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REINVENTING THE WHEEL: RE-ENGINEERING EXISTING SHOPPING CENTER PROJECT THURSDAY, MAY 6, 2010 8:30-10:00 AM (Commercial Real Estate Transactions Group)

John I. Cadwallader, Esq.
FROST BROWN TODD LLC
10 West Broad Street
Suite 2300
Columbus, OH 43215-3467
PH: 614-464-1211
jcadwallader@fbtlaw.com
www.frostbrowntodd.com

James B. Jordan, Esq.
SUTHERLAND ASBILL & BRENNAN LLP
999 Peachtree Street, NE
Suite 2300
Atlanta, GA 30309-3996
PH: 404-853-8101
jim.jordan@sutherland.com
www.sutherland.com

Christopher Mrozinski
PREIT
Director of Development
200 South Broad Street
Philadelphia, PA 19102
215-875-3587
mrozinsc@preit.com

Joseph Coradino
PREIT
President, Preit Services
200 South Broad Street
Philadelphia, PA 19102
215-875-3587
coradinj@preit.com

I. COMMON REDEVELOPMENT PATTERNS:

A. Regional Malls

It is not uncommon for aging regional malls built in the 1970s and 1980s to be redeveloped in an attempt to restore their economic viability. The face of retailing is vastly different today than it was when many of these regional malls were first constructed. For instance, at the time that these malls were developed, big box stores, such as Wal-Mart, Target, Costco, Sam's, Home Depot and Lowe's, often did not even exist as a retail product type. It is not uncommon for the owners of aging retail malls to redevelop their properties so as to include many different types of retailers - - both big box stores and junior anchors such as Best Buy, Circuit City, Marshalls, TJ Maxx, Ross Dress for Less, *etc.* This makes for extremely interesting transactions as these different types of retailers often have vastly different views of the world and how a mall should be developed and operated. For instance, if a home improvement retailer, such as Home Depot or Lowe's, is introduced, then such differences of opinion include the home improvement retailer's concept of "area of control," outdoor sales and storage, right to store and display trucks for rental to customers, outdoor garden centers and outdoor display of portable sheds, grills, patio furniture and building materials, which are not traditional department store concepts. The home improvement retailer, which is accustomed to operating on stand-alone basis, is not concerned with the remainder of the center as much as with the common areas in the immediate vicinity of the home improvement retailer's store. Traditional department stores, which are true anchors for the center, are concerned with the traffic, parking, signage, look and reputation of the entire center.

B. Lifestyle Centers

Many of the shopping centers constructed in 2005 – 2008 were "lifestyle" centers, which are effectively strip centers containing a "village" or "main street" component and sometimes a residential component. They are called "lifestyle" centers because they often contain health facilities, entertainment (theater and restaurants), coffee shops, grocery stores, convenience stores and clothing stores designed to serve an upwardly mobile segment of the market. In this regard, lifestyle centers are often referred to as "live, work, play" environments. They are the new downtown constructed close to work, geared to young singles, childless professionals and empty nesters. They also appeal to those who seek "chic" places to shop and be seen, even though they may not fit the mold of those who live in or near such lifestyle centers. Lifestyle centers, particularly if they include residential units, are favored by many urban planners as a solution to further urban sprawl and are viewed as "green" alternatives (*i.e.*, environmentally sensitive) to traditional developments where residential development and retail development are separate and connected by highways and streets.

The players in a lifestyle center transaction may include some or all of the same players as in the regional malls, but department stores and big box tenants are somewhat less likely to be involved in true lifestyle centers.

Anecdotal evidence suggests that lifestyle centers have suffered greatly during the recent recession.

C. **Power Centers**

The redevelopment of a power center will involve issues and constraints similar to those involved in the redevelopment of a regional mall, except that there are less likely to be conventional department stores in the power center setting.

D. **Big Box/Lifestyle Center Hybrids**

Many retail projects now being developed are hybrids of a traditional power center and a lifestyle center. These projects combine traditional "inline" horizontal power center development with a "village" or "main street" lifestyle center component. Some existing big box centers are being redeveloped as hybrids by introducing a "main street" or "village" component.

II. REASONS FOR REDEVELOPMENT:

A. **Anchor Tenant Closure**

The consolidation of retailers has both increased the number of vacant big boxes in shopping centers, particularly malls, and reduced the number of retailers who can fill them. This has resulted in the introduction of different tenants and occupants in the shopping center, including discount retailers, junior department stores, specialty retailers, theaters, and additions of lifestyle components to existing enclosed malls.

B. **Employment of Capital to Create More Valuable Asset**

The owner, often a purchaser, may desire to refurbish a well located but physically substandard project to create a more valuable property.

C. **Need for New Centers, but not of Size of Regional Malls, due to Growth of Exurbia**

Many cities are now experiencing urban sprawl which requires smaller retail projects in areas located miles from traditional downtown. Whether this trend will continue is subject to doubt as the migration to the suburbs and beyond has begun to reverse itself.

D. **In-Line Tenants' Occupancy Rate Low**

It may make sense to de-mall, and yet keep the existing anchors, if the occupancy rate of in-line tenancies is low. The location of the remaining anchors (both their current location, if they are to remain open during the de-malling process, and their future location) is important in planning the phasing of the de-malling.

E. **Sale of Store**

The redevelopment of an existing shopping center may occur as a result of the sale of an existing department store, either in connection with a bankruptcy proceeding or as a private sale of one or more properties outside of bankruptcy.

F. **Desire to "Go Green"**

Your developer client may ask you what you know about building a "green" shopping center. Drawing upon your real estate expertise, rather than your college art major, you might want to inform the developer about this movement which, to date, has probably been more utilized by the Federal Government than it has by the shopping center industry. A major catalyst for developing the green building principles was the U.S. Green Building Council ("USGBC"), a nonprofit organization formed in 1993 by a group of professionals in the building industry. The USGBC mission statement describes the organization as "the nation's foremost coalition of leaders from across the building industry working to promote buildings that are environmentally responsible, profitable and healthy places to live and work". The USGBC started its own rating system called the "Leadership in Energy and Environmental Design" or "LEED". LEED is a rating system available for setting the standards for "green" buildings, and while it is not the only standard, it is the most widely used.

So why would a developer choose to build a "green" shopping center? First, some states and many local jurisdictions have "green" programs that provide a variety of different kinds of incentives if a "green" building is constructed. Some incentives provide for expedited construction reviews, and a few states (e.g. New York and Oregon) offer some form of tax incentives if a building has a certain level of LEED certification. Some cities and other governmental authorities now require that new construction performed in accordance with LEED-like requirements. Second, there is always the historical "cost/benefit" analysis. Should we spend more up front for the purchase of a hybrid car that enables us to substantially reduce our gasoline purchase, and over what period of time will that payback occur? The same cost benefit analysis relating to energy savings is applicable to green construction. Third, there may be benefits in attracting tenants to shopping centers that desire to participate in an environmentally friendly and progressive movement, but also wish to reduce their CAM costs arising from the green construction.

The green movement is here to stay, but the real question is to what extent it will be used in our shopping center industry.

III. FINANCING THE REDEVELOPMENT:

A. **The Current Mess**

We currently are mired in a deep commercial real estate recession that has dramatically affected the entire economy. While there are signs that the recession is easing in some sectors, the presence of "green shoots" to use President Obama's language, many believe that the tough economic times will continue to be difficult for at least the next year for the commercial real estate sector of the economy.

Economic conditions are particularly troublesome to the owners of shopping centers and other retail properties for a number of reasons. First, problems in the overall credit markets over the last 24 months, including the virtual elimination of securitization of CMBS loans, have made it extremely difficult to refinance maturing debt and to obtain purchase money financing for the acquisition of new properties. Second, the general economic problems, including historically high rates of unemployment, have resulted in reductions in consumer spending which in turn have resulted in increased tenant bankruptcies, stores closures and a slow down in the opening of new stores by those retailers who are still in a growth mode. Third, as a result of the perception of increased risk resulting from the first two factors, the returns required by real estate investors have increased substantially, thereby resulting in higher "cap rates" and lower property values. Fourth, while retail sales statistics have recently begun to improve, retail sales for the tenants occupying the shopping centers have dramatically declined, leading to efforts by those tenants to invoke lease clauses to reduce rent and/or terminate their leases.

Given this economic data, we can expect that loan delinquencies and defaults will continue to increase and that workout activity will be on the rise. Although it is beyond the scope of this paper, it appears that for a number of reasons, workouts during this economic downturn may be qualitatively different from the workouts that were experienced in prior downturns. This is so for at least two reasons. First, the threat of bankruptcy by a defaulting borrower is likely to result in less leverage than in the past. Second, the CMBS structure, with its reliance on master servicers and special servicers, has changed the lay of the land in a very substantial manner.

The difficult conditions in the credit markets continue to challenge existing owners' ability to redevelop their centers. In addition, the financial distress in the commercial real estate market over the last few years have resulted in grave problems as to many existing centers an inability for owners to invest adequately in their centers. This may create an opportunity for future redevelopment transactions particularly after distressed properties have been transferred back to the lender or other opportunistic buyers.

B. Restrictions on Modifications of Securitized Mortgage Loans

The holder of loans in a pool will typically elect to be treated for tax purposes as a REMIC (Real Estate Mortgage Investment Conduit). A REMIC holds a pool of mortgages for the sole purpose of issuing multiple classes of mortgaged-backed securities, and is subject to certain restrictions under the Internal Revenue Code and Regulations on what modifications can be made to individual loans held by a REMIC without risking the REMIC's status of a pass-through entity for federal tax purposes. Under most circumstances, a REMIC is not permitted to modify a loan, if such modification would be deemed "significant" by the Internal Revenue Code and Regulations. A modification that releases, substitutes, adds or otherwise alters a substantial amount of the collateral for, a guarantee on, or other form of credit enhancement for a nonrecourse debt instrument is deemed a significant modification of the loan by the Internal Revenue Code and Regulations.

When the documents for a loan which has been securitized do not include provisions permitting the contemplated redevelopment or renovation, the borrower will typically request that the lender modify the loan documents to permit the proposed redevelopment or renovation. When this modification is requested, the lender (typically the servicer and the servicer's counsel), must make a determination that the proposed modification would not be a significant modification of the loan. If it is determined that the modification would be deemed a significant modification, a servicer may not be permitted to consent to such changes, regardless of whether the proposed modification is economically beneficial for the borrower or property.

There are two general exceptions to the rules and regulations prohibiting the significant modifications of loans which are applicable in the context of a contemplated redevelopment or renovation of real property. First, the regulations provide that a modification which is undertaken as a result of the exercise by the borrower of a unilateral option set forth in the loan documents, is not deemed a significant modification of the loan. Second, the addition of improvements on the property which already secures the loan is also not viewed as a significant modification of the loan (although the lender may have additional concerns from an underwriting standpoint).

For this reason, if redevelopment and/or significant renovation is contemplated for property which will be subject to a securitized loan, it is imperative that borrower and borrower's counsel discuss this with counsel for the lender during the loan documentation process, and specifically provide for a unilateral option to permit the proposed redevelopment or renovation. Without these provisions, it will be very difficult and expensive, if not impossible, for the borrower to obtain the modifications required to effect the redevelopment.

Many of the existing securitized loans do not contain the necessary provisions permitting redevelopment. This requires that the existing loan be paid off before redevelopment can occur.

C. <u>Prepayment and Defeasance of Securitized Loans</u>

If the documents for a loan which has been securitized do not include provisions permitting the contemplated redevelopment or renovation, and the lender is not otherwise able or willing to permit the borrower to undertake the proposed redevelopment or renovation, it will be necessary for the borrower to defease or prepay the loan. Depending on the size of the loan, the loan documents may not permit the borrower to prepay the loan – even with yield maintenance -- but will require the borrower to defease the loan. To defease a loan, the borrower is required to purchase government securities for the lender's benefit that precisely match the interest and principal payments on the loan for the remaining term of the loan.

At origination, if the loan commitment will require the borrower to defease the loan, the borrower and borrower's counsel should closely review the defeasance provisions and negotiate provisions which are as beneficial to the borrower as possible. Specifically, if allowed by the lender, the borrower should have the option to defease the loan through the date on which the loan is first payable without penalty (often 30, 60 or 90 days prior to the stated maturity date), rather than providing defeasance payments through the maturity date. In addition, if allowed by the lender, the borrower should be permitted to post as defeasance collateral any government securities which have been approved by the rating agencies, rather than simply posting United States treasuries. Like the traditional "yield maintenance premium" or "prepayment penalty," the costs to purchase the securities to defease a loan will be a function of the yield differential on the loan and the government securities which are posted as substitute collateral. Given the traditionally low yield on government securities, the costs of the securities is often material and may make it economically impractical to defease a loan.

D. **<u>Conventional Financing</u>**

In the current market, there is little, if any, conventional construction financing available. The securitized market has just begun to open its doors in 2010, but only for refinancing existing debt on high quality centers or in connection with packaging new securitized loans on centers that have previously not been encumbered, like the recent financing completed by Developers Diversified Realty ("DDR") that was structured as a securitized loan in a pool with only DDR as the borrower. Where debt financing is available, the lenders use lower capitalization rates to generate lower appraised values, and then finance no more than a seventy percent (70%) on a loan-to-value ratio. The higher loan-to-value ratios occur only on the highest quality centers. The underwriting standards are difficult and lenders are looking carefully at the quality of the tenants and the length of their respective leases.

E. **<u>Joint Ventures</u>**

Some developers entered into joint venture arrangements with investment/venture funds that have substantial cash, but not necessarily shopping center expertise. Many of the public REITs, such as Developers Diversified Realty and Glimcher Realty Trust, have announced they are entering into joint venture structures where they would contribute existing shopping centers into the joint venture, with their joint venture partner receiving an ownership interest in the joint venture assets (often in the 50% range), by paying these developers a cash payment equal to their percentage times the agreed upon value of the center, based upon (conservative) appraisals based on (lower) market capitalization rates. The structure of these joint ventures are beyond the scope of this paper, but the issues addressed in these joint venture documents deal with many economic and operational issues such as giving the financial partner veto power over certain agreed upon "major acts", dealing with obligations to fund assets inside the joint venture as well as dealing with criteria for embarking upon new acquisitions, specifying detailed rules for the distributions of cash flow and capital transactions and the related returns and waterfall allocations, resolution of disputes, etc.

