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Workshop 31

**The 'Anything-But-Shopping' Shopping Center:
Alternative/Supplemental Uses in the Age of the Internet**

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The 'Anything-But-Shopping' Shopping Center: Alternative/Supplemental Uses in the Age of the Internet

- I. **History.** Before exploring where we, the shopping center industry, may be heading, it is important to take a look at where we came from...

Shopping centers sprung up throughout the country in the 20th century, in essence, to provide one-stop, shopping destinations for consumers so that they could gather all the goods they desired without having to travel to multiple locations and visit retailers one-by-one.

Shopping centers were favored not only by the consumers – who now had a convenient means to shop for a variety of goods from a variety of retailers – but also by the retailers who tenanted such shopping centers as a convenience to their existing customers and as a means of attracting new customers from the customers of other retailers in the shopping center.

Thus, it goes that, for both consumers and retailers, the most popular shopping centers were the ones with the most retailers as they provided the consumer with the broadest range of goods and variety of retailers, which resulted in more customers and more sales.

Also favored by both consumers and retailers were shopping centers anchored by department stores as they offered consumers a broad range of goods not only at one destination but under one roof and thus were significant drivers of customer traffic. Department store-anchored shopping centers were also favored by shopping center developers because department stores typically occupied large spaces and thus would provide a developer the critical mass it needed to obtain the financing and interest from other retailers necessary to construct the shopping center.

Being favored by consumers, other retailers and developers, department stores (and other big-box retailers) had a lot of clout, and thus could negotiate for many favorable terms in their agreements with developers. Some of those terms gave the department store control over or at least approval rights with respect to many aspects of the shopping center, including the types of tenants that could occupy space at the shopping center. Example 1 on **Exhibit A** attached hereto is a restricted use provision from an agreement between a national department store and the developer of a shopping center in which it is located.

The primary purpose of such restricted use provisions was to assure the department store that the shopping center would remain a destination that would attract well-heeled, paying customers who would visit the shopping center for one purpose: to shop. But times, they are a changing.

- II. **A Change in the Retail Landscape.** The advent of the internet has reshaped many aspects of American life, and the shopping center industry is no exception. Particularly impacting shopping centers is the rapidly increasing popularity of e-commerce, a means by which consumers can purchase any goods they want, any time they want, anywhere they want... whether it be in the comfort of their own home, in their cars or at work. The same retailers that tenant shopping centers now sell the same goods, sometimes at steeper discount or with more frequent sales, over the internet, accessible by desktop, laptop and mobile devices. Suddenly, an industry built upon convenience is being upended by something even more convenient.

To meet the challenges facing our industry, developers and brick-and-mortar retailers have had to rethink their strategy... Instead of focusing only on shopping, which now can be accomplished by a mere tap on your phone, developers and brick-and-mortar retailers have had to find new ways of attracting customers to the shopping center. Logically, those ways include introducing uses that satisfy needs that can't (or at least can't easily) be satisfied over the internet. The theory being that once the consumer is at the shopping center, then perhaps it's even more convenient to stop in a store and buy something than it is to buy something online, wait for it to arrive and possibly send it back.

III. **What was once old (and unwanted) is new (and desired) again.** To mitigate against the damaging effects of e-commerce, developers have looked to fill their shopping centers with uses that, although once shunned by shopping center developers and restricted by their tenants, remain, for the most part, at least for now, “internet-proof”. Such uses include restaurants, fitness centers/studios, children’s entertainment uses, educational facilities, movie theaters, bowling alleys, escape/mystery rooms, medical facilities and much more “experiential”-type uses. Let’s take a look at a few of those and why each has become increasingly important to shopping centers in the age of the internet...

