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Workshop 4

Purchase and Sale of Retail Developments: A Puzzling Array of Issues

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1. INTRODUCTION

- a. This interactive workshop will explore special issues relating to the purchase and sale of retail developments. We will discuss complications of splitting up a shopping center, including issues relating to exclusive and prohibited uses, co-tenancy requirements and protected areas. Additionally, the discussion will include rights of first offer and refusal, prorations and holdback agreements.
- b. We will attempt to provide perspectives from the various players in these types of transactions, including the buyers of parcels within a shopping center, as well as developer sellers who are parcelizing the center.

2. SALE OF OUTPARCELS OR PORTIONS OF SHOPPING CENTER

- a. Existing Center versus Ground Up Development. There are different issues to consider depending on if the retail center to be split up is existing, or undeveloped. For example, in an existing center, if there is an existing and operating large anchor tenant (such as a Costco), and there is a set of master CC&Rs in place, then the future outparcel owners may want to create a separate set of CC&Rs (a sub-CC&Rs to govern those areas of center outside of the anchor's ground premises). Also, is this "retail center" a part of a larger project, which may contain office, residential, etc., if so,

there may be multiple layers of CC&Rs and REAs in place, or which will need to be put in place. For buyers who are first to purchase in a center, they may have an easier time in obtaining rights important to them (such as exclusive use rights), whereas when buying in a long-standing center where rights are firmly established, a buyer may have to consider how feasible it will be to obtain these same rights. Are there master entitlements, master development plans, or design guidelines that are already in place that a buyer is subject to?

b. Subdivision/Parcel Map Process.

- i. Closing Condition. Creating of a separate legal parcel to be purchased or sold may be a condition to the purchase agreement, if not already subdivided, depending on the state that the development is located in. In California, this will be a condition to both the seller's and buyer's closing obligations, in order to comply with the Map Act's (i.e., California Subdivision Map Act as codified in California Government Code Section 66499.30, et seq) requirement that property conveyed be a separate legal parcel. The Deed will include the new legal description created by the new subdivision map. See Schedule 2(b)(i) for language.
- ii. Process. Either the seller or buyer, but typically the seller developer, handles the subdivision. The buyer will want approval rights not only over the size, location and legal description of the parcel, but also approval rights with regard to any conditions imposed by the governmental authorities with respect to approval of the new Map, or lot line adjustment, etc., similar to the approval rights a buyer would have with respect to title.
- iii. Considerations. A buyer will want to consider whether its parcel will include all its parking needs, includes its required access to a public street, and signage on-site, for example. If not, then rights with respect to these items must be included in a declaration or CC&Rs (discussed in more detail below). Note that, in California, if the developer wanted to ground lease that "parcel", it could likely do so without the creation of a separate parcel of land via an exemption to the Map Act.
- iv. May Vary State to State. The parties will need to understand the laws of their particular state in order to determine whether or not this process of parcelization will need to occur in order for the center to be split up into various parcels in order to comply with law.

c. Exclusive and Prohibited Uses.

- i. Differences between Purchase and Lease. There is a big difference between, on the one hand, a center where a landlord owns the entire center and is able to control (grant and enforce) restrictive uses across the entire center (through their leases, for example), and, on the other hand, a center which is split up between various owners. Most national retail operators will want to have its primary use encumber and restrict the other portions of the center. The way to do this is to record a document encumbering those other parcels (either through a declaration, CC&Rs or similar document, or there may be an existing memorandum of lease already recorded before the center is split up). Once the closing of the purchase occurs, the new buyer will be relying on these recorded documents and will not have a landlord to seek remedies against for a breach of its rights. See Schedule 2(c) for sample language.
 - ii. Where a buyer is buying a parcel (such as an outparcel) within an existing shopping center, that buyer needs to review title for the property to see what restrictions already exist.
 - iii. Developers who will retain parcels and/or who will control the center after selling off portions of the center, must allow themselves flexibility to develop the center when granting individual parcels exclusive use rights (ex., CC&Rs containing exclusives should contain carve-outs for incidental uses, exceptions for non-applicability to major anchors or users over a certain square footage, terminations of exclusives for non-use, etc.). Also, such developers must be careful prohibiting certain uses that they may want to sell to (or lease to on their retained parcels) in the future, such as medical uses.
- d. Co-Tenancy Requirements. If a particular buyer (or its future ground tenant) desires a vibrant center with other (or particular) operators in the center, that buyer would need to figure out a mechanism for ensuring that when it closes on its parcel, that those other operators have met certain milestones (such as drafting into the purchase agreement a closing condition that seller provide written notice to and evidence that seller has entered into leases for a certain threshold of the center and that construction has commenced). Remedies for failure of any “co-tenancy” requirements are different than under a lease situation where a tenant can pay a reduced rent or even terminate a lease. As a practical point, the closing is the point of importance here for this buyer. See Schedule 2(c) for sample language.
- e. Opening Requirement. Sellers of the parcels in what is to be an integrated retail center may want to ensure that the buyer actually opens by a certain time (such as by a grand opening event). To

accomplish this, sellers may want to include in their purchase agreement a requirement that buyer sign an opening covenant agreement as a condition to closing. See Schedule 2(c) for sample language.