Considerable funds have been raised to invest in distressed real estate. While many sponsors contemplate acquiring fee title to distressed real estate or defaulted loans, other sponsors are searching for opportunities to recapitalize existing partnerships or limited liability companies by investing new capital in return for a priority return. This structure could be used to provide funding for the redevelopment of an existing project.

IV. ISSUES RELATED TO EXISTING CENTERS:

A. <u>Repurchase Rights/Rights of First Refusal</u>

1. The prior owner of land comprising all or part of a shopping center may have the right to buy parcels located in the center that are not seemingly related to such prior owner. For instance, in many older centers developed by the (former) retailer Strawbridges, it had encumbered the entire shopping center property with such an option running to the benefit of Strawbridges and its corporate (and not fee title) successors in interest. Such repurchase rights may be significant impediments to a typical retail redevelopment transaction as many redevelopment transactions involve the conveyance of parcels to new retailers coming to the project. In other deals, where such rights of refusal or repurchase rights exist among the fee owners, they may need to be terminated to satisfy lender requirements. For this reason, among others, a thorough title examination is essential before the developer embarks on a redevelopment transaction.

2. Option to Buy Property or Terminate Lease if a Retailer Goes Dark

   (a) Fee Purchase. The developer may have the right to purchase an anchor store's fee interest if it goes dark.

   (b) Lease Termination. The developer may have the right to terminate a lease and recapture the space of an anchor or big box that has ceased operations.

   The terms of a "go dark" based option to purchase/recapture are highly negotiable. Terms commonly negotiated include purchase price (Fair market value determined by arbitration? Book value? Some multiple or fraction of fair market value or book value? Greater of fair market value or book value?) and whether such repurchase or recapture right is a one-time right or a continuing right. The definition of "going dark" may be negotiated as well (how long must operations have ceased? Are there some cessations, such as condemnation, casualty, etc., which are not included for determining whether the retailer has gone dark? Is total cessation required in order for retailers to have gone dark or can there be a recapture in the case of a "partial" cessation?). **<u>See Schedule 1</u>** for terms of a sample provision addressing lease recapture in the go dark context.

3. What if there are no developer repurchase or recapture rights? If a big box retailer closes and moves across the street, the shopping center may die as the owner has no means of obtaining control of the vacant store.

B. **Operating Covenants/Co-Tenancy Clauses**

Co-tenancy clauses have long been used in shopping centers to require the developer to maintain occupancy levels for other tenants and/or anchor stores. Co-tenancy clauses have different remedies depending upon whether they are imbedded in a lease or contained in an operating covenant within a reciprocal easement agreement ("REA") where the retailer (typically a regional department store) owns fee simple title to the real estate where it operates. The issues relating to co-tenancy clauses in the REA/anchor department store context are somewhat different from those contained in the non-anchor store lease and the following discusses both of these contexts.

1. **Anchor Department Stores.** Attached to this paper as **Schedule 2** is a sample of an operating covenant that might be contained in a regional mall's REA. The trend over the last ten years, and usually the clear preference of the anchor department store, is to place the operating covenants in the REA and make them a matter of public record. As you can see from the attached operating covenant, the anchor department store agrees to continuously operate its department store for an agreed upon period of time (usually 15 years in new shopping centers) but is released from that obligation for a variety of reasons, two of which generally relate to co-tenancies in the shopping center. The first co-tenancy obligation requires the developer to maintain an occupancy rate of some agreed upon percentage (typically 65 to 70%) of the in-line mall shop tenants in the shopping center. The second co-tenancy obligation is keyed to the operation of certain other anchor department stores, and both of these co-tenancy obligations are discussed below. Anchor department store operating covenants are complicated, and because it is so important that the anchor department store not be released from its operating covenant, careful drafting is essential. If an anchor department store is released from its operating covenant, the developer is likely in default under its loan documents whether or not the anchor department store ceases to operate. Moreover, if the anchor department store ceases to operate, it will likely have a "domino" effect that releases other anchor department stores from their operating covenants, and permits other in-line specialty retailers to pay substitute rent and/or to terminate their leases. As a **practice pointer**, when negotiating these anchor department store operating covenants, careful consideration should be given to the following components of the co-tenancy clauses:

(a) **REA In-Line Mall Shop Co-Tenancy Clauses.** The typical percentage of in-line mall shop tenants that must be operating is usually in the 65-70% range. The nature of those tenants is always an important consideration, with the anchor department store insisting that these tenants be more than temporary licensees. As you can see in the attached form, there is often a definition for "Standard Tenants" with the anchor store taking the position that the developer should not be able to maintain the in-line percentage by simply filling the shopping center with temporary licensees, and with the developer taking the position that there is a middle ground so that not just "national tenants" are required to fill the 65-70% occupancy level. Most operating covenants will require an anchor department store to give the developer written notice when the occupancy rate has fallen below the required level, with developer then having (usually) one (1) year after that notice to regain the required occupancy rate.

(b) **REA Co-Anchor Department Store Co-Tenancy.** The second co-tenancy requirement in the typical REA operating covenant relates to the obligation to have other anchor department stores open and operating. Sometimes the co-anchor requirement is keyed to named department stores and other operating covenants simply require a specified number of any of the anchor department stores to be open and operating. Like the mall shop co-tenancy, there is usually a grace period to give the developer some period of time, usually between eighteen (18) and twenty-four (24) months, to find a substitute anchor department store. The criteria for satisfying a substitute co-anchor is always a point of contention in the negotiation, because it is important to anticipate that named anchor department stores may disappear due to mergers, intra-corporate consolidations and bankruptcies. Accordingly, depending upon the number of the other anchor department stores in the shopping center, and further depending upon the number of those that must be open and operating, care should be given to permit a successor entity to meet the requirements of a substitute anchor. Often, the requirement will entail insuring that the successor continues to operate a certain specified number of other anchor department stores having not less than a specified amount of square footage in a trade area that can be as small as one city or as large as one or more states. From the developer's perspective, the broader the definition of "anchor tenant", the better.

2. **Co-tenancy Clause for the Non-Anchor Store Tenants.** The trend over the last number of years to construct open-air/lifestyle centers rather than regional malls, many in-line retailers have insisted on adding co-tenancy clauses keyed to other specialty retailers, rather than to an anchor department store. When drafting these clauses, care should be given to permitting the developer to replace named specialty retailers with other specialty retailers, because as we all know, with bankruptcies, intra-corporate trade name consolidations and lease terminations, developers must have the flexibility to lease space to other tenants that can satisfy the co-tenancy requirements. Consider the following recent cases where retailers have sought to terminate their leases based upon co-tenancy clauses:

- In Chesterfield Exchange, LLC v. Sportsman's Warehouse, Inc., 572 F. Supp. 2d 856 (E.D. Mich. 2008), Sportsman's Warehouse successfully terminated a lease, based on co-tenancy grounds, even where its lease failed to include a co-tenancy clause. In a case that should surprise any experienced retail lawyer, Sportsman's Warehouse, entered into a lease that failed to include an express co-tenancy clause. Like many of the cases discussed above, the court allowed parol evidence to be introduced at trial because of its conclusion that the lease terms were "ambiguous". That extrinsic evidence demonstrated that the developer had promised Sportsman's Warehouse that a Sam's Club would be included as part of the shopping center development, and the court permitted Sportsman's Warehouse to terminate its lease. The interesting legal point is that Sam's Club was shown on the site plan attached to the lease as a "proposed Sam's Club", and the court held that the word "proposed" was ambiguous and spent several pages discussing the difference between "proposed" versus "planned" versus "pending". Based upon this "ambiguity", the court permitted the extrinsic evidence that served as the basis for terminating the lease.

- In <u>Tippecanoe Associates, LLC v. OfficeMax North America, Inc.</u>, 2009 U.S. Dist. LEXIS 25448 (S.D. Ind. 2009), OfficeMax claimed that a local costume and fireworks supplier that had replaced T.J. Maxx did not qualify as a required substitute co-tenant. The co-tenancy clause required three single user retail tenants, each occupying in excess of 15,000 square feet, and the lease gave the landlord one (1) year to replace a missing co-tenant. The landlord replaced T.J. Maxx with a local costume and fireworks supplier, and OfficeMax contended that this substitute tenant was not a "single user retail tenant," and argued that the lease language was ambiguous, seeking to introduce extrinsic evidence for the meaning of a "single user retail tenant". The court, in this case, rejected the argument that the lease was ambiguous and failed to allow the extrinsic evidence, concluding that the substitute tenant was a "single user retail tenant". In this case, OfficeMax sought to terminate its lease, but it was clear from the opinion that the lease would have also given OfficeMax the remedy of paying substitute rent.

- <u>Jo-Ann Stores, Inc. v. Property Operating Co.</u>, 880 A.2d 945 (Conn App. Ct. 2005) dealt with both co-tenancy issues and the ability to retroactively apply a substitute rent clause. Jo-Ann filed suit in 2002, to recoup overpaid rent that was paid from 1996 to 2001. Under the terms of the lease, Jo-Ann was given the right to pay a lesser rent if a specifically named anchor tenant (Clothing Superstore) failed to operate or the landlord failed to replace that tenant within six months "with a comparable suitable tenant which uses and occupies Clothing Superstore's space for a first class retail purpose (e.g. not a flea market, night club, second hand store, or furniture store)". The landlord replaced Clothing Superstore with a children's recreation center that also served fast food. The court concluded that the combination of these retailers did not qualify as a "first class retail purpose", and awarded Jo-Ann's a judgment equal to the difference between its regular rent and the lower substitute rent for the prior six years. Once again, the court permitted the admission of parol evidence based upon the determination that "first class retail purpose" was ambiguous. The court's decision raises two interesting points. First, shopping center documents routinely use "first class retail purposes" or "first class retail department store" as a standard for a substitute tenant or co-anchor. Second, it appears from the decision that the trial lawyers failed to plead that Jo-Ann had waived its rights by waiting six years to initiate the action. The appellate court refused to address the waiver issue because it had not been pleaded in the trial court. Note that in Cascade Crossing II, Inc. v. Radioshack Corp., 480 F.3d 1228 (11^{th} Cir. 2007), the court ruled that waiting three years to file suit for an exclusive use violation was a waiver. Here it appears that the litigators, and not the real estate lawyers, dropped the ball.

3. **Remedies for Violations of Operating Covenants**

(a) **General compensatory damages** may be of little benefit to a landlord/developer in the case of the violation of an operating covenant. If the tenant who is not operating is current in the payment of rent and other charges, there may not be any resulting general compensatory damages. On the other hand, if the tenant that is not operating is not current in the payment of rent and other charges, the landlord can bring a direct action against the tenant for nonpayment of rent rather than violation of the operating covenant.

(b) Some courts have held that landlords may be entitled to **consequential damages** based on the "diminution in value" of the shopping center caused by the vacancy. "Diminution in value" damages have not been awarded uniformly, and courts have generally limited recovery to circumstances where the harm caused by the tenant's breach was reasonably foreseeable at the time of the lease. The courts awarding the recovery have often done so due to the foreseeability of harm caused by the premature cessation of operations by an anchor tenant. See e.g., Hornwood v. Smith's Food King No. 1, 772 P.2d 1284 (Nev. 1989) (the court first implied an operating covenant given the relatively low amount of base rent and the resulting importance of percentage rent and then held that the tenant was liable for the difference between the "present worth of the entire property with the lease less the present worth of the entire property without the lease"); Hornwood v. Smith's Food King No. I, 807 P.2d 208 (Nev. 1991) citing Washington Trust Bank v. Circle K Corp., 546 P.2d 1249, 1252 (Wash. Ct. App. 1976); Pleasant Valley Promenade v. Lechmere, Inc., 464 S.E.2d 47 (N.C. Ct. App. 1995); BVT Lebanon Shopping Center, Ltd. v. Wal-Mart Stores, Inc., 48 S.W.3d 132 (Tenn. 2001) (the court reasoned that the cessation of operations by anchor tenant affected a shopping center's financing, traffic flow, internal stability). Most courts characterize the "diminution in value" remedy as consequential damages which require special pleading, proof that such damages were in the contemplation of the parties, and proof that damages can be determined with reasonable certainty. See e.g., BVT Lebanon Shopping Center, Ltd., 48 S.W.3d at 139 (Parker, J., concurring). The proof of damages with reasonable certainty may be problematic. Counsel may wish to consider including "window dressing" language in the lease providing the basis for a claim that the "diminution on value" damages were foreseeable and within the contemplation of the parties. **See Schedule 3** for sample language.

(c) Given the fact that general compensatory damages may not be of benefit to the landlord and the problems in pleading and proving "diminution in value" consequential damages, landlords may consider including contractually agreed upon **liquidated damage** awards tied to the cessation of operations. Courts generally enforce liquidated damages provisions so long as such awards are not punitive in nature and the typical black letter law requirements are satisfied. See e.g., American Multi-Cinema, Inc. v. Southroads, L.L.C., 115 F.Supp.2d 1257, 1263 (D.Kan. 2000).

(d) If legal damages are insufficient to remedy the wrong caused by Tenant's breach, courts may, in rare circumstances, order a tenant to **specifically perform** its lease obligation to continue operation. See e.g., Mass. Mutual Life Ins. Co. v. Associated Dry Goods Corp., 786 F.Supp. 1403 (N.D.Ind. 1992); Dover Shopping Center, Inc. v. Cushmann's Sons, Inc., 164 A.2d 785, Page 791 (N.J.Super.Ct.App.Div. 1960). The Associated Dry Goods and Dover Shopping Center cases are exceptions to the general rule. Most courts are not willing to grant equitable relief for violation of an opening or operating covenant. The grounds for refusing to do so include a determination that legal damages are sufficient to compensate an aggrieved landlord. (See, e.g., Summit Towne Centres, Inc. v. Shoe Show of Rocky Mount, Inc., 828 A.2d 995 1003 (Pa. 2003) or concerns that equity will not order specific performance if it would require continuous supervision of the court. (See, e.g., CBL & Associates, Inc. v. McCrory Corp., 761 F.Supp. 807, 809, 812 (M.D.Ga. 1991).