- A. **Restaurants** have always existed, but never have they been so diverse and inventive. From fast casual dining, to full-service and fine dining restaurants, to food halls and food trucks, there are now food service operators serving up cuisine of just about every style, ethnicity and region on earth and customers with seemingly insatiable appetites who apparently never tire of trying new things. What makes a restaurant valuable to a shopping center, however, is not the food itself... the food itself can be ordered online, just like any other goods. What makes a restaurant valuable to a shopping center is the venue it provides... a venue for one to celebrate with friends and family, a venue to meet another on a first date, a venue to fraternize with co-workers, and so on and so forth. Such a venue cannot be found on the internet, and thus is capable of drawing potential customers out from their homes and to the shopping center.
- B. Over the last two decades or so, there has been an explosion of **fitness studios and gyms** as Americans become increasingly self-aware of their body image and overall health. Indeed, full-service fitness centers, such as 24 Hour Fitness, Crunch, Planet Fitness and Equinox, and specialized fitness studios, such as Soul Cycle, Fit Barre, Flywheel Sports and a multitude of yoga and pilates studios are popping up in shopping centers across the country to fill yet another need that is unable to be filled over the internet... exercise. Retailers and developers are hoping that, after or before a workout, gym goers will stop in a store and pick up a new pair of jeans or shoes before heading at home.
- C. **Medical facilities**, such as quick-service, emergency-type operations like Urgent Care and CityMD, which provide an alternative to traditional, hospital-based emergency rooms, and dental clinics are also taking space more traditionally occupied by retail uses; and retailers are increasingly more willing to accept them as co-tenants for the same reasons they are accepting restaurants and fitness uses... Such medical facilities satisfy yet another need that cannot be met over the internet, and thus provide yet another opportunity for the retailer and shopping center, i.e., the possibility of converting a patient of such facilities into a customer of the retail stores.

So, the good news is that there are uses and tenants that will continue to lease space in shopping centers. The bad news, however, at least for some shopping centers, is that there still exists restricted use provisions like Example 1 on **Exhibit A** attached hereto that serve as impediments for some of such uses to enter the shopping center. For example, if you take a look at the restricted uses listed in the provision attached as Exhibit A, you’ll see (highlighted in gray) many of the uses mentioned above as well as other uses currently being sought by developers/owners of shopping centers to fill vacant space.

In many instances, the department store or big-box retailer for whose benefit the restricted use provision was intended to serve will agree to waive a portion of the provision if it means bringing in a high-quality, experiential tenant to an otherwise ailing shopping center; however, in other instances, such waiver will come at a significant cost (monetary or otherwise) to the developer/owner or be flat-out rejected. And sometimes the restricted uses are nullified, when the department store or big-box retailer closes its doors or is bought out by a developer/owner who is looking to breathe new life into a shopping center being bogged down by poor performing anchor tenants.

IV. **Retailers Evolve.** In addition to adding new, experiential-type uses to tenant-mix, we are also seeing changes in traditional, dry-good retail uses.

Many department stores and other big-box retailers are taking less space than before, and some are subleasing or giving back to the developer/owner portions of their old spaces. With websites to support their brick-and-mortar locations (or is it the other way around?), such stores find taking less space to be an easy way to cut back on costs while not sacrificing too much in sales.

Other retailers have begun to add experiential-type uses to their dry-good retail operation. For example, lululemon conducts yoga classes in many of its stores, and Sur La Table conducts cooking classes.

Many stores have enticed would-be customers by offering free hors d'oeuvres and cocktails or by hosting special events, such as viewing parties for sporting events, awards ceremonies or royal weddings.

Another trend in traditional, dry-good retail is the concept of "showrooming". The concept used to have a negative connotation when it referred to consumers using brick-and-mortar stores (such as Best Buy) as a showroom for websites (such as Amazon). In other words, the customer would go to a store like Best Buy, get up-close and personal with the product, and then buy it (perhaps at a lower price) online using a website like Amazon. The current use of showrooming, however, stems from e-tailer turned retailer (or "clicks-to-bricks" retailer) Bonobos's brick-and-mortar operation, in which it carries no inventory and the customer walks out with new merchandise. Instead, the customer tries on selected styles and fits and any purchase is subsequently shipped to the customer's address. Many other clicks-to-bricks