- f. **Building Restrictions.** When purchasing a parcel within a center, the buyer must review any building restrictions that may exist. These restrictions could exist in the form of governmental regulations, conditions of approval of the overall project, or recorded documents. For example, are there building area/size limitations, building height restrictions, drive-thru prohibitions, existing construction black-out periods? A buyer may need to build into its diligence period under its purchase agreement a right to get relief from these restrictions (for example, a consent or waiver from a party who has a construction moratorium for a period of time after it opens which would thereby restrict a new parcel owner from building after its closing).
- g. **Common Areas.** It is important for a buyer in a parcelized center to understand what common area rights exist. This dovetails into parking and access considerations. Some centers are simple in that the center is parcelized in a way that each parcel is self-maintained, self-parked, do not need to access or utilize drive aisles on other parcels, and have all its desired signage on its parcel. In those scenarios, there may not need to be any “common areas” and may not need to be any CC&Rs or other agreements between parcel owners. More often than not, however, there will be some shared common areas (such as shared drive aisles) and shared rights. It is important to understand how undeveloped parcels are treated in any CC&Rs – i.e., will all of the parcels be considered common area, or only after development has occurred. Also, buyers may need to ensure that drive aisles remain lit during all hours of darkness, and any undeveloped parcels remain in safe and lit condition to discourage crime.
- h. **Parking Requirements.** Parking is crucial for retail centers. Any buyer must understand if its parcel is required (either by the city or county, or by the CC&Rs) to be self-parked, or whether there will be cross-parcel parking or shared parking (including in order to make code; for example, will a parcel need to rely on adjoining parcels in order to be parked per governmental requirements?). If parking is shared, then it is of utmost importance for any potential buyer to ensure that the CC&Rs or other document ensures that that parking cannot be removed. Also, are there employee parking location limitations in any recorded document?
- i. **Cross-Access.** When splitting up a center, the various parties need to understand what access rights will govern the project. Will there be cross-access across all drive aisles, or cross access

with only certain driveways (maybe the main circulation driveways)? Will the drive aisles be fixed per a site plan attached to a CC&Rs? This could limit flexibility to change plans to develop parcels if driveways are fixed in place. For owners who will rely on cross access, they need to ensure that the crucial driveways are not blocked, obstructed, or altered, and understand who is maintaining these driveways, and what rights do parties have if the driveways are not properly maintained?

j. Signage.

- i. Signage rights are important to retail operators. A parcel that is being purchased with good visibility to main thoroughfares with a right to build its own monument or even pylon or pole sign are desirable. Signage, however, may be located on another parcel, and the new owner will need a right to those signs through a sign agreement, or declaration. See Schedule 2(c) for sample language.
- ii. Also, a parcel to be purchased may include a shopping center sign (or a right to building such sign) which other users will have rights to. That can get tricky, as there are considerations, such as who is maintaining that multi-tenant sign, and there will be need to be easements rights over the parcel for that maintaining party get to that sign, and along with those easement rights, a burdened parcel owner will want language in a recorded document requiring such user to not unreasonably interfere with such parcel owner's operations during such entry, and provide insurance and indemnity requirements.
- iii. For any multi-user sign that an owner has rights to place a panel on (whether on or off of such owner's parcel), such owner should consider what types of users are permitted to use that sign (for example, a reputable national operator may not want its sign panel on a sign with a marijuana dispensary or even a tobacco user).
- iv. Signage rights will need to be governed by a recorded document to ensure that the signage rights run with the land. This should be handled during the diligence period under the purchase agreement.

- v. Buyers need to check to see if there is a master sign program governing the center. This could be in the form of a private document, but also could be a city or county document. In some cases, sellers and/or buyers will need to seek amendments/replacements to the master sign programs for various reasons (they are old and need to be updated, don't support the signage that new owners will need, etc.).
- k. Site Plan Approval. Ideally, a buyer will have a right to approve the overall development site plan, and changes thereto during its feasibility period under this purchase agreement. See Schedule 2(c) for sample language.
- l. Declaration; Reciprocal Easement Agreements.
 - i. Contingency; Condition to Closing. Creation of a CC&Rs, or Declaration, or COREA or similar document will typically be a closing condition when buying a parcel of land within a new shopping center. If the center is existing, the execution and recordation of an amendment, restatement, or supplement to the CC&Rs is typically a condition to closing if there are items within such existing CC&Rs that are problematic to a new buyer. Amending an existing CC&Rs however, is not always an easy task – it could depend on many things, including who the approving parties are and how much leverage that new owner with those approving parcels (i.e., is the new use one that is attractive for the other owners/users). For developers who are selling off parcels, they need to be careful as to who they are granting approval rights to, and ideally they should strive to keep as much control under the CC&Rs as possible. It is important that purchase agreements require sellers/developers to provide all of the governing documents for the center so the buyer can review during its diligence period. See Schedule 2(c) for sample language.
 - ii. These recorded documents are crucial for developers to ensure the orderly administration and operation of the center, but also provide the needed rights, and protections, for individual owners in the center.
 - iii. If one of these documents already exists, it is an important diligence item for a buyer to review during its diligence period under the purchase agreement, including:
 - 1. Coverage. Do the CC&Rs govern the entire center or just portions? Are there multiple layers of CC&Rs governing (such as master CC&Rs, sub-CC&Rs)?
 - 2. Parties. Who are the parties to the CC&Rs?