(e) Note that the remedy of liquidated damages is mutually exclusive with the remedies of either equitable relief, in the form of specific performance, or the amount of compensatory damages which requires an ability to measure damages. Of course, a developer will not be entitled to collect a sum in excess of the liquidated damages even if its actual damages were higher.

C. **Exclusive Use Clauses.** Exclusive use clauses grant a tenant the right to sell certain kinds of products or services on an exclusive or protected basis in the center. There is probably no other clause in a lease that requires more careful and precise drafting and shopping center industry knowledge. The typical remedy for violating an exclusive use is to give the tenant one or both of the rights to pay a reduced rent or terminate its lease. When redeveloping a shopping center, there are a variety of considerations that must be addressed when considering placing new tenants in the existing center and considering additional restrictions that may be embedded in the leases in the target center:

1. Scope. The scope of the exclusive use clause is always the threshold negotiating point, with the retailer wanting the widest scope possible, and the landlord rebutting those requests with industry examples demonstrating its resulting inability to lease other space in the shopping center to a variety of other retailers. An obvious illustration is in the grocery store context where the grocer's request is for an exclusive to sell "groceries". Some courts have defined the term "groceries" very broadly as "commodities sold by a grocer who is one who sells food stuffs and household items" Mark-It Place Foods, Inc. v. New Plan Excel Realty Trust, Inc. 156 Ohio App. 3d. 56, 2004 Ohio 411. Also see Penn Mart Supermarkets, Inc. v. New Castle Shopping LLC, 2005 Del. Ch. LEXIS 199 (July 25, 2005) (an unpublished opinion) for a discussion discussing the difference between "groceries" (applies to both food and non-food items) and "food or food products intended for off-site premises consumption" (does not include non-food items). Attached to this paper as **Schedule 4** is a suggested form of a grocery store exclusive with carve-outs permitting the landlord to lease to other retailers that also sell products sold in grocery stores. A well negotiated exclusive use clause will include sufficient carve-outs and differentiate between an exclusive being related to a competing tenant's "primary use" as contrasted with an incidental use. We were recently involved in a negotiation with a grocery store that had entered into a broad exclusive to sell "groceries" in an old 1970s lease, and based upon that clause, the national grocery store chain was unwilling to permit a "dollar" type store to enter the center because many of the items sold by the "dollar" store were "groceries". The impass was resolved but at a significant cost to the developer because the grocery chain extracted the right to sell gasoline with minimal rental increase.

   The scope/vagueness issues arising in exclusive use clauses appear in a variety of contexts, and not just in the much litigated groceries context, as noted by the following recent cases that litigated other exclusive use clauses:

   - In McDonald's Corp. v. Rappaport, 532 F. Supp. 2d 264 (Mass. Dist. Ct. 2008), the lease prohibited the landlord from leasing any additional space to a "so-called fast food restaurant, food service establishment, drive-in or walk up eating facility". McDonald's sued to block a lease to the International House of Pancakes ("IHOP") and lost because IHOP convinced the court that the exclusive use clause was "ambiguous", which permitted somewhat contradicting extrinsic evidence to be introduced at trial, eliminating the parol evidence restrictions, resulting in the judge's decision to permit IHOP to enter the center. The judge must have been a former real estate lawyer because we think the developer was lucky with that outcome, given the poorly written exclusive use clause.

- In Regency Commercial Associates, LLC v. Lopax, Inc., 869 N.E.2d 310 (App. Ct. Ill. 2007), after an appeal to the appellate court and a subsequent trial on remand, the court concluded that the restaurant, Buffalo Wild Wings, was not in violation of an exclusive use given to another party for any "fast-food [(quick service restaurant)] restaurant or restaurant facility whose principal food product is chicken on the bone, boneless chicken or chicken sandwiches". Like in McDonald's Corp., *supra*, the court held that the exclusive use clause was "ambiguous" thereby permitting the introduction of extrinsic evidence to conclude that BW3 was not a "fast food restaurant". Once again, we think the opposite result could have been reached, and believe the author of the exclusive use clause could have benefitted from attending our ICSC Law Conference.

2. Incidental vs. Primary Use. The words "incidental" and "primary" cannot be underutilized when negotiating use clauses. From a landlord's perspective, granting an exclusive use to one tenant should be drafted so that other retailers in the same center can sell those same products as an "incidental" use. For example, in the cell phone store context, the exclusive use should not prohibit other retailers in the center form selling, as an incidental use, cell telephones, telephone gift and credit cards, etc. because many general merchandise retailers offer these kinds of products as incidental sales. Likewise, does an exclusive use to sell "delicatessen sandwiches and submarines" prohibit a developer from leasing space to a pizza shop that sells as an incidental part of its business, sub sandwiches? If the exclusive prohibits the landlord from leasing to another tenant that sells, as its primary business, delicatessen sandwiches and submarines, then there would not be a problem. The issue impacts both the developer and the retailer, because retailers want to protect their sales, but on the other hand, do not want to be so broad in drafting their exclusive use clauses that it prohibits the developer from maintaining a healthy occupancy level at the center. The developer may be better off not trying to define "incidental use" by reference to a threshold percentage of gross sales or floor area.

3. Notice of a Violation. The use clause should be carefully drafted to require the tenant to give the landlord notice of the alleged violation. Often, experienced lawyers and business negotiators for retail tenants will argue that no notice should be required because the landlord knows when it has leased to a competitor in violation of an exclusive use clause. The obvious response from the landlord is that it should have the right to cure a default prior to a substantial reduction in rent or a lease termination. We were recently involved in a negotiation with a national retailer that claimed that our developer client had violated an exclusive use clause. That retailer, like many in today's economic environment,

had retained a national consultant that scoured every shopping center where that retailer was located, in an effort to determine whether any of its exclusive use rights had been violated. In our situation, the national retailer claimed it was owed in excess of a half a million dollars because a competing tenant occupying only 1,200 square feet, had done so for the last six years, thereby entitling the national retailer to six years of back rent reduction even though the retailer had waited six years before demanding the rent reduction. We were able to resolve this matter for a fraction of the amount originally claimed, primarily because the national retailer's lease required it to give the landlord notice of all defaults, thereby eliminating the claim for the retroactive back rent. As a **practice pointer**, be careful, as the form leases for many national retailers are drafted to permit substitute rent payments without notice to the landlord thereby bolstering the claim for retroactive relief.

Some leases are vague on this notice/waiver issue leading to expensive litigation, with the retailer claiming that its sales were damaged retroactively, and with the landlord arguing that the tenant had operated for years without notifying the landlord, thereby waiving its exclusive use rights. The courts have split on this waiver issue, and once again, careful drafting can save significant litigation expenses.

- In <u>Cascade Crossing II, Inc. v. Radioshack Corp.</u>, 480 F.3d 1228 (11^{th} Cir. 2007), the landlord entered into a lease with Radio Shack that prohibited the landlord from leasing space in the shopping center to another tenant "whose primary use involves the sale of electronic equipment and components". That lease was entered into in 1995, and a year later, the landlord leased space to a cellular telephone company. Four years later, in 2000, Radioshack notified the landlord that it would commence paying reduced rent and was owed a rent credit for the years of overpayment. The court held that Radioshack had waived its rights by waiting four years to enforce the clause.

- In <u>Dolgencorp, Inc. v. Winn-Dixie Stores, Inc.</u>, 2 So. 3d 325 (Fla. Dist. Ct. App. 2008), Winn-Dixie waited three years before it filed suit against Dollar General claiming that its exclusive right to operate a "supermarket, grocery store, meat, fish or vegetable market" was violated by Dollar General. It appears from the opinion that the waiver defense may have been argued at trial, but the court declined to address those issues because the entire controversy became moot because Dollar General had already vacated the shopping center by the time of trial. The trial court's decision issuing an injunction in favor of the exclusive use clause was reversed, but once again, think about the legal fees

4. <u>Duration of the Reduced Rent and Termination Right</u>. Thought should also be given to the duration of the substitute rent and the window permitting the exercise of the lease termination right. Most sophisticated retailers will agree that after exercising the right to pay substitute rent, if it exercises a lease option, then rent can be restored to the regular amount.

When drafting those clauses, it should be clear that both the substitute rent right and the lease termination right arising from that original violation are thereafter waived after the option exercise. Depending upon the leverage, thought should be given to negotiating the elimination of the lease termination right where the tenant has paid substitute rent for some to-be-negotiated period of time. There are legitimate positions on both sides of that argument, with the developer taking the position that the termination right should expire after one or more years of paying substitute rent, and with the retailer arguing that sales could continue to deteriorate after several years, thereby making the termination right even more important.

D. **Exclusive Use Radius Restrictions – Restrictions on the Landlord.**

Exclusive use radius restrictions (sometimes referred to as "reverse radius clauses") are cousins of exclusive use clauses, but restrict a landlord from leasing space to other tenants in and around a designated radius of the center. (These clauses should not be confused with radius restrictions sometimes imposed upon a tenant paying percentage rent to preclude that tenant from opening other stores within a designated radius of the center that could adversely reduce the amount of percentage rent paid in the original center.) The most interesting aspect of these clauses arises under circumstances where the retailer ceases to operate in the center, continues to pay rent, but opens a new retail establishment within the trade area of the original shopping center, and then refuses to permit the developer of the original shopping center from leasing to a competing use within that shopping center. These clauses can wreak havoc when attempting to redevelop the original shopping center which is the focus of the redevelopment. Obviously, redevelopment impetus often arises because a new center has been constructed down the road drawing existing tenants in the old shopping center into the new shopping center, leaving the older shopping center in need of redevelopment by either the existing owner or by a purchaser that believes it can make money by turning the old center around. For a variety of results under different fact patterns, see the following cases:

- Putnam Downtown, LLC v. The Stop & Shop Supermarket Co., No. CV020067485, 2002 Conn. Super. LEXIS 3464 (October 16, 2002) (an unreported opinion with no subsequent opinions). The lease between the landlord and Stop & Shop for a grocery store in a strip center restricted the landlord from leasing space to any other supermarket within or around the shopping center. Stop & Shop closed after 20 years and opened a new supermarket 2 miles away, but continued to pay rent and to exercise options to renew. The landlord filed a claim against Stop & Shop, including a claim for violation of the Connecticut Unfair Trade Practices Act (CUTPA), alleging that Stop & Shop used the radius clause to suppress competition, which was injurious to the landlord and caused injury to consumers. Stop & Shop moved to strike the CUTPA count, alleging that it was under no legal duty to release the radius clause it had bargained for in the lease. The court denied the motion to strike the CUTPA count, holding that the landlord's allegation that Stop & Shop used the radius clause to suppress competition stated a legally sufficient cause of action under CUTPA, which as a remedial measure, was to be "construed liberally in an effort to effectuate its public policy goals."

- *See also* Tippecanoe Assocs. II, LLC v. Kimco Lafayette 671, Inc., 829 N.E.2d 512 (Ind. 2005). The Indiana Supreme Court reversed the ruling of the Court of Appeals and held that the radius clause had been severed from the occupancy and was unenforceable. The tenant grocery store had executed a lease containing a two mile radius restriction, which "ran with the land". Landlord sought to declare the restrictive covenant void because it could only find a grocery store to replace a large vacated space in the center. The State Supreme Court reversed the Court of Appeals and held that because the grocery store space in the center was no longer being used as a grocery store, there was no interest within the center that a restrictive covenant should protect. The court held that it was inequitable to enforce an anticompetitive covenant by a party no longer operating in the center, found the covenant to be both overly broad and excessively burdensome.

- *See also* Davidson Bros., Inc. v. Katz & Sons, 643 A.2d 642 (Sup. Ct. NJ, 1994). Plaintiff grocer sold its downtown grocery store to a merchant, who then sold the property to the City of New Brunswick. The original deed of sale from the grocer contained a restrictive covenant preventing any future use of the property as a grocery store. The City leased the property to a grocer, and the former grocer filed suit for declaratory relief, asking that the court uphold the restrictive covenant. After a somewhat complicated procedural history, the case was decided by the superior court which held that the covenant was not enforceable for public policy reasons. In considering the "reasonableness" of the restrictive covenant, (in a lease or in a deed of sale) the Court weighed a variety of factors that were discussed at length in the case, and ultimately concluded that changed circumstances (i.e., the fact that the plaintiff grocer was no longer operating a grocery store in the area) together with public policy concerns (the need for a grocery store in the neighborhood) weighed against upholding the restrictive covenant.

- *But see* Deer Cross Shopping LLC v. Stop & Shop Supermarket Co., 773 N.Y.S.2d 211 (N.Y. App. Div. 2003). The court denied shopping center owner's motion for declaratory judgment to void a restrictive covenant in a lease with Stop & Shop Supermarket ("Stop & Shop") that no longer operated in center, where the covenant restricted the owner from permitting another supermarket within the center or within a 2 mile radius. The court held that Stop & Shop's operation within the 2 mile radius of the center was a valid business reason to enforce the restrictive covenant against the shopping center owner and that plaintiff shopping center owner did not demonstrate as a matter of law that enforcement of the covenant was unreasonable or violated public policy. The court noted that the lease clearly stated that Stop & Shop was required to open as a supermarket, but was not required to remain open or to continue to operate, and that the restrictive covenant would remain in effect even if Stop & Shop ceased to operate.

- *See also* Erie Plaza Partners v. Save-a-Lot Food Stores, No. 1376, 2004 Phila.Ct.Com.Pl. LEXIS 54 (Nov. 4, 2004). Plaintiff/landlord Erie Plaza Partners claimed breach of commercial lease and breach of covenant of good faith and fair dealing when Save-a-Lot abandoned its leased premises and opened a new store approximately two blocks away. The landlord also sought percentage rent on the sales at Save-a-Lot's new store outside the center. It does not appear from the opinion that the lease contained an exclusive use radius restriction that prohibited the former landlord from leasing other space in its center to a competing grocery store. However, it appears from the opinion that the landlord wanted to recapture the dark space vacated by Save-a-Lot, and Save-a-Lot refused to terminate the lease unless the landlord agreed not to lease that vacant space to a grocery store. The landlord sought to deal with this issue by initiating its claims for a breach of lease, breach of the covenant of good faith and fair dealing, and demanding percentage rent on sales at Save-a-Lot's new store. This case is different from the others discussed above because here the landlord was seeking to recapture the vacated space and re-lease it. In the above cases, the landlords were seeking to lease other space in their center to a competing use. The court held in favor of Save-a-Lot and concluded that it had the right to maintain its old lease so long as it paid rent since there was no operating agreement, and that there was no basis to permit the landlord to receive percentage rent on sales at the other location not in its lease.

As you can see from the above cases, the courts have split on the enforceability of radius restrictions where the tenant no longer operates in the center, continues to make lease payments, and seeks to prevent its former landlord from leasing other space in the old center to a competitor.

E. **Attachment to Mall/Entrance onto Mall**

It is common for REAs utilized in traditional enclosed malls to require that the department stores be connected to the enclosed malls by one or more points of connection. This may be problematic in the case of a "demalling" strategy involving the introduction of retailers other than traditional department stores (e.g., big box retailers such was Wal-Mart, Target, Home Depot or Lowe's). Such retailers typically employ floor plans and operate in a manner such that all customer traffic enters and exits the store from one point located at the front of the store. Many of these big box retailers will resist the operational changes that would result from multiple points of connection, particularly points at the rear of the store. These may be for reasons such as shrinkage or the cost of a change to prototype floor plan. In any event, the existing inline tenants would likely balk at a location along a corridor leading to a big box with no entrance along that corridor, whether within an enclosed mall or in an open air center.

F. **REA, Permissible Building Areas and Other Site Plan Controls**

1. PBAs Generally: Permissible building areas may result in inability to demolish an existing store and rebuild the new owner's prototype store and may not provide sufficient options to expand store.

2. PBA – Site Plan: Permissible building areas (PBAs) on site plan. Watch the "fine print". See the first of the following two site plan cases:

(a) Belk, Inc. v. Warner Robins Zamias L. P., 555 S.E.2d 19 (Ga. Ct. App. 2001) The lease between Belk, anchor tenant, and Zamias, developer, required the developer to obtain the consent of Belk before constructing any building not shown on the site plan attached to the lease. The newest site plan, substituted by amendment to the lease, showed a 70,000 square foot "Proposed Future Store" to be built on a pad. For the first time on any site plan, the following words appeared within the dotted lines on the site plan: "Actual Configuration & Size May Vary - A Minimum of 5.5 Parking Ratio Will Be Maintained." This language was in all future permissible building areas for future store pads on the site plan. When the developer later allowed Dillard's to construct a 101,298 square foot store on the pad, with sufficient additional parking to meet the 5.5 ratio, Belk objected with the argument that the 70,000 depicted was a maximum. The court pointed to other language in the lease that expressly limited sizes of various buildings to maximum and minimum sizes, and stated that since the language on the site plan did not do so, and further since the quoted site plan language regarding the parking ratio limit made no sense in the site plan note regarding variation of actual configuration and size unless it was anticipated that size *may* increase. Finally, the limit within the lease to department stores to be constructed within the permissible building areas on the site plan did not apply to this pad, which had been re-designated in the new site plan from "Future Proposed Department Store" to "Proposed Future Store". The Court relied on the principle that courts are to strictly construe restrictive covenants so as to minimize their impact on the right of landowners to use their property for any lawful purpose. Lower court's grant of summary judgment in favor of developer was affirmed.

(b) K-Mart Corp. v. Oriental Plaza, Inc., 875 F.2d 907 (1st Cir. 1989). The court held that a lease agreement giving K-Mart the final approval of any additional structures not originally contemplated by the site plan or any structures in the parking area that would exceed ten thousand (10,000) square feet was valid. The court held that K-Mart would suffer irreparable harm from the decreased prominence of their store and that harm justified an injunction and demolition of the additional retail space.

3. Height restrictions: Many retailers are keenly interested in maintaining satisfactory visibility of their storefronts (prototypical fascia design for national or regional tenants, especially restaurant or entertainment uses). Developer's counsel should take into account differing needs of different types of users in a mixed-use/non-enclosed mall environment.

4. Traffic flow: Traffic flow patterns may be impacted by changes to surrounding streets (including signalization, etc.), location of outparcel tracts, construction of buildings, parking structures, etc. The shopping center REA may provide for a "frozen site plan" which would prohibit any changes to traffic patterns and parking areas without the consent of all approving parties or include access roads in "no change" areas. In the case of a redevelopment of an existing shopping center, parking aisles, driveways and curb cuts, as well as parking ratios, are likely to be modified. Thus, the consent of the existing parties to the REA may be required.

5. Existing Easements: There are likely to be existing easements as to access and utilities. As part of the construction of a new store, the site plan is often reconfigured as to access and parking and perhaps utility location. Care must be taken to ensure that the Acquiring Retailer has the right to make these changes pursuant to the existing documents.

6. Construction Black Out Dates: Many existing REAs provide for construction black out dates, often tied to the Christmas holiday shopping season, which are intended to protect existing retailers. These blackout dates must be overlaid on the construction schedule to see if there are any inconsistencies. Even if there are not planned inconsistencies, problems may result from future construction delays.

7. Architectural Controls: Many REAs provide that the declarant or other parties to the REA maintain the right to approve architectural elevations or deviations from an approved theme. The theme may or may not permit the incorporation of prototype elements of any new exterior elevations.

8. Consent Rights.

   (a) Some cases distinguish between outright prohibition vs. consent requirement in document. See, e.g., Cafeteria Operators, L.P. v. Coronada, 952 P.2d 435 (N.M. Ct. App. 1997) 'Configuration agreement" in lease limiting the physical layout of the shopping center to dimensions set forth in an attached schematic was an *express prohibition* and did not authorize the landlord to change the configuration of the shopping center *subject to the consent of tenant*, therefore court held that there was no implied obligation of good faith on the part of tenant to negotiate regarding a landlord-proposed change in configuration to include a building to be leased to Dairy Queen in the parking lot. The fact that tenant did undertake negotiations with landlord regarding the proposed change, and whether tenant had an implied duty of good faith and fair dealing in such negotiations, were not considered because such issues were not raised below. Of particular interest was that landlord constructed and leased the building during settlement negotiations in the face of tenant's objection, and even though tenant had less than five years left on its term (a fact that weighed against tenant in determining relative hardships for injunctive relief), the court ordered that the building be demolished. Landlord essentially gambled that its breach would ultimately be to its advantage because it would gain additional rent income and force Tenant to agree to a modification of the configuration agreement.

(b) On the other hand, what are tenant's rights *vis-a-vis* a third party that is not a party to its lease if landlord defaults in lease provisions? See Spring Valley Invs. v. Rite Aid of Ohio, Inc., 2000 Ohio App. LEXIS 1635 (Apr. 14, 2000) (tenant was not entitled to equitable remedies, but only to monetary damages, because such damages were quantifiable, i.e., no irreparable harm). See also Bowdoin Square, L.L.C. v. Winn-Dixie Montgomery, Inc., 873 So. 2d 1091 (Ala. 2003) Tenant who was not a party to the REA had to rely on the landlord to enforce same. Question was whether tenant, which had closed its store and then terminated its lease and stopped paying rent based on landlord's failure to enforce restriction in REA, had abandoned the premises entitling landlord to common law remedies, and also whether the landlord's breach was material, giving the tenant right to terminate the lease in the first place. Consider including a provision in the lease permitting tenant to act as attorney-in-fact on behalf of landlord to enforce an REA if the landlord fails to timely do so, and/or expressly granting tenant the right to terminate lease if landlord fails to enforce the REA, and/or amending the REA to add tenant as a third party beneficiary with notice, enforcement and consent to amendment rights, at least with respect to certain enumerated provisions. Is a right to terminate the lease a sufficient remedy for tenant, which has spent money and foregone other opportunities to situate its store at this location?

(c) Condemnation or "taking" of retailer's rights under the REA and/or lease in lieu of obtaining retailer's required consent. A trend has developed to expand the eminent domain power beyond condemnation for roadway purposes (still a real concern in redevelopments, i.e., the widening of adjacent roadways to ease congestion and improve traffic flow, with a potential for changing the traffic patterns within the shopping center itself), to include taking of property to achieve broader purposes such as relieving a neighborhood or municipality from blight, or developing or constructing a commercial project, often by a private owner or developer, which "serves a public purpose" (which "public purpose may include an increase in local tax values). See Kelo v. City of

New London, 545 U.S. 469 (2005) (question was whether the city's proposed disposition of property by the City of New London qualifies as a "public use" within the meaning of the "Takings Clause" of the Fifth Amendment to the U.S. Constitution, where the city assembled land for a development plan that was "projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas", by purchasing property from willing sellers and using the power of eminent domain to obtain the remainder of the property from unwilling sellers. The properties to be condemned were conceded **not** to be blighted; the properties simply were located in the identified "development area". The Supreme Court of the United States determined that a city's decision to take property for the purpose of economic development satisfies the "public use" requirement of the Fifth Amendment).

For Pre-Kelo authority see Kaufmann's Carousel, Inc. v. SIDA, 750 N.Y.S.2d 212 (App. Div. 2002) (taking of consent rights in leases and reciprocal easement agreements regarding, among other things, common facilities, site plan, permissible building areas and name of shopping center was upheld by the New York State Supreme Court. The appeals to the New York Court of Appeals by plaintiffs J. C. Penney Corporation, Inc. and Kauffmans Carousel, Inc. (now owned by Federated Retail Holdings, Inc.) were denied).

G. **Parking Restrictions**

1. Garage/Deck. Decks are very expensive, but may be needed to accommodate REA and/or code parking requirements. Some big box leases expressly prohibit deck parking. This is a carryover from power center developments where surface parking is the norm.

2. Street Parking. Most often employed in "lifestyle" centers as part of the "main street" look and feel.

3. In a mixed use project, be careful with center-wide overall minimum parking ratios which may have restaurateur "Peter" stealing from retailer "Paul" in order to meet the overall ratio. This "borrowing" of excess spaces to meet parking ratios as to uses that are "underparked" can be combated by requiring that the minimum parking ratios apply on a parcel by parcel basis in addition to a center wide basis.

4. Must outparcels be self-parked (such that customers of the outparcel must park within the outparcel and not on the remainder of the shopping center and customers of the shopping center must not park within the outparcel) or will cross parking by outparcels with the remainder of the center be permitted? Many form REAs expressly provide for self parking of outparcels and expressly prohibit cross parking. This may be problematic for a developer who has fixed outparcels for sale which may

not be large enough to accommodate parking needs of some restaurant type outparcel tenants. In such case, the developer's inclination is to allow cross parking, to the extent there are excess parking spaces in the shopping center.

5. Real Estate Conveyances to Accommodate Parking Needs

   (a) One REA party may need to convey a long term or perpetual easement for parking spaces in the shopping center to provide parking to another party whose site is losing parking due to the expansion/redevelopment.

   (b) One party may need to convey a fee interest to another party to satisfy parking requirements of the code and/or the REA (which requirements may have been reduced by a variance or by amendment to the REA, or which may have been reduced due to reduction in the size of the party's building as part of the remodeling of the center, e.g., a new store prototype is smaller and requires fewer parking spaces.).

   (c) Tax treatment: Treat swaps of land and/or conveyances of fee or easement interests as Internal Revenue Code Section 1031 tax deferred exchanges. Note that if the real property that is transferred is a long term easement, it must have a term (inclusive of remaining unexercised options) of more than 30 years similar to a long term lease (check the REA and/or ground lease for the remaining term).

H. **<u>Unwinding of Loan Documents, Ownership Documents</u>**

Depending on the extent of the redevelopment of an existing center, for instance the need to adjust parcels, swap portions of existing parcels owned by different occupants of the shopping center, etc., the existing lenders, including any sale-leaseback landlord, will have to be involved in the redevelopment. For instance, if the parcel securing the debt is to be adjusted or a portion of it conveyed to a third party in exchange for another parcel, then the lender's consent to, and release of, the conveyed portion will be required. The same is the case in the event of a sale-leaseback landlord which owns fee or ground leasehold title to a particular parcel, a portion of which must be conveyed to accomplish the redevelopment. It is often easier and cleaner to make the deal happen by paying off the entire debt and obtaining a complete release, or buying back the sale-leaseback landlord's interest in the parcel, if possible, thereby unwinding the transaction.

I. **<u>Ability to Transfer all or Portion of Interests</u>**

1. Right to sell outparcels: Are there restrictions and easements that bind and benefit the outparcels once sold so that the mall anchors and tenants understand the nature of the outparcel development and its impact on the center?

2. Right to sell vacant anchor parcels: Will the anchor stores agree to create future anchor store PBAs without an anchor presently being a party to the redevelopment?

J. <u>Environmental Problems</u>

Environmental problems are often encountered in the redevelopment scenario. In some cases, the shopping center being redeveloped may have been initially developed at a time when there was much less scrutiny as to environmental problems and the environmental condition of the property. The degree of the environmental due diligence may differ as to subsurface conditions and conditions in existing buildings depending on the scope of the redevelopment. If the existing buildings are being renovated rather than demolished such that there is little excavation to be performed, subsurface conditions may be less important. Irrespective of the amount of renovation to the buildings, increased scrutiny will be required as to the possibility of hazardous substances incorporated in the existing buildings, particularly as to buildings built in the 1970s and before, given the prevalence of the use of lead paint and asbestos containing materials during such time periods. If asbestos is discovered in the buildings, costly measures will need to be employed to ensure that such materials are either removed or encapsulated in accordance with applicable law. Careful consideration should be given to hiring the correct professional firm with ample experience to perform such activities.