3. Construction. Are there approvals rights for certain uses and for construction in the center? Is there an architectural review committee that needs to be review plans and specifications? Are there construction black-out periods? Are there time deadlines by which construction, once commenced, must be completed? Are there restrictions on using common areas for staging areas?
 4. Amendments. Whose approval is required to amend the CC&Rs?
 5. Expiration. When do the CC&Rs expire? If rights granted in the CC&Rs are important (parking, access, use, signage, easements), it is crucial that the CC&Rs do not go away.
 6. Maintenance Responsibilities. What are the common area maintenance responsibilities? Are parcels to be self-maintained? What are the cost allocations amongst the various parcels (building to building, land to land)?
 7. Assessments; Costs Allocation. If self-maintained, do parcel owners participate for limited contribution to maintenance of just drive aisles and shared signage for example (i.e., a limited participation)? Perhaps a fixed CAM charge with an annual fixed percentage increase.
 8. Utility/Drainage. Do the CC&Rs provide for utility easements? Drainage easements? Are utilities (such as parking lot lighting, irrigation) separately metered for each parcel?
 9. Insurance; Indemnity. Do the CC&Rs have required insurance to be carried? What are the indemnity obligations (including with respect to hazardous materials)?
 10. Protected Areas. Are there any areas of the center that are protected? For example, are the main drive aisles and driveways, or main parking areas, protected from changes, modifications, obstruction, or removal? Are there exclusive common areas benefitting another owner/occupant of the center (such as exclusive parking spaces or exclusive patio space)?
- iv. Buyers will want to try to get their various rights that we have discussed previously into these recorded CC&Rs, including exclusive use rights, parking and access rights, and signage rights. Parties may need to obtain clarifications, waivers, and consents from holders of rights under CC&Rs.

- v. If the center is old and is being redeveloped as a part of the parcelization, then there may be CC&Rs existing that are outdated and do not fit the new redeveloped center. In this case, the CC&Rs may need to be either amended and restated or simply replaced to reflect the future uses, configuration, etc.

3. THIRD-PARTY RIGHTS AND CONSENTS.

- a. Purchase Rights. Both seller and buyer should review leases and property agreements for any third-party purchase rights. These generally fall into three categories: (i) purchase options, (ii) rights of first offer and (iii) rights of first refusal.

- i. Purchase options are generally ongoing or limited to a set time period (such as during the last year of a lease term). A third-party sale will not generally trigger any requirement under a purchase option, but seller will likely need to disclose as an exception to a representation, and a buyer will want to understand how and when an option can be exercised.

- ii. Rights of first offer are generally handled seller prior to marketing the property. Assuming the right is waived by the benefitted party, seller should obtain a written waiver to provide to buyer.

- iii. Rights of first refusal generally cannot be waived until seller has a letter of intent or purchase agreement to provide to the benefitted party. Accordingly, the Purchase Agreement will need to address the waiver of the right of first refusal as a condition to closing. buyers should consider asking for reimbursement of pursuit costs if the benefitted party exercises the option and, in effect, nullifies the Purchase Agreement. See Schedule 4(a) for sample language.

- iv. Purchase rights provisions often include deemed waiver provisions. However, a title company may require a written waiver to insure over the purchase right. Seller should carefully document the sending of any notices and the expiration of applicable time periods.

- b. Governmental Approvals. Governmental approvals are rarely required for shopping center acquisitions. However, seller and buyer should carefully review any development or incentive agreements to confirm whether consent or notice is required.

- c. Bulk Sales Requirements. Some states require notice and/or tax clearance for the sale of all or substantially all of a business's assets in that state. If not obtained, a lien against the property may arise, so both sellers and buyers should work with local counsel to satisfy any requirements.

4. PRORATIONS.

- a. General. Shopping center leases often vary significantly in terms of form and content due to, among other things, transfers of the property and the negotiating power of the tenant. This results in a broad range of provisions for the payment of base rent, percentage rent, real estate and personal property taxes, utilities and common area maintenance charges, even in the same shopping center. As a result, sellers and buyers must carefully review the effect of the amount and timing of rental payments and the way in which rents and other charges will be allocated after the closing of the transaction.
- b. Rent. The Purchase Agreement should set forth the method and waterfall for prorating and collecting base rent. See Schedule 4(b) for sample language.
- c. Operating Expenses. Because operating expenses and other pass-through costs are typically collected based on estimates, the Purchase Agreement should provide for the method of reconciliation of estimated amounts charge against actual costs. See Schedule 4(c) for sample language.
- d. Taxes. Many jurisdictions collect real estate taxes in arrears, so the actual real estate taxes due for the year of closing may not be available at closing. The Purchase Agreement should specify what amounts will be used for proration (typically, the amounts due for the prior year) and whether or not the real estate taxes will be re-prorated once the actual real estate taxes are known. If any tenant pays real estate taxes directly, the parties should consider providing that those real estate taxes will not be prorated. The Purchase Agreement should also address any pending real estate tax appeals. See Schedule 4(d) for sample language.
- e. Utilities. Any utilities paid by seller shall be prorated as of the closing date unless included in the Operating Expense proration. Utilities paid directly by any tenant should not be prorated. The Purchase Agreement should address the application of any utility deposits made by seller. They are typically returned or credited to seller at closing.