On the other hand, in the case of a demolish and rebuild scenario involving excavation, Phase I testing will certainly be required and Phase II may well be required if concerns exist or arise as a result of such Phase I testing. This is more likely the case of redevelopment of property located in urban areas that may well have been impacted by ground water and soil contamination problems resulting from historically "environmentally dirty" uses. In some states, "Brownsfield" legislation may be available to mitigate the effect of existing environmental problems. A typical Brownsfield program allows a purchaser of property to apply for the acceptance of the property into the program, which will involve a negotiated remediation plan coupled with the receipt of a covenant not to sue from the regulatory authority. In some cases, taxes incentives may be available as well. A typical Brownsfield program binds only to regulatory authorities and does not bind third parties who may have claims relating to contamination that emanated from the redeveloped property onto adjoining properties. Most Brownsfield programs are intended to provide an incentive to a new purchaser to purchase property which has environmental problems. Accordingly, in many states, in order for an entity to avail itself of the Brownsfield protection, the owner may be required to have the property accepted into the program before the owner acquires the property. For this reason, Brownsfield programs may not be available to the existing owners.

V. IMPEDIMENTS TO REDEVELOPMENT:

A. <u>Closing of Remaining Retailers During Redevelopment</u>

1. In the de-malling context, retailers which face the portion of the enclosed mall to be demolished will require possible closing of their mall entrance and/or construction of a tunnel for, at least, an emergency exit during the heaviest demolition work.

2. Closure of mall entrance may require redesign of store departments, extra security at closed entrance, signage at general mall entrance or outside of mall directing customers to the closest entrance to store.

B. **Interference with Ongoing Operations**

1. Asbestos removal/remediation issues: For developments constructed prior to 1980, asbestos in ceiling and/or floor tiles and possibly spray-on fire proofing covering pipes in the ceiling are likely present, unless such stores have undergone major renovation previously.

2. Customer access and safety concerns: Demolition of the enclosed mall may include the area immediately outside of a store's entrance into the enclosed mall, requiring tunnel exits to the parking lot across the enclosed mall and/or closing off of the enclosed mall entrance of the store.

3. Parking: Loss of parking during certain periods such as re-striping of parking lots, staging and renovation or relocation of other common facilities needs to be considered.

4. Signage: Appropriate signage from highways and streets, at open and closed access points, in parking lots within the shopping center, and within the enclosed mall.

5. Dust or dirt.

6. Loss of customers.

C. **Lease Terminations Based upon Landlord Defaults**

1. A termination of a lease due to a landlord's default (e.g., default of lease provision resulting from deleterious effects of redevelopment) can be based upon a variety of grounds, but generally speaking, the right of termination must either be based upon an express termination right, or due to a significant and substantial landlord default. As noted in Dubois v. Gentry, 184 S.W.2d 369, 370 (Tenn. 1945), "the weight of authority supports the general rule that in the absence of any stipulation giving the lessee, under certain contingencies, the right to terminate the lease, he has no such right." However, recently, in MeadWestvaco Corp. v. Worcester New Bond LLC, 2009 Mass. Super. LEXIS 92, at *34 (Jan. 6, 2009), a Massachusetts court held that if landlord failed to perform a valid promise contained in the lease, and as a consequence thereof, the tenant was deprived of a significant inducement, then the tenant could terminate the lease. The significant inducement was the alleged failure of the landlord to maintain a weather tight roof, and the reported case was

based upon motions for summary judgment by both parties which were denied by the court, and there has been no further reported activity in this case. Generally, the cases seeking to terminate a lease based upon common law theories arise from allegations of a breach of the warranty of quiet enjoyment or constructive eviction.

2. Recent cases have addressed the issue of whether a warranty of quiet enjoyment, which may be expressed or implied, can provide a cause of action to a tenant if the landlord's construction activities during redevelopment result in interference with or disruption of the tenant's business. A landlord's responsibilities under the covenant of quiet enjoyment have expanded over time. At common law, the covenant served to protect tenants from actual dispossession of the leased premises as a result of the direct or indirect actions of the landlord. A limited number of jurisdictions still limit the covenant to "possessory" protection, maintaining that the tenant must, at a minimum, prove constructive eviction in order to recover damages for breach of the warranty of quiet enjoyment. See, e.g., Reade v. Reva Holding Corp., 30 A.D.3d 229, 237 (N.Y. App. Div. 2006) (the landlord did not breach covenant of quiet enjoyment when constructing a second level over and around the tenant's premises, as tenant never abandoned premises and absent an actual or constructive eviction, there was no breach of the covenant of quiet enjoyment in New York); Hardwick, Cook & Co. v. 3379 Peachtree, Ltd., 363 S.E.2d 31, 34 (Ga. Ct. App. 1988) (upholding summary judgment denying recovery to commercial tenant seeking damages for landlord's breach of covenant of quiet enjoyment due to office building renovations since nothing in the record indicated that tenant had been constructively evicted and the renovations were authorized by the lease). BAS Communications, Inc. v. YTK Corp., 836 N.Y.S.2d 497 (N.Y. App. Div. 2007) (because the plaintiff maintained possession of the convenience store there were no grounds for claims of either breach of the covenant of quiet enjoyment or constructive eviction).

3. In a recent case involving a somewhat novel theory, a tenant stopped paying rent leading to the landlord's suit. The tenant alleged that the premises were uninhabitable due to a defective floor and the related accumulation of mold in the basement. At trial, the tenant testified that it had notified the landlord but was unable to produce a copy of the letter due to a flood at the premises. The court refused to side with the tenant and held that it failed to produce evidence supporting its allegations. The court also noted that the landlord had demonstrated that the repairs had been completed within a reasonable time. KFP Family Limited Partnership v. We Rent Mini Vans, LLC, No. CV054016915S, 2007 Conn. Super. LEXIS 1631 (June 21, 2007) (an unreported opinion that may have been subject to further appellate review).

4. Despite these cases, the modern trend has been to expand the covenant to include protection from any "substantial interference" even if the interference does not result in the tenant's actual abandonment of the premises. See e.g., Echo Consulting Services, Inc. v. North Conway Bank, 669 A.2d 227, 229 (N.H. 1995); Andrews v. Mobile Aire Estates, 22

Ca.Rptr.3d 832, 839 (Cal.Ct.App. 2005) ("Minor inconveniences and annoyances are not actionable breaches of the implied covenant of quiet enjoyment. To be actionable, the landlord's act or omission must substantially interfere with a tenant's right to use and enjoy the premises for the purposes contemplated by the tenancy."); Stinson, Lyons, Gerlin & Bustamante, P.A. v. Brickell Building One Holding Co., Inc., 747 F.Supp. 1470 (S.D.Fla. 1990) (The landlord contemplating future redevelopment, included express covenants in the lease granting the landlord the right to renovate the building. The court was called upon to reconcile the direct conflict between these express covenants granting landlord the right to renovate with the tenant's implied covenant of quiet enjoyment. The court ultimately awarded the tenant a 20% abatement in rent during the period of maximum interruption on the grounds that the contemplated renovations should have been completed in a reasonable and unobtrusive manner).

5. Notwithstanding the holding in the Brickell Building referenced above, an owner contemplating future redevelopment activities should include covenants in its leases recognizing the fact that redevelopment is likely to occur and that (significant) disruptions may result. See **Schedule 5** for a sample clause addressing the possible disruptive effects of future redevelopment. For the retailer's perspective, see **Schedule 6** for a clause dealing with the possible disruptive effects of construction on the retailer's continued operations.

D. **Increased Costs**

1. Increased Taxes:

(a) It is likely that taxes will increase as the assessed value of the redeveloped shopping center increases. This may be problematic to the developer in the case of caps on increases in taxes (which are relatively rare) or a provision requiring the landlord to use reasonable efforts to minimize increases in taxes from time to time.

(b) On the other hand, if the developer razes existing floor area in order to construct a new building or lifestyle center with less square footage, then the tenant's proportionate share of taxes may increase while the value of the property increases with no resulting increase in the fair market value of tenant's building. This is not fair to tenant and some leases will provide that in determining the tenants' pro rata share, there shall be a minimum number of square feet of floor included in the denominator of the pro rata share fraction.

2. Allocation and Amount of CAM Costs: If a class B property is upgraded to a class A property, CAM costs may increase as the more valuable asset is maintained to a higher standard. On the other hand, if an aging class A regional mall is converted to a power center with a Home Depot, for example, then the anchor department store's share of CAM costs will

likely rise, as it is forced to share on a pro rata basis with the other (fewer) occupants even though the maintenance standard may not be the same level as the regional mall.

(a) Different uses by different users, such as residential vs. commercial. Levels and hours of security needed varies with use.

(b) Maintenance Standard: General standard -- "first class regional enclosed mall" may be too general a standard in long term contract in light of changing values over time.

(c) Caps: It is not uncommon to have caps as to CAM increases in leases. This may cause a problem for the developer in the case of a redevelopment resulting in higher CAM costs.

(d) Big box retailers are likely to be reluctant to pay for internal mall CAM costs particularly if they have no entrance into the mall.

(e) CAM Allocation Approaches

(i) Pro rata CAM: This has been the traditional standard. The usual battlegrounds are the scope of the charges (e.g., capital expenses) and the denominator used to calculate the tenant's pro rata share (e.g., the entire center GLA or the leased GLA).

(ii) Fixed CAM: This approach is used by some developers and retailers to avoid protracted negotiations and pro rata CAM audit fights.

(iii) Hybrid-Variable Costs: **See Schedule 7** for example of language in CAM provisions in net lease covering fixed/variable CAM charge.

(iv) Audit Rights: Issues include who pays for the audit, how often can one be undertaken, whether a contingent fee auditor may be used and confidentiality of the data.

(v) Different users and uses have different levels of maintenance costs: For example, retailers which are open 24 hours at a high level of lighting vs. a department store or in-line retail store. Restaurant use vs. theatre vs. bank vs. residential use.

3. Cash Payments or Real Estate Conveyances to Accommodate the Redevelopment

(a) Retailer's Point of View: Anchor retailers may require contribution to the anchor for renovating its existing store, which to the retailer will be necessary if the developer is renovating the rest of the center, and bringing in new retailers that are not otherwise permitted under the documents. If the anchor does not renovate its store, such new anchors and redevelopment will cause the existing anchor's store to appear dingy and old in comparison. Further, the timing of the renovation is on the developer's timeframe, not necessarily within the time frame of the retailer, and therefore not on the retailer's capital plan for the redevelopment year chosen by the developer.

(b) Developer's Point of View: Consideration for consent may be viewed as "blood money", as it may negatively impact the overall budget of the renovation of the center.

(c) Tax Treatment

(i) If anchor is a fee owner, then the payment should be structured as a contribution to the recipient's capital under Internal Revenue Code Section 118, in order for the contribution not to be taxable as income upon receipt.

(ii) If the anchor is a tenant under a lease of the building or space, and does not own the building, then the payment should be structured as a payment for the cost of permanent leasehold improvements which are owned by the developer, with the depreciation for those improvements being taken by the developer, not the recipient of the payment.

(iii) **See Schedules 8 and 9** for examples of provisions for documentation for each of the structures mentioned in paragraphs (i) and (ii) above.

E. **Consents of Third Parties, including Existing Lender and Other Owners/Tenants**

1. Existing Financing

(a) Developer Tract: The loan documents encumbering the developer's tract will need to be reviewed in connection with the proposed redevelopment. The lender's consent and/or subordination to the REA amendment will likely be required, and depending upon the scope of the redevelopment, additional financing may be necessary, which may be prohibited by the existing loan documents. The developer's options regarding additional financing range from obtaining the lender's consent if the loan is not a securitized loan, or if it is a securitized loan, to defeasing the loan and refinancing (**see Section III above**). A conventional loan refinance may trigger a prepayment penalty (typically described in the loan documents as a "yield maintenance payment"). Depending upon the scope of the development, the developer may be able to effect a redevelopment by selling off a portion of the developer's tract to a new anchor. Particularly if the existing financing is a securitized loan, it may be difficult to obtain a release of the mortgage from the release parcel unless the loan documents contemplated the future release (**see Section III(B) above**).

(b) Loan Assumptions: If the shopping center is being sold, and a new developer is undertaking the redevelopment, it is possible that the existing loan may be assumable. The developer's counsel will need to review the existing loan documents relating to loan assumption which often specify the associated fees payable to the lender. Securitized loans are serviced by loan servicers which will require detailed information regarding the assumption and facts and credit history of the assuming developer. Rating agency approval may be required. Substantial amounts of data will be required to be given to the loan servicer, and the assumption approval process may take considerable time.

(c) Anchor Store Tracts: The anchor stores may also have mortgage debt encumbering their respective tracts. If the REA is being amended, it is likely that the anchor stores' lenders will also be required to consent and/or subordinate to a modification of the REA or a reconfiguration of the common areas resulting from the creation of a new anchor store parcel carved out from the developer's tract.

2. Relocation Rights

(a) Relocation provisions often give the landlord the right to relocate a small tenant to "similar" or "substantially similar" space. Sometimes the provisions are negotiated by the tenant subject to the relocation to address specific concerns *vis-à-vis* relative location versus anchors, the food court, entrance to the mall, *etc.* The successful navigation of these relocation provisions may be essential to a successful redevelopment of a shopping center.

(b) Will the proposed relocation, whether within or outside of the existing enclosed mall or shopping center (e.g., to a free-standing building within the ring road to the shopping center or to an outparcel of the shopping center), or to another shopping center altogether, be "substantially similar" to the existing location (assuming that the lease establishes this as the applicable standard)? Note that the cost of relocating the tenant is usually imposed upon the developer/landlord and must be considered in the overall budget of the developer in the mall redevelopment.