5. POST-CLOSING REQUIREMENTS.

- a. Tenant Improvements and Allowances. The Purchase Agreement should set forth who is required to perform and pay for any tenant improvements and/or tenant allowances. This is often determined based on which party will benefit from the rentals under the lease.
- b. Holdbacks and Escrows. Seller and buyer may negotiate that seller remains responsible for post-closing construction work or other obligations. If so, the parties should enter into an agreement

that survives the closing that addresses the obligations and, in some cases, a holdback of a portion of the purchase price to secure the same.

SCHEDULE 2(b)(i)

Sample Subdivision Language

Parcel Map & Specific Plan. Seller owns _____ acres of land containing the Property that must be subdivided [and master planned]. Consequently, and in accordance with applicable law, Closing hereunder is expressly conditioned on the approval of [a specific plan (the “**Specific Plan**”) and] a parcel map (the “**Parcel Map**”) by all necessary governmental authorities not later than ___ days after the Effective Date (“**Seller’s Approvals**”). Commencing promptly following the Effective Date, Seller shall use all reasonable commercial efforts in good faith to obtain such approvals prior to Closing, and Seller shall provide Buyer with periodic updates regarding the status of its efforts and governmental developments. If Seller fails to satisfy Seller’s Approvals by the Closing Date, Buyer may, at its sole discretion, either: (i) extend the Closing Date for a reasonable period of time as determined by Buyer, for the purposes of allowing Seller to complete the process and obtain Sellers Approvals, or (ii) terminate this Agreement. If Buyer elects to extend the Closing Date, Seller shall continue to exercise commercially reasonable efforts in good faith to obtain Sellers’ Approvals. If, notwithstanding Seller’s efforts, it is unable to obtain Seller’s Approvals within the time as extended by Buyer, either Buyer or Seller may terminate this Agreement. If this Agreement is terminated as provided above, such termination shall be a Deposit Refund Event and Seller shall reimburse Buyer for any and all actual costs incurred by Buyer in connection herewith and the development costs relating to the Premises, including, but not limited to, all legal and development fees and expenses. Such reimbursement shall be due 5 business days following receipt of an officer’s statement of an officer of Buyer certifying the amount of such actual out-of-pocket costs. [CALIFORNIA PROVISION]

Parcel Map. Prior to or at Closing, and as a condition of Closing (the “**Parcel Map Condition**”), Seller shall process and record in the office of the Office of the County Recorder of County a parcel map (the “**Parcel Map**”) which will create a separate legal parcel for the Property. Seller shall use commercially reasonable efforts, in good faith, to satisfy the Parcel Map Condition not later than the Closing Date (as defined in **Section 11.1**). During the Feasibility Period, Seller shall prepare and deliver to Buyer for reasonable approval the proposed Parcel Map, such approval not to be unreasonably withheld, conditioned or delayed. Seller shall provide Buyer with periodic updates regarding the status of its efforts to obtain all consents and governmental approvals required for the Parcel Map. If Seller fails to satisfy the Parcel Map Condition by the Closing Date, Buyer may, at its sole discretion, either: (a) agree to an extension of the Outside Closing Date for a reasonable period of time as determined by Buyer, for the purposes of allowing Seller to complete the process and satisfy the Parcel Map Condition, or (b) terminate this Agreement. If Buyer agrees to extend the Closing Date, Seller shall continue to exercise commercially reasonable efforts, in good faith, to satisfy the Parcel Map Condition. If, notwithstanding Seller’s efforts, it is unable to satisfy the Parcel Map Condition within the time as extended, either Buyer or Seller may terminate this Agreement by written notice to the other given at any time prior to the date the Parcel Map Condition is satisfied. [CALIFORNIA PROVISION]

Subdivision. The parties acknowledge that the Property does not constitute a Legal Lot or parcel of land that may be conveyed as a separate lot or parcel in accordance with the Map Act.

i. Seller shall, at its sole cost and expense, use diligent efforts to complete a lot line adjustment, lot tie covenant or subdivision map (the “Subdivision”), to bring the Property into compliance with the

Map Act such that the same constitutes a Legal Lot. Upon completion of the Subdivision, the final legal description of the Property shall be established and used as the legal description for the Property in the Grant Deed, and in all other transfer and conveyance documents relating thereto.

ii. Buyer shall have a right to approve (a) the legal description, (b) any new Exceptions that affect the Property as a result of the completion of the Subdivision, and (c) each of the conditions imposed by the governmental authorities ("Approval Items").

iii. Buyer shall have twenty (20) days following the date Buyer receives notice of any Approval Items (the "Inspection Period"), to deliver to Seller a written notice identifying any objections Buyer may have to the same (the "Objections").

iv. No later than ten (10) days following its receipt of the Objections, Seller shall elect to either cure Buyer's objections on or prior to Closing or not cure such objection on or prior to Closing ("Seller's Notice"), and Seller shall cure prior to Closing any such objection Seller has agreed (or is deemed to have agreed) to so cure. If Seller fails to timely deliver a Seller's Notice as to a particular objection within such ten (10) day period, then Seller shall be deemed to have made the election to cure same. If Seller elects not to cure any such objection, then Buyer shall have until ten (10) business days from receipt of Seller's Notice to notify Seller that either Buyer is willing to purchase the Property subject to such objection or (2) Buyer elects to terminate this Agreement. [CALIFORNIA PROVISION]