(c) Seaford Assocs. Ltd. P'ship v. Subway Real Estate Corp., No. 2248, 2003 Del. Ch. LEXIS 58 (2003). (Right to relocate which was contained in the lease required prior notice, the new premises to be no smaller than the existing premises, equivalent access and visibility for the new premises as for the existing premises, the landlord to be required to pay the entire cost of the tenant's relocation, and the new premises to be ready for occupancy by the tenant prior to the tenant's being relocated. In addition, tenant's lease gave the tenant the choice to terminate its lease if the tenant chose not to relocate, and/or to adjust its base rent if its sales decreased after relocation. Seaford (the landlord/developer) negotiated a new lease for a free-standing Eckerd drug store, which would require the Subway building in the same shopping center to be demolished. Seaford proposed to move Subway to a new location which Seaford claimed had the "equivalent (if not better) access and visibility as" the existing premises, and the new building had an existing drive-thru access window. Id. at *12. Seaford offered to pay the entire cost of relocation. Subway orally rejected Seaford's proposal and instead suggested construction by Seaford of a new free-standing building adjacent to the proposed Eckerd. Seaford was willing to consider the proposal, but learned that Subway planned to open in another shopping center. Subway then exercised an option to renew its lease, and Seaford claimed that such exercise was ineffective because Subway had been in default under the lease, and Seaford sought to evict Subway. The words used in the lease relating to the "no default" condition were "has not been in default" rather than "is not then in default", and the court based its decision in favor of Seaford on the "no default" condition to an exercise of the renewal option. Id. at *4. Subway tried to argue that Seaford had "unclean hands" in its attempts to relocate Subway, but the court found that Subway failed to show unclean hands because the site to which Subway was to be moved by Seaford was in the same shopping center, and Seaford believed the new building was the equivalent of the one in which Subway was currently located.)

(d) New Orleans Hat Attack, Inc. v. New York Life Ins. Co., 665 So.2d 1186 (La. Ct. App. 1995). (Relocation by New York Life (landlord) in order to make way for a new tenant, Planet Hollywood, in Jackson Brewery, New Orleans, Louisiana, was permitted due to the fact that the lease contained a provision that permitted relocation by the landlord upon reasonable notice (without requiring more). However, the court noted that the right of relocation is not unlimited, and pointed to restrictions outlined in the Louisiana Civil Code that bind the lessor, by implication, to deliver "the thing leased", to maintain the thing leased in a condition as to serve the use for which it is leased, and to cause the lessee to be in a peaceable possession of the thing leased during the term. The court held that New York Life did not breach the lease because the area to which the retail business was being located was being maintained in such a condition as to serve the use for which the parties intended, *i.e.*, "the retail sale of … caps and hats and merchandise related specifically thereto". The fact that the new space was less desirable in location and size did not defeat the warranties implied by code, and the lease did not provide for more). *See also* Kite v. Gus Kaplan, Inc., 747 So.2d 503 (La. 1999). (A jewelry department tenant that was relocated to the back of the department store, without notice by the department store, said relocation being made because the jewelry department was not performing well. The court held that, notwithstanding lease provision that permitted landlord to change the department's location from time to time at its option and expense, the landlord/department store had an obligation to prepare a suitable location and give the tenant/jewelry department reasonable time to move so as not to disrupt its business. The court did not dispute the relocation right contained in the lease, only the landlord's unreasonable methods in effecting the relocation.)

(e) Sereno v. New York Life Ins. Co., No. 94-1485, 1996 U.S. Dist. LEXIS 9708 (E.D. La. July 11, 1996). (Motion for summary judgment was denied because a determination as to whether the premises were kept in such a condition as to serve the use for which the parties intended was a question for fact finder. Tenant was one of several tenants that New York Life (as landlord) attempted to relocate within Jackson Brewery, or evict, in order to make way for Planet Hollywood as a new tenant. Tenant operated an imported leather goods shop. Tenant claimed that the landlord breached the lease because the premises were not "kept in such a condition as to serve the use for which the parties intended" in that construction in and around the tenant's shop disrupted its business, no comparable relocation space was offered to tenant, and tenant's peaceable possession was disturbed by threatened evictions. Landlord claimed that the lease itself permitted it to "make or permit changes or revisions in its plan for the Shopping Center or the Shopping Center Area, including additions to, subtractions from, rearrangements of, alterations of, modifications of, or supplements to the building areas, walkways, parking areas, driveways or other Common Areas" and that therefore Landlord was entitled, as a matter of law, to summary judgment. The court denied summary judgment because Landlord's "claim is that under this lease, the plaintiff (tenant) could have been moved to the roof with no access by customers" may not be a valid defense under Louisiana Civil Code article 2692, if the lease was intended for retail space and not a space for some other purpose, "i.e., sunbathing or studying astronomy." Id. at *7-8. Thus, the lease must be read in light of the Louisiana Civil Code.)

(f) Quality Wig Co., Inc. v. J.C. Nichols Co., Inc., 728 S.W.2d 611 (Mo. Ct. App. 1987) (*reh'g denied*). (Landlord sought Tenant's approval to convert enclosed mall space on which the store fronted to small shop space, with the result that Tenant's store had no access onto the enclosed mall. Landlord and Tenant agreed that Landlord could convert the enclosed mall space into small mall shop space in exchange for free rent for a limited period of time, at the end of which the Tenant would decide either to terminate its lease for a fee paid by the Landlord, or to relocate to another comparably sized mall space in the shopping center. Landlord and Tenant negotiated and signed a lease for new space with access directly onto the enclosed mall, but the new space turned out to be substantially smaller than the Landlord had unintentionally represented to the Tenant. The Tenant refused to vacate its existing space, and withheld payment of its rent (based on a call with a representative of the Landlord permitting the Tenant to continue rent-free until the new space was ready for its occupancy), and insisted on the Landlord substituting larger space for Tenant's use. Landlord filed suit to evict the Tenant. The Tenant counterclaimed for breach of the lease and negligent misrepresentation, and sought damages for lost profits that would result from smaller sized space, damages for loss of sale of its business to a third party due to the third party's objection to the small space, and specific performance to require the Landlord to locate the Tenant in comparably sized space to the existing space in the mall. The general rule is that lost profits are too speculative, conjectural and subject to uncertainties to permit as damages. The court held that the exception to the general rule, which permits damages for lost profits for interruption in an established business, did not apply in this case because the Tenant had continued to operate in the existing space, evidence furnished by the Tenant did not include cash register receipts or daily entry journals and was only periodic, and the Tenant's estimate of lost profits was not based on past income but on profits presumably lost on a new space at the better location (which was speculative). Loss of the sale of the Tenant's business due to the small size of the new location was not "proximately caused" by the lease of the new location because the sale was lost prior to the Tenant signing the new store lease. Specific performance was not appropriate because it is available only where a valid contract is in existence based on clear mutual understanding and in terms sufficiently definite and certain to enable a court to decree its performance. The only contract at issue was the lease for the new smaller space that was rejected by the tenant once it determined the new smaller size of the space.)

(g) Dealing with Tenants in the Absence of Relocation Rights

(i) Lease Buyouts/Acquiring Relocation Rights

(A) Obtain options to terminate/relocate before closing the acquisition

(B) Confidentiality

(C) Economics will vary depending on sophistication and reasonableness of the tenant

(ii) Enforcement of rights

(A) Delays can be problematic and very costly

(B) Substantial liquidated damages

(C) Entry of consent order

4. Governmental Approvals

(a) In addition to obtaining the approvals of the anchors and certain in-line tenants, a developer effecting a redevelopment will also likely need various approvals, including site plan approval, from the applicable zoning or governing authorities.

(b) Zoning variances; public approval

(i) "Anti Wal-Mart" or anti-big box regulations or zoning: Such regulations may be broad enough to include other retailers which were not "intended targets" of the initial legislation.

(ii) See Bakersfield Citizens for Local Control v. City of Bakersfield, 124 Cal. App. 4th 1184 (2004). (Bakersfield Citizens for Local Control ("BCLC") challenged the sufficiency of the environmental impact reports ("EIRs") prepared by the City of Bakersfield for two shopping centers located within 3.6 miles of each other, each to contain a Wal-Mart Supercenter. Court found that BCLC had standing under the California Environmental Quality Act and rejected a claim that it lacked standing because it was motivated by economic issues. Further, the court rejected the EIRs for failure to evaluate potential urban decay impacts (i.e., "[failed] to consider the projects' individual *and cumulative* potential to indirectly cause urban/suburban decay by precipitating a downward spiral of store closures and long-term vacancies in existing shopping centers" [*emphasis added*]). Id. at 1184-85. The EIRs did not consider the effect of the other shopping center notwithstanding that it was to be located 3.6 miles away and the public knew that each was to contain a Wal-Mart Supercenter, even though the EIRs noted that the opponents to the projects raised only economic issues. The court held that since evidence had been introduced suggesting that the economic impact of the shopping centers would trigger the environmental impacts of urban decay [water contamination and air pollution as well as store closures (the existing Wal-Mart) and long-term vacancies which ultimately destroy existing neighborhoods and leave decaying shells in their wake, urban decay which the trial court recognized as being a risk from the new shopping centers], it must address and evaluate that issue. Also, the EIRs did not include reference to the other project in the cumulative impact analysis. The court further held that even though much of the construction had been completed, the case was not moot.)

(iii) Public's lack of support for Wal-Mart opening in certain areas. This lack of support has resulted in Wal-Mart being at least delayed in its scheduled opening, for instance, by additional public hearings and changes to plans, in Plano, TX although eventually, Wal-Mart opened a store with a new higher end, gourmet food concept).

(c) Signage Variances. The redevelopment may require signage variances to accommodate the needs/desires of new tenants' signage appearing on their buildings or on desired pylon signs.

(d) Competitors may contest required approvals to delay and ultimately defeat the proposed redevelopment.

John I. Cadwallader, Esq.
FROST BROWN TODD LLC
10 West Broad Street
Suite 2300
Columbus, OH 43215-3467
PH: 614-464-1211
jcadwallader@fbtlaw.com
www.frostbrowntodd.com

James B. Jordan, Esq.
SUTHERLAND ASBILL & BRENNAN LLP
999 Peachtree Street, NE
Suite 2300
Atlanta, GA 30309-3996
PH: 404-853-8101
jim.jordan@sutherland.com
www.sutherland.com

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<u>**SCHEDULES**</u>

SCHEDULE 1 –	**Landlord Recapture Right if Tenant Goes Dark (See Section IV(A)(2)(b))**
SCHEDULE 2 -	**Anchor Store Operating Covenant (See Section IV(B)(1))**
SCHEDULE 3 –	**Provision Providing Basis for Diminution in Value Claim (See Section IV(B)(3)(b))**
SCHEDULE 4 -	**Grocery Store Exclusive Use Clause (See Section IV(C)(1))**
SCHEDULE 5 -	**Lease Provision Contemplating Future Development (See Section V(C))**
SCHEDULE 6	**Assurances of Performance of Developer/Landlord of its Obligations in Connection with the Re-development of Center (See Section V(C))**
SCHEDULE 7 –	**Common Area Maintenance Charge – Hybrid Fixed / Variable Costs (See Section V(D)(2)(e)(iii))**
SCHEDULE 8 –	**Developer Contribution to Retailer which is Owner of Fee Title in Land (See Section V(D)(3)(c)(iii))**
SCHEDULE 9 –	**Tenant has Leasehold Interest; Whether or not Building is owned by Tenant of Landlord (See Section V(D)(3)(c)(iii))**

SCHEDULE 1

Landlord Recapture Right if Tenant Goes Dark

Cessation of Operations. Tenant shall have absolutely no duty to operate in the Premises. If Tenant fails to open within ___ months of the Possession Date ("Opening Period"), or if after opening, Tenant (which for purposes of this provision shall specifically include subtenants and assignees) ceases operations in the Premises entirely for a period in excess of _________ months ("Dark Period"), Landlord shall, by written notice to Tenant given within sixty (60) days of the expiration of such Opening Period or Dark Period, as the case may be, have the right to terminate the Lease on the terms and conditions set forth herein and recapture the Premises upon payment of a sum equal to the Recapture Price. The failure by Landlord to give such notice within such sixty (60) day period shall be conclusively deemed to result in the waiver by Landlord of its right to recapture the Premises pursuant to the terms hereof and this article shall automatically become null and void. Any such termination shall be effective as of a date selected by Tenant not more than nine (9) months from the date of Landlord's notice of election to terminate. Tenant shall have the right to vitiate Landlord's termination notice by (i) providing notice to Landlord that Tenant intends to recommence operations and (ii) actually recommencing operations within such twelve (12) months of the expiration of the Dark Period.

The Recapture Price shall be _____ % times the greater of the then-existing unamortized balance of Tenant's Investment as reflected on Tenant's books and records or the Fair Market Value. As used herein, the term "Tenant's Investment" shall mean the aggregate sums invested by Tenant, both hard and soft, in consummating this Lease transaction (including any sums paid to Landlord on account of work performed by Landlord) and thereafter from time to time in making permanent improvements to the Premises. As used herein, the term "Fair Market Value" shall mean the amount a willing buyer would pay to a willing seller to purchase the Tenant's leasehold interest in the Premises, assuming the exercise of all future renewal options. The determination of the Fair Market Value shall be determined by an appraisal conducted as follows:

(i) Landlord and Tenant shall each appoint, by written notice to the other party, an independent appraiser within ____ days after the receipt of Landlord's notice of exercise of its right to recapture the Premises. If either party fails to appoint an appraiser within that time period, then the party which has appointed an appraiser may notify the other party that it has an additional _____ days in which to appoint an appraiser. If the party receiving such notice fails to appoint an appraiser in such _____ day period, then the decision of the one appointed appraiser shall be binding on the parties.