SCHEDULE 2(c)

Sample Contingency Language

Co-Tenancy. It shall be a further condition to Buyer's purchase obligation that Seller shall have provided to Buyer written notice (the "**Co-Tenancy Notice**") and evidence that: (i) it has entered into good faith, bona-fide leases with tenants for not less than ____% of the gross leasable area shown on the Site Plan for the Overall Development, which are or have become non-contingent (except for delivery of possession to the applicable tenant); and (ii) that construction of all buildings and improvements necessary to support the tenant's with such non-contingent leases is complete (the "**Co-Tenancy Condition**"). If Seller does not provide Buyer with the Co-Tenancy Notice within 30 days after Buyer has waived the last to end of the Diligence Conditions, then Buyer shall have the ongoing right to terminate this Agreement upon 30 days prior written notice to Seller so long as the Co-Tenancy Condition has not been satisfied. Within 30 days after delivery of Buyer's termination notice, Seller shall reimburse Buyer for all actual hard and soft costs incurred by Buyer for entering into this Agreement, feasibility, entitlements, permitting and construction of the improvements made by Buyer to the Property, including, but not limited to, attorneys' fees and expenses plus other related holding costs.

Opening Covenant Agreement. Buyer hereby acknowledges and agrees that, at the Closing, an Opening Covenant Agreement in the form of Exhibit _ attached hereto (the "Opening Covenant Agreement"), shall be recorded against the Property. The Opening Covenant Agreement shall run with the Real Property and shall be for the benefit of Seller, its successors, assigns and affiliated entities. [below are provisions from the agreement]

1. Repurchase Option. If Buyer fails to open for business to the public from the Property as required above, Seller shall have the right, but not the obligation, to repurchase the Property (the "Opening Repurchase Option"), for an amount equal to _____ percent (___%) of the Purchase Price under the Purchase Agreement (the "Repurchase Price"). Seller may give Buyer written notice (the "Repurchase Exercise Notice") of its intent to repurchase the Property and exercise its Opening Repurchase Option at any time after the Opening Outside Date and until such date as Buyer opens for business to the public from the Property as a _____, fully fixtured, staffed and stocked with its typical supplies for at least one (1) day.

2. Repurchase of Property. Within ten (10) days after Seller's delivery of the Repurchase Exercise Notice to Buyer. Seller and Buyer shall open an escrow (the "Escrow") with a mutually acceptable escrow company ("Escrow Holder"). Said Escrow shall be scheduled to close no later than _____ days after the opening thereof.

Buyer agrees to execute all commercially reasonable instruments and other documents reasonably requested by Seller or Escrow Holder and to take all actions required pursuant to the provisions hereof in order to carry out the intent of this Agreement and to consummate the transaction contemplated hereby. Seller and Buyer shall promptly sign standard form escrow instructions supplied by Escrow Holder. The terms of Seller's repurchase of the Property pursuant to this Agreement are as follows:

a. Upon close of Escrow, Buyer shall convey the Property to Seller by grant deed subject only to (i) covenants, conditions, restrictions, easements and other matters of title (excluding, however, monetary encumbrances) existing as of the date of the event which triggers Seller's right to repurchase the Property, and (ii) non-delinquent real property taxes and assessments prorated to the date of close of escrow. Buyer, at its expense, shall cause to be delivered to Seller upon the close of escrow, an ALTA standard policy of title insurance issued by a title company designated by Seller with liability equal to the full Repurchase Price, and insuring fee simple title to the Property vested in Seller. Seller shall have the right to obtain an ALTA extended policy of title insurance, but shall bear any excess cost with respect thereto, and provided further that such extended title coverage shall be not be a condition of the closing.

b. Prior to the close of Escrow, Buyer shall deposit with Escrow Holder the grant deed duly executed and acknowledged conveying fee simple title to the Property to Seller. Buyer shall also deposit with Escrow Holder an assignment and bill of sale duly executed, which assignment and bill of sale shall be substantially in the same form as the assignment and bill of sale executed pursuant to or specified by the Purchase Agreement.

c. Seller and Buyer shall each pay one-half (1/2) of any Escrow fee for the sale and purchase of the Property. All other costs and closing expenses shall be paid by the parties according to County custom as reasonably determined by Escrow Holder.

Following the close of Escrow, Seller shall have the right to unilaterally terminate this Agreement by recording a "Termination Agreement" in the official records for County, California.

Covenants, Conditions and Restrictions. It is a condition to the purchase herein that Seller shall, not later than the end of the Feasibility Period, submit for Buyer's reasonable approval a declaration of covenants, conditions and restrictions, a reciprocal easement agreement or a similar document (the "CC&Rs") memorializing and protecting Buyer's rights in the Overall Development, including those pertaining to ingress and egress, the common areas of

and maintenance of the Overall Development, Buyer's signage rights (as described below) and its Exclusive Uses (as defined below). The CC&Rs shall run with the land and burden all portions of the Overall Development. If Seller and Buyer are not able to mutually agree to reasonably satisfactory CC&Rs, the Feasibility Condition shall be deemed not to be satisfied. It shall also be a condition to the purchase herein that Seller shall cause any lender with a lien on the Overall Development to subordinate its lien to the CC&Rs, so that Buyer may obtain affirmative title insurance coverage over the CC&Rs and any easements contained therein, and that the CC&Rs shall be recorded on or prior to Closing as described below. In furtherance, and not in limitation, of the foregoing, the CC&Rs shall also provide for the following:

Covenants, Conditions and Restrictions Amendment. The Overall Development is subject to (i) that certain [Declaration of Covenants, Conditions and Restrictions] executed by _____ and recorded on _____ as Instrument No. _____, in the Official Records of _____ County (the "CC&Rs"). It is a condition to the purchase herein that Seller shall, not later than the end of the Feasibility Period, submit for Buyer's reasonable approval an amendment to the CC&Rs (the "CC&R Amendment") memorializing and protecting Buyer's rights in the Overall Development, including those pertaining to ingress and egress, the common areas of and maintenance of the Overall Development, Buyer's signage rights (as described below) and its Exclusive Uses (as defined below). The CC&R Amendment shall run with the land and burden all portions of the Overall Development. If Seller and Buyer are not able to mutually agree to reasonably satisfactory CC&R Amendment, the Feasibility Condition shall be deemed not to be satisfied. It shall also be a condition to the purchase herein that Seller shall cause any lender with a lien on the Overall Development to subordinate its lien to the CC&Rs, so that Buyer may obtain affirmative title insurance coverage over the CC&Rs and any easements contained therein, and that the CC&Rs shall be recorded on or prior to Closing. In furtherance, and not in limitation, of the foregoing, the CC&Rs shall also provide for the following:

Signage. The CC&Rs shall not restrict Buyer's right to: (i) place and maintain signage on all exterior elevations of the Building to the maximum extent permitted by law, including standard window banners and self-adhesive appliques (whether located on the interior or exterior of the windows and doors), pre-opening announcements and banners, and sale or store closing signage; and (ii) construct a freestanding monument and/or pylon sign on the Property. The CC&Rs shall also provide that Buyer may allow its occupants to place sign panels bearing their trade names upon each side of any future freestanding multi-tenant monument and/or pylon sign or signs serving the Overall Development, in the top and most prominent position thereon (the "Buyer's Sign Panels"). Buyer or its occupant will pay for the design, fabrication and installation of all of Buyer's Sign Panels and Buyer will pay Buyer's

proportionate share of Seller's costs of maintaining and repairing the sign structures upon which Buyer's Sign Panels are located, such proportionate share to be based upon the area, in square feet, of Buyer's Sign Panels to the total area, in square feet, of all sign panels on such sign structures. In no event will Buyer be required to pay for any portion of the initial construction costs of any sign structures upon which Buyer's Sign Panels are located.

Exclusive Uses. The CC&Rs shall also provide that the use of any parcel in the Overall Development other than the Property for the Exclusive Uses shall be prohibited. For purposes hereof, "Exclusive Uses" means uses constituting: _____. A "_____" is any retailer that sells _____, or that devotes more than [10% or 20%] [10% if small shops got to 20% only if there is a pharmacy pad and they are pressing for it] of its sales floor area to the display and retail sale of _____ for [on- and] off-premises consumption.

Site Plan Review by Buyer. Buyer shall have the right to review the general project site plan for the Overall Development ("Project Site Plan"), the current version of which is attached as Exhibit XX, as it develops (including the conceptual site plan, elevations (if available), parking structures on other parcels, and proposed building structures planned on adjacent parcels). Buyer may terminate this Agreement if Buyer is dissatisfied with any aspect of the Project Site Plan at any time prior to the end of the Feasibility Period. Thereafter, if the Project Site Plan is modified in any way from the later of: (i) that attached hereto as Exhibit XX or (ii) any later Project Site Plan that has been specifically agreed to in writing by Buyer, and such modifications, in Buyer's discretion, may have a material adverse effect on the feasibility of Buyer's or its occupant's prospective use of the Property, Buyer may (by written notice given within 30 days after receipt of the modification) either (a) accept the modified Project Site Plan and purchase the Property as provided herein, or (b) terminate this Agreement. If Buyer fails to approve the revised Project Site Plan within such period, Buyer shall be deemed to have disapproved thereof. If Buyer elects to terminate this Agreement, the termination shall be a Deposit Refund Event.

CC&Rs. [existing CC&Rs] On or prior to the expiration of the Inspection Period, Buyer shall have the right to approve of the form and substance of any CC&Rs recorded against the Property and/or the Shopping Center. Seller shall, on or prior to the expiration of the Inspection Period, make commercially reasonable efforts to change or amend the CC&Rs to the extent requested by Buyer.