(ii) Both appraisers so appointed shall together select a third appraiser within ________ days after receiving confirmation of their role in the appraisal process. If Landlord's appraiser and Tenant's appraiser cannot agree upon the identity of the third appraiser, the third appraiser shall be selected by the American Arbitration Association (or its successor) or if the American Arbitration Association fails to make such an appointment, by a judge of the court of general jurisdiction for the area in which the Shopping Center is located. All three appraisers shall produce one appraised Fair Market Value. Landlord and Tenant shall use their commercially reasonable efforts to cause the appraisers to render a prompt, written decision within _______ days after the selection of the appraisers. The concurring determination, if any, of any two appraisers shall become the Fair Market Value. In the absence of an agreement of any two appraisers, then the average of the two appraisal values that are mathematically closest together, as determined by the appraisers, shall be the Fair Market Value. If the appraisal value that is between the other two appraisal values is exactly equal to the average of the other two appraisal values, then such appraisal value shall be the Fair Market Value.

(iii) No appraiser shall have any personal or financial interest as would disqualify such appraiser from exercising an independent and impartial judgment as to the matter under appraisal. Each appraiser shall be a member of the American Institute of Real Estate Appraisers (or any successor association or body of comparable standing if such institute is not then in existence), shall have at least ten (10) years experience in the appraisal of real estate and shall be familiar with property values in the area in which the Shopping Center is located. Each party shall pay the fees and expenses of the appraiser appointed or selected by it, and the fees and expenses of the third appraiser, if any, shall be paid equally by Landlord and Tenant **[Tenant would argue that as this is a right granted to Landlord, Landlord should pay entire amount of costs of appraisers]**.

(iv) In the event of the failure, refusal or inability of any appraiser to act, a new appraiser shall be appointed as his replacement, which appointment shall be made in the same manner as provided above for the appointment of such appraiser so failing, refusing or being unable to act.

(v) The decision of the appraiser(s) shall be final, conclusive and binding on Landlord and Tenant.

Tenant shall not be deemed to have ceased operating if: (i) the Premises are closed due to damage by fire or other casualty, taking by eminent domain or force majeure; (ii) the Premises are closed for a period of time not more than __________ (_______) days for alterations, renovation or repair; or (iii) the Premises are closed for a period of time of not more than ___________ (______) days for renovation and other preparations by an assignee or subtenant.

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SCHEDULE 2

<u>Operating Covenant of Tenant.</u>

Tenant covenants with Landlord that Tenant shall for a period of ten (10) years after the opening of the Tenant's Store Building to the public for business continually operate or cause to be continually operated in at least 75% of the Floor Area in the Tenant's Store Building a retail department store under a name consisting of, or in which there appears, the word "ABC" or such other name under which a majority of ABC, Inc.'s retail department stores are then being operated.

Anything herein to the contrary notwithstanding, the foregoing operating covenant may be terminated by Tenant on 30 days prior written notice if:

(i) DEF Stores, Inc. shall have failed to open its store in premises within three months after the date upon which Tenant shall have opened Tenant's Store Building to the public for business;

(ii) at any time during the ten (10) year period referred to above DEF Stores, Inc. shall for a period in excess of 120 days cease to operate a retail store in its premises under the name "DEF" or under such other name as it may then be using in a majority of its retail stores;

(iii) less than 200,000 square feet of the Floor Area of retail space occupied by a well-balanced mix of tenants, both local and national, reasonably acceptable to Tenant, shall be open for business, of which at least 100,000 square feet of Floor Area shall be within Tenant's Area of Influence, and such condition shall have continued for a period of twelve (12) consecutive months; or

(v) the operating covenant of DEF Stores, Inc. shall have been terminated, cancelled or released by agreement, acquiescence or sufferance of Landlord. Landlord represents that DEF Stores, Inc.'s operating covenant is for ten (10) years and that DEF Stores, Inc. is obligated to conduct its operations under conditions not substantially less onerous than those imposed on Tenant under this Section 8.3.

A temporary cessation of business by Tenant or by any tenant or occupant of Floor Area in the Shopping Center shall not be deemed a cessation of business for purposes hereof if such cessation:

(1) is occasioned by, and only for the duration of, the making of repairs, alterations, or renovations due to damage or destruction of the premises where such cessation of business occurs; or

(2) is caused by, and only for the duration of, an "Unavoidable Delay".

It is not intended that the foregoing operating covenant of Tenant should in any way serve to regulate the manner or hours of operation of business in the premises occupied by Tenant, nor prohibit Tenant from leasing or subleasing portions of Tenant's Store Building, licensing departments or granting concessions to other parties.

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SCHEDULE 3

Tenant acknowledges that it is an anchor tenant of the Shopping Center, that other leases for space in the Shopping Center may provide for rental abatement rights or termination rights in the event that Tenant ceases operating and that the ability of Landlord to lease additional space in the Shopping Center, obtain financing as to the Shopping Center and sell the Shopping Center would be adversely impacted in the event that Tenant ceases operating in violation of the terms of this provision.

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SCHEDULE 4

Sample Grocery Store Exclusive Use Clause

Until the date which is the later to occur of: (i) the date on which the Grocery Store Lease expires or terminates in accordance with the terms thereof; or (ii) the date on which the owner of the Developer Tract executes, delivers and records a termination of such rights (the **"Supermarket Control Period"),** no Tract within the Shopping Center, other than the Developer Tract, may be used for any use which is in violation of the Supermarket Exclusive. The **"Supermarket Exclusive"** means that the Occupant of the Developer tract is hereby granted the sole and exclusive privilege in the Shopping Center (as currently constituted and as it may be expanded): (A) for the operation of a supermarket, grocery store and/or convenience store, which exclusive privilege shall also include, but not be limited to, a store or department for the operation of a bakery or delicatessen, or for the sale, display or merchandising of meat, poultry, sea food, frozen foods, produce, dairy products, baked goods, prepared foods, health foods, the sale for off-premises consumption of alcoholic beverages or any other type of food or grocery products; (B) for the following fuel station and convenience store uses (the **"Fuel Exclusive"**): (i) the operation of a convenience store, (ii) the operation of an automobile and light truck fueling station, (iii) the sale of gasoline, diesel fuel, gasohol, methanol, or alternative fuels, such as, but not limited to, alternative motor fuels, natural gas and any other substance or material used to fuel or propel vehicles regardless of changes in technology, and (iv) the operation of a car wash; (C) for the operation of a pharmacy requiring the services of a licensed pharmacist (the **"Pharmacy Exclusive"**); (D) to sell vouchers, card certificates or other forms of media that serve as "gift certificates" or store credits (collectively **"Gift Cards"**); provided that this exclusive right to sell Gift Cards shall not prohibit any other Occupant in the Center from selling Gift Cards for its own store or business in the Shopping Center or for other stores or businesses owned or operated by such Occupant, or an entity controlling, controlled by, or under common control with such Occupant. The foregoing is not intended to and shall not prohibit the operation of Restaurants. Further, Restaurants shall not be prohibited from selling prepared foods for on-premises or off-premises consumption, and Restaurants may also display prepared foods for sale (such as, by way of example only, a Panera restaurant), provided such display is incidental to its primary operation as a Restaurant and such display area is limited to the lesser of (x) ten percent (10%) of such Occupant's Floor Area or (y) 1,000 square feet. The foregoing shall not prevent any other tenant in the Shopping Center from selling food items as an incidental part of its operation, so long as the total number of square feet devoted to display for the sale of such products does not exceed the lesser of (a) ten percent (10%) of the total square feet of Floor Area leased by such tenant, or (b) one thousand (1,000) square feet (including one-half of the aisle space adjacent to any display area). The Supermarket Exclusive shall not prohibit the following: (a) stores selling primarily health food products, vitamins, and smoothies (such as that which is operated, as of the date hereof, by GNC); provided that any such user shall not occupy more than 2,500 square feet of Floor Area; or (b) stores that sell primarily frozen dairy products (such as ice cream, yogurt, smoothies) and related products (such as those operated as of the date hereby by Cold Stone Creamery, Graeter's Ice Cream, TCBY); provided that any such user shall not occupy more than 3,500 square feet of Floor Area, or (c) beauty supply stores (such as those which are operated as of the date hereof by ULTA, Sephora, Bath and Body Works), so long as they do not, in any event, violate the Pharmacy Exclusive nor sell food products in excess of the limitations set forth above. Additionally, the Supermarket Exclusive is not intended to preclude or prohibit the sale of the following products by an Occupant which is not otherwise operating a supermarket or grocery store, and is not in violation of the Pharmacy Exclusive, the Fuel Exclusive and which is not selling Gift Cards, but rather is selling any one of the following categories of products as their primary use: office supplies, craft supplies, floral products (live and/or artificial), pet food, automotive supplies (subject, however, to the Fuel Exclusive), hardware supplies, furniture, books, CDs, DVDs or greeting cards; provided that in any event, such Occupant may not violate the square footage limitations placed on food products set forth above.

"Restaurant" shall mean any operation or business which requires a governmental permit, license and/or authorization to prepare and/or serve food for on-site consumption as its primary business; provided however, notwithstanding anything herein to the contrary, a supermarket, grocery store, convenience store or similar operation shall not be deemed to be a "Restaurant".

SCHEDULE 5

A. Landlord Lease Provision Contemplating Future Development

Tenant acknowledges that during Tenant's occupancy of its present Premises and the Substituted Premises, Landlord will be engaged in the redevelopment of the Project (the "Project Redevelopment"), which will involve the demolition of the Project (including the Common Areas) other than the Building in which the Substitute Premises is located and the construction of new Common Areas, buildings, structures or other improvements and facilities in, or on, the Project. During the Project Redevelopment, Landlord will engage in demolition, redevelopment, and construction activities (the "redevelopment Activities") that will result in any number of the following:

(i) the disruption of Tenant's (and its employees and invitees) access to the Substituted Premises, the parking areas serving the Substituted Premises, and other areas of the Project;

(ii) the reconfiguration, reduction and relocation of the parking areas serving the Substituted Premises;

(ii) the temporary loss of utility service to the Premises;

(iv) construction related noise, dust and debris; and

(v) the temporary disturbance of Tenant's use and occupancy of the Premises.

Tenant agrees that the Project Redevelopment and the Redevelopment Activities shall neither constitute an actual or constructive eviction of Tenant nor a violation of Tenant's right of quiet enjoyment.

B. Tenant Lease clauses anticipating disruption in utilities during construction of expansion of center

Any utility work, or other work that may impact utility service, shall not be conducted during hours when Tenant is open for business to the public or for one hour period prior to and subsequent to said hours. If any utility work, or other work that may impact utility service, causes a disruption in utility service to the Tenant's Store Building which results in the Tenant's Store Building being closed to customers, then Landlord shall reimburse Tenant for any and all damages, including but not limited to consequential damages and lost profits, incurred by Tenant as a result of such utility disruption; provided that Tenant and Landlord agree that if Tenant's Store Building has been opened to the public for business for at least one calendar year, then the measure of lost profits shall be determined by taking into account the profits for Tenant's store for the previous year, same day of the week and time of the day of such utility shut down, taking into account, however, variances between the two years having an affect on sales such as differences in weather.

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SCHEDULE 6

Assurances of Performance of Developer/Landlord of its Obligations in Connection with the Re-development of Center

Remedies of Store

A. In the event that (i) Developer/Landlord fails to construct the On-Site and/or Off-Site Improvements and/or the preparation of the building pad for the Store Building in accordance with the terms of this Supplemental Agreement/Lease ("Failure to Comply With Specifications") or (ii) Developer/Landlord does not complete certain improvements by respective Critical Dates ("Failure to Comply With Time Schedule"), or (iii) Developer/Landlord fails to fulfill the conditions set forth in the Reliance Letter (as defined herein), then, and in any such event, Developer/Landlord shall be deemed in default under this agreement and Store, in addition to any remedies otherwise granted to Store pursuant to this agreement, at law or in equity, shall have the following rights and remedies.

(a) In each and every instance of Developer's/Landlord's Failure to Comply With Specifications or Failure to Comply With Time Schedule, without notice or opportunity to cure, Store may at Store's option, and in its sole discretion as to the necessity therefore, perform any such term, provision, covenant, or condition, or make any such payment, on Developer's/Landlord's behalf, and Store by reason of so doing shall not be liable or responsible for any loss or damage thereby sustained by Developer/Landlord or anyone holding under Developer/Landlord. If Store so performs any of Developer's/Landlord's obligations hereunder, or if Store shall sustain any damage by reason of Developer's/Landlord's Failure to Comply With Specifications or Failure to Comply With Time Schedule, the full amount of the cost and expense entailed or the payment so made and the amount of the loss so sustained by Store, including any and all damages arising as a result of Landlord's failure affecting the construction schedule and/or opening date of the Store Building, shall immediately be owing by Developer/Landlord to Store, and Developer/Landlord shall repay to Store upon demand the full amount thereof with interest thereon from the date of payment at the lesser of (i) two per cent (2%) above the bank prime rate at the time of such payment established by Citibank N.A., New York, N.Y., or its successor (or, if there shall then be no such banking institution in existence, by the commercial bank in New York, N.Y., whose assets at such time are the largest of any such bank in that city), and (ii) the highest rate permitted by applicable law. If such repayment shall not be made within 10 days after such demand is made, Store shall have the right to deduct the amount thereof, together with interest as aforesaid, without liability of forfeiture, from rents or any other sums then due or thereafter becoming due from Store to Developer/Landlord hereunder, and irrespective of who may own or have an interest in Store's Premises at the time such deductions are made. Until so paid or offset, the amount so owed Store shall constitute a lien upon Developer's/Landlord's right, title and interest in and to the Developer's/Landlord's Parcel as of the date of Store's demand for reimbursement thereof. Developer/Landlord shall execute such instruments as Store may request to permit the recordation of such lien, and Developer/Landlord hereby irrevocably designates Store as Developer's/Landlord's attorney-in-fact for such purpose. Store shall have the right to foreclose such lien in the manner provided by law, it being understood and agreed that such lien shall be superior to any other lien and/or encumbrance granted by Developer/Landlord on the Developer's/Landlord's Parcel; provided, however, that such lien shall be subject and inferior to (i) the lien of any conventional first Mortgage now or hereafter placed on Developer's/Landlord's interest in the Shopping Center Site as security for repayment of a loan made by an Institutional Lender to the extent of the amount of such lender's loan, and (ii) each lease of all or any part of the Developer's/Landlord's Parcel which is superior to the lien of such first Mortgage or as to which the holder of such first Mortgage is required to recognize the rights of the lessee thereunder so long as such lessee is not in default thereunder.