CC&Rs. [no existing CC&Rs] Within thirty (30) days following the Effective Date, Seller shall deliver to Buyer a copy of a draft of the CC&Rs that Seller intends to record against the Property and/or Shopping Center at or prior to the Closing Date. Buyer shall have until the expiration of the Inspection Period to approve or disapprove of the draft

CC&Rs, provided that notwithstanding anything set forth herein to the contrary, the Inspection Period shall be extended on a day-for-day if a draft of the CC&Rs is not delivered to Buyer in a timely fashion. If Buyer does not so approve of the CC&Rs in writing as specified above, but nonetheless does not terminate this Agreement pursuant hereto, the CC&Rs shall be recorded in materially the same form as last received by Buyer from Seller during the Inspection Period. Any change to the form or substance of the CC&Rs so received by Buyer during the Inspection Period shall not be recorded unless Buyer has approved of the same in writing in its sole and absolute discretion. The CC&Rs shall contain the following provisions: (a) a section prohibiting changes to the Common Area within the area marked on the Site Plan as "No Change Area" without Buyer's consent (which may be withheld or granted in Buyer's sole and absolute discretion); (b) Buyer's Exclusive Use rights; (c) easements for ingress, egress, access, and parking for the benefit of the Property and Buyer over the Common Area, for ingress, egress, access, and parking rights each day of the year; (d) Buyer's right to maintain signage on or off the Property; (e) a provision allowing Buyer to maintain the Common Area on its Property, at Buyer's expense and not to be required to pay for any and all common area maintenance costs or expenses of any kind or nature.] [OR if Buyer will be required to pay for its share of common area maintenance costs for the Shopping Center, provisions specifying that Buyer's share of such common area maintenance costs and expenses shall be the ratio, stated as a percentage, which is the GLA of Buyer's Building compared to the total GLA of all buildings in the Shopping Center]; (f) a provision insuring that an illuminated path of travel shall at all times be provided from all public roadways adjacent to the Shopping Center and other access points within the Shopping Center to the Property and providing that the location of such illuminated path and the light fixtures forming a part of such illuminated path be subject to Buyer's reasonable approval; (g) a provision requiring that the controls for utilities for Common Areas be maintained in an area accessible to Buyer at all times; (h) a provision granting Buyer the right to park as follows: _____; (i) a provision requiring the Common Area outside of the Property have available at all times for use by the occupants of the Shopping Center the greater of (A) the number of parking spaces required by a Governmental Authorities (without the granting of a variance) from time to time, or (B) _____ (___) parking spaces per one thousand (1,000) square feet of building area, within all portions of the Center outside of the Property; and (j) a provision prohibiting the following uses within the Shopping Center: _____.

SCHEDULE 3(a)

Sample Right of First Refusal Language

The parties acknowledge that the terms of that certain [Lease] between _____ and _____ contains a right of first refusal to acquire the Property (a "ROFR"). Seller and Buyer hereby agree that, in the event _____ does give notice of its intent to exercise ROFR or does actually exercise a ROFR, Buyer or Seller may terminate this Agreement in which event Buyer shall receive the Earnest Deposit and neither of the parties shall have any further rights or obligations hereunder except for obligations which specifically survive the termination and except as set forth in the following sentence. Notwithstanding anything herein to the contrary, in the event of termination of this Agreement pursuant to the foregoing sentence, Seller agrees to reimburse Buyer for out-of-pocket expenses incurred by Buyer in connection with its good faith efforts regarding this Agreement (other than legal fees incurred by Buyer or its affiliates), provided that such amount shall not exceed _____ Thousand and 00/100 Dollars (\$_____.00) and that Buyer shall provide reasonable evidence of such expenditures to Seller prior to reimbursement under this Section.

SCHEDULE 4(b)

Sample Rent Proration Language

All collected Rents (as hereinafter defined) shall be prorated between Seller and Buyer as of 12:01 AM on the Closing Date. Seller shall be entitled to all collected Rents attributable to any period prior to, but not including, the Closing Date. Buyer shall be entitled to all collected Rents attributable to any period on and after the Closing Date. After Closing, Buyer shall make a good faith effort to collect any Rents not collected as of the Closing Date on Seller's behalf and to tender the same to Seller upon receipt (which obligation of Buyer shall survive the Closing and not be merged therein); provided, however, that all Rents collected by Buyer on or after the Closing Date shall first be applied to all amounts due under the Leases at the time of collection (i.e., current Rents and sums due Buyer as the current owner and landlord) with the balance (if any) payable to Seller, but only to the extent of amounts delinquent and actually due Seller. Buyer shall not have an exclusive right to collect the sums due Seller under the Leases and Seller hereby retains its rights to pursue claims against any tenant under the Leases for sums due with respect to periods prior to the Closing Date; provided, however, that Seller: (i) shall be required to notify Buyer in writing of its intention to commence or pursue such legal proceedings; (ii) shall only be permitted to commence or pursue any legal proceedings after the date which is three (3) months after the Closing Date; and (iii) shall not be permitted to commence or pursue any legal proceedings against any tenant seeking eviction of such tenant or the termination of the underlying lease. The terms of the immediately preceding sentence shall survive the Closing Date and not be merged therein.

SCHEDULE 4(c)

Sample Operating Expense Proration Language

Operating Expenses (as hereinafter defined) for the Property shall be prorated as of 12:01 AM on the Closing Date. Seller shall pay all utility charges and other operating expenses attributable to the Property, if any (collectively, the "Operating Expenses"), incurred prior to, but not including, the Closing Date (except for those Operating Expenses payable, whether actually paid or unpaid, by tenants for such tenant's leased premises in accordance with the Leases) and Buyer shall pay all Operating Expenses attributable to the Property on and after the Closing Date. All Operating Expenses paid or payable by tenants in accordance with the Leases shall be allocated between Seller and Buyer, with Seller responsible for periods prior to, but not including, the Closing Date and Buyer responsible for all periods on and after the Closing Date, and all applicable amounts to be trued up between Seller and Buyer in accordance with this Section 5.2. Seller agrees to use commercially reasonable efforts to cause all meters for all public utilities (including water) being used on the Property to be read on the day of giving possession to Buyer or as soon as reasonably practical following the Closing Date. Buyer shall arrange with such services and companies to have accounts opened in Buyer's name beginning at 12:01 AM on the Closing Date. To the extent that the amount of actual consumption of any utility services is not determined prior to the Closing Date, a proration shall be made at Closing based on the last available reading. Seller shall not assign to Buyer any deposits which Seller has with any of the utility services or companies servicing the Property. Within ninety (90) days following the Closing Date, Seller shall deliver to Buyer a reconciliation statement of the Operating Expenses for the Property for the portion of the calendar year in which the Closing occurs that the Property was owned by Seller. Seller's reconciliation statement shall include tenant invoice calculations and reasonable Operating Expense invoice back-up. Within the thirty (30) day period following Seller's delivery of such reconciliation statement for Operating Expenses, Seller and Buyer shall work in good faith to resolve any issues with respect to such reconciliation statement. Upon approval of the Operating Expense reconciliation statement, Seller shall remit any amounts due to Buyer within thirty (30) days. No later than March 1st of the calendar year immediately after the calendar year in which Closing occurs, Buyer shall deliver the Operating Expense reconciliations to the tenants. Buyer shall deliver to Seller amounts due to Seller in connection with such reconciliations within ten (10) days after receipt from tenants of such applicable amounts. Buyer shall include in any Operating Expense reconciliations with the tenants under the Leases copies of any applicable billing statements and invoice back-up provided by Seller for operating expenses incurred by Seller during the period of Seller's ownership of the Property. This Section shall survive the Closing and not be merged therein.

SCHEDULE 4(d)

Sample Real Estate Tax Proration Language

Real estate taxes and assessments, both general and special that are payable to the taxing authority (collectively, the "**Tax Expense**") shall be prorated as of 12:01 AM on the Closing Date. Seller shall be responsible for the Tax Expense attributable to the Property prior to, but not including, the Closing Date (except for the Tax Expense, whether actually paid or unpaid, which is payable directly by tenants to the taxing authority for such tenant's leased premises in accordance with the Leases), and Buyer shall be responsible for the Tax Expense attributable to the Property on and after the Closing Date. If the Closing occurs prior to the receipt by Seller of the bill for the Tax Expense for the calendar year in which the Closing occurs, the Tax Expense shall be prorated on the basis of the last officially certified and available tax duplicate. Monthly and/or lump sum amounts Seller, as landlord, has collected from tenants under the Leases and Temporary Occupancy Agreements as reimbursements or prepayments of Seller's Tax Expense (collectively, "**Tax Receivables**") shall be prorated between Buyer and Seller as of the Closing Date. The collected Tax Receivables shall be matched against the applicable Tax Expense to which they relate. Seller shall be entitled to Tax Receivables to the extent they relate to the Tax Expense attributable to the period prior to, but not including the Closing Date, and Buyer shall be entitled to Tax Receivables to the extent they relate to the Tax Expense attributable to the Closing Date or thereafter. After receipt of a final bill for the Tax Expense, Buyer shall promptly prepare and present to Seller a calculation of the re-proration of the Tax Expense and Tax Receivables, based upon the actual amount of such Tax Expense charged and/or Tax Receivables received by the parties for the year or other applicable fiscal period. The parties shall make the appropriate adjusting payment between them within thirty (30) days after presentment to Seller of Buyer's calculation and appropriate back-up information. Buyer shall provide Seller with appropriate backup materials related to the calculation. With respect to any portion of the Property that is a separate tax parcel, and the applicable tenant pays the Tax Expense with respect to such parcel directly to the taxing authority under the terms of its lease, the Tax Expense for that parcel shall not be prorated between Buyer and Seller at Closing as such tenant(s) shall be responsible for paying the taxing authority for such Tax Expense as it becomes due pursuant to the terms of its lease.

Notwithstanding the foregoing, any real estate tax refunds or rebates which apply to periods before the Closing Date shall remain the property of Seller, and Seller shall have the right to file and pursue any appeals attributable to Seller's period of ownership of the Property, with respect to tax assessments for the Property. If Seller is

successful in any such tax appeal related to the calendar year in which the Closing occurs, Buyer and Seller shall share in the cost of any such appeal and rebates or refunds in the same proportion as the proration of the Tax Expense set forth on the settlement statement executed by the parties at Closing. Seller will also calculate and apply to tenants' accounts credits and charges where applicable. Seller will provide copies of this calculation, along with copies of the billings to Buyer, along with any balance due to Buyer. If Buyer is successful in any such tax appeal attributable to Seller's ownership period of the Property, Buyer and Seller shall share in the cost of any such appeal and rebates or refunds in the same proportion as the proration of the Tax Expense set forth on the settlement statement executed by the parties at Closing. Buyer will also calculate and apply to tenants' accounts credits and charges where applicable. Buyer will provide copies of this calculation, along with copies of the billings to Seller, along with any balance due to Seller. All prorations hereunder shall be made within thirty (30) days after presentment of invoices or receipt of amounts applicable to this Subsection.

This Section shall survive the Closing and not be merged therein.