(b) In each and every instance of Developer's/Landlord's default under (i), (ii) and/or (iii) above, without notice and opportunity to cure, Store may at Store's option, and in its sole discretion, elect to "put" its interest in the Store's Premises/terminate this lease by so notifying Developer/Landlord, which "put"/termination shall also give rise to Store's rights under **[the "put" section of this agreement]**. Upon such "put"/termination notice being given this agreement shall terminate, and Store shall thereupon be released from and relieved of any further obligations hereunder.

(c) In each and every instance of Developer's/Landlord's Failure to Comply With Specifications or Failure to Comply With Time Schedule, and Developer/Landlord subsequent failure to cure such lack of compliance and furnish to Store a construction schedule for completing and/or correcting all On-Site and Off-Site Improvements, without notice or opportunity to cure, Store may at Store's option, and in its sole discretion, elect to draw on the Performance Bond (as more particularly set forth in this agreement) using such funds to perform any such term, provision, covenant, or condition, or make any such payment, on Developer's/Landlord's behalf, and Store by reason of so doing shall not be liable or responsible for any loss or damage thereby sustained by Developer/Landlord or anyone holding under Developer/Landlord.

(d) In the event that Developer/Landlord fails to fulfill the conditions set forth in the Reliance Letter, Store shall have the right to permanently abate all charges/rents and other charges payable hereunder until such time as Developer/Landlord has fulfilled the conditions set forth in the Reliance Letter.

(e) In each and every instance of Developer's/Landlord's Failure to Comply With Specifications or Failure to Comply With Time Schedule, and Developer/Landlord subsequent failure to cure such lack of compliance and furnish to Store a construction schedule for completing and/or correcting all On-Site and Off-Site Improvements, without notice or opportunity to cure, Store shall have the right to collect from Developer/Landlord the amount of any and all damages sustained by Store as a result of Developer's/Landlord's default, including but not limited to damages incurred as a result of Developer's/Landlord's failure affecting the construction schedule and/or opening date of the Store Building,

(f) In the event that Developer/Landlord has not completed any On-Site and/or Off-Site Improvements by the respective Critical Date applicable to such work as set forth in this agreement, then in addition to any and all other rights and remedies set forth in this lease or available at law or in equity to Store, Store shall be entitled to liquidated damages in the amount of $_____ per day of between (a) the applicable Critical Date and (b) the date on which the all said condition(s) has been satisfied, it being agreed by the parties hereto that some of the damages accruing to Store as a result of such delay will be incapable of being determined and that the amount set forth herein as liquidated damages is a reasonable estimate of the incalculable damages to Store in the event of such delay. The liquated damages set forth herein shall not preclude Store from claiming damages under (a) or (e) above.

B. The rights and remedies granted in paragraph A of this Section are not exclusive of each other and Store shall be entitled to exercise any or all of such right**

"Critical Dates" shall mean the dates defined as such herein which dates shall trigger certain rights and remedies of Tenant in the event Landlord does not fulfill certain obligations by such respective dates, all as more particularly set forth in Section re: delivery of premises (such as expansion pad), Construction Article and Construction Schedule.

Reliance Letter

Simultaneously with the delivery of the building pad for the Store Building (or expansion), Developer/Landlord shall deliver to Store a letter setting forth a list of all Off-Site Improvements, On-Site Improvements and buildings which will be completed and ready for use and/or occupancy prior to or on the Scheduled Reopening Date (the "Reliance Letter"). The Reliance Letter shall also contain a list of retailers, tenants and other occupants who will be open for business on or prior to the Scheduled Reopening Date. If the Shopping Center is to be developed in different phases, then the Reliance Letter shall also set forth the improvements that will be completed and the occupants that will be opened for each phase of development. Developer/Landlord is furnishing the Reliance Letter with the knowledge that Store will rely on the information contained therein in projecting its construction schedule, the volume of merchandise, number of employees and other operational matters. Developer/Landlord further acknowledges that failure to complete the improvements set forth in the Reliance Letter on or prior to the Scheduled Reopening Date and/or the failure of the retailers, tenants and other occupants set forth in the Reliance Letter to open for business on or prior to the Scheduled Reopening Date shall have an adverse effect on Store's business operations in the Store Building.

SCHEDULE 7

Common Area Maintenance Charge – Hybrid Fixed/Variable Costs

Common Area Maintenance Charge A. Effective as of the commencement of the term of this lease and continuing thereafter until the expiration of such term so long as Landlord shall not be in default in the performance of its obligations under the article hereof captioned "MAINTENANCE OF PARKING AND OTHER COMMON FACILITIES", Tenant shall reimburse Landlord as its share of the costs incurred by Landlord in operating and maintaining the Common Facilities (other than costs of snow removal, security, if any, and parking lot and pylon sign lighting electricity, which is addressed below) an annual amount equal to the product of the Floor Area of the Demised Premises and:

Lease Years	Amount Per Square Foot of Floor Area
1 – 5	
6 – 10	
11 – 15	
16 – 20	
First Option Period (as provided for in the article hereof captioned "OPTIONS TO EXTEND")	

The amount payable per square foot of Floor Area for each option period after the initial term shall be increased by __ (____) over that payable for the immediately preceding option period.

Such amounts shall be payable in equal monthly installments, in advance, on or before the tenth day of each month during the continuance of the term of this lease. If such amounts shall be payable for a fraction of a month, the amount payable shall be a pro rata share of a full month's payment.

B. Effective as of the commencement of the term of this lease and continuing thereafter until the expiration of such term so long as Landlord shall not be in default in the performance of its obligations under the article hereof captioned "MAINTENANCE OF PARKING AND OTHER COMMON FACILITIES", Tenant shall also pay to Landlord:

(a) Tenant's Pro Rata Share of the actual cost of snow removal on the Entire Premises,

(b) Tenant's Pro Rata Share of the actual reasonable cost of security if it is ever mutually determined by Landlord and Tenant that security is warranted at the Shopping Center (provided that such cost and the contract for said security shall be subject to Tenant's review and approval at Tenant's option, and in the event Tenant determines that an alternative more cost effective contract for similar services is available, then Tenant shall be entitled to require Landlord to enter into said alternative contract),

(c) Tenant's Pro Rata Share of the actual cost of electricity serving the lighting of the two pylon signs, and

(d) the actual cost of the electricity serving the parking lot lights within the portion of the parking area depicted on **Exhibit B** hereto as Tenant's Parking Field, which light poles will be sub-metered separately from the other light poles.

There will be three exterior sub-meters serving the light poles for the parking and the pylon signs. One sub-meter will measure the light poles for the Tenant's Parking Field, one will measure the other light poles and one will measure the lighting for the pylon signs. Tenant shall pay to Landlord the amounts owing under this paragraph B, clause(s) (a), (b), (c) and (d), if applicable, within 30 days after receipt of an invoice for such amounts from Landlord, provided that such invoice includes the invoice from the snow removal company and/or utility company and/or security company, if applicable. In addition, Tenant shall be entitled to inspect and audit the records of Landlord regarding the costs to be paid under clause(s) (a), (b), (c) and (d), if applicable, hereunder, provided that Tenant shall request such inspection or audit within 3 years of the date of receipt of such invoices by Tenant, and in the event such an audit reflects that Landlord has overcharged Tenant for any such amounts by more than 4 % for any such charge, then Landlord shall reimburse Tenant for the costs of Tenant's audit.

C. With respect to the light poles located in the Entire Premises parking area that lie outside of the area hatched on **Exhibit B** hereto and depicted thereon as the Tenant's Parking Field, Landlord shall comply, or cause its tenants or occupants of the space within the buildings located on the Entire Premises that are located outside of the Demised Premises to comply, with the provisions of the article of the Lease captioned "MAINTENANCE OF PARKING AND OTHER COMMON FACILITIES" above with respect to said light poles, and Landlord shall pay or cause to be paid the costs of all electricity required in order to comply with such requirements. Any required entrance into the Demised Premises for purposes of either reading the meters for the electricity to the other light poles and/or to the pylon signs will be permitted to Landlord or the utility company in Landlord's presence, upon prior notice to Tenant, at times and days reasonably convenient to Tenant, and in the presence of a Tenant store manager or a designee of said store manager; and Landlord hereby indemnifies and agrees to defend Tenant from and against any loss, damage or costs incurred by Tenant resulting from said entry by Landlord or its agents into the Demised Premises pursuant to this sentence.

D. Anything herein to the contrary notwithstanding, the amount payable by Tenant under the provisions of this article for any period of time shall abate proportionally with any abatement which may occur in any fixed rent payable by Tenant hereunder.

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SCHEDULE 8

Owner of Fee Title in Land

<u>Developer's Capital Contribution</u>

Developer and Store have bargained for the Developer to make a capital contribution in the amount equal to ______________ Dollars ($____________) (the "Capital Contribution") to Store within the meaning of Section 118 of the Internal Revenue Code of 1986, as amended, to permanently increase the working capital structure of Store. Developer acknowledges that Store has not provided any services to the Developer for which the Capital Contribution is intended as compensation. Developer and Store agree that Store may use the Capital Contribution toward the costs incurred by Store for constructing, fixturing and equipping the Store Building. The Capital Contribution shall be paid to Store via wired funds or certified check upon the re-opening of the Store Building to the general public consistent with the applicable requirements of this Agreement and the REA.

In the event Developer shall not have paid Store the amounts Store has requested be paid hereunder within the 14 days of Store's request therefore, then Store, in addition to any other rights and remedies Store may have available at law or in equity, shall have the right to deduct the unpaid portion of the Capital Contribution from all charges then due or thereafter coming due hereunder or under the REA, and irrespective of who may own or have an interest in the charges at the time such deductions are made.

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SCHEDULE 9

Tenant has Leasehold Interest; Whether or not Building is owned by Tenant or Landlord

Tenant Allowance

Proposed contract language for payment by Landlord where Landlord grants to Tenant a fixed maximum amount for relaying, remodeling or expanding a store [such language being included to insure that Tenant is not taxed on amounts reimbursed and to insure that Landlord obtains federal tax depreciation deductions with respect to the acquired items]:

[Landlord agrees to pay to Tenant the sum of ____________ Dollars ($______________) ("The Reimbursement Amount") in order to permit the expansion and modernization of the mall and for the obligation of Tenant to improve, alter, and modernize [and/or expand] qualified long-term real property for use in Tenant's business at the Demised Premises, including installation and construction of a new store front (collectively the "Tenant's Work").] Tenant shall have the right to improve, alter and make changes to the Demised Premises and Landlord's property, whether structural or otherwise, **[expand and describe the extent of the work to be performed, especially if changes will be made to the exterior portions of the Demised Premises or portions beyond Tenant's lease line]** (the "Tenant's Work"). Landlord hereby agrees to pay for the cost of materials, labor, overhead, architectural and other fees and expenses expended and utilized in the performance of the Tenant's Work on the Demised Premises and in the construction of permanent leasehold improvements in connection with Tenant's Work, but in no event shall Landlord pay for any sums exceeding the amount of **[$___________ (the "Cap")]**. [In the event that the actual cost expended by Tenant for Tenant's Work is less than the Reimbursement Amount, Landlord shall pay Tenant, in addition to the cost expended by Tenant for Tenant's Work, the difference between the Reimbursement Amount and the cost of Tenant's Work in order that Tenant shall be reimbursed for the full Reimbursement Amount. **[Note: if the cost of Tenant's Work amounts to less than the Reimbursement Amount and is documented as such, and Tenant is paid the additional amount up to the Reimbursement Amount, the additional amount, including any amounts used to acquire furniture and fixtures, will be treated as ordinary income and taxed as such to Tenant].**] The cost of labor shall only include the cost of independent contractors and/or tradesmen hired by Tenant or any contractor or subcontractor and shall not include any cost for employees of Tenant other than the construction foremen.

Within sixty (60) days following completion of Tenant's Work, Tenant shall deliver to Landlord a statement setting forth an itemized scope of Tenant's Work, said itemization to apportion said funds so expended for Tenant's Work between permanent leasehold improvements ("Landlord items") and fixtures ("Tenant items"), and the actual amount of money expended by Tenant for said two types of improvements up to the Cap, [and shall also set forth the amount of the Reimbursement Amount in excess of the amounts expended by Tenant for said Tenant's Work (the "Excess Reimbursement Amount")], said statement to certify that the amounts so expended have been fully paid by Tenant, and to be certified by an officer of Tenant. Landlord shall pay for the cost of Tenant's Work up to the Cap within 14 days of receipt of said statement submitted by Tenant. All payments made by Landlord under this article shall be forwarded to ___________________ if paid by check or if Landlord pays by wire transfer instead of a check then Landlord shall forward the money to ________________. If such money is wire transferred than simultaneously therewith Landlord shall telephone ______ at ___________ of the placement of the wire transfer, together with the Federal Reference Number.

In the event Landlord shall not have paid Tenant said amount within said 14 days, Tenant, in addition to any other rights and remedies Tenant may have available at law or in equity, shall have the right to deduct said amount from all rents and other charges then due or thereafter coming due hereunder, and irrespective of who may own or have an interest in the Demised Premises at the time such deductions are made. **[make sure the lease provides for an order of deductions, i.e., non-cumulative deductions are taken first]**

Any amounts paid to Tenant in respect of this provision (other then the Excess Reimbursement Amount) are intended for application by Tenant to the cost of Tenant's Work at the Demised Premises. Landlord will have the right to any and all depreciation associated with amounts expended by Tenant for Landlord items comprising Tenant's Work which have been reimbursed by Landlord under this article.

All improvements and alterations constituting Landlord items made by Tenant to the Demised Premises shall immediately become the property of the Landlord.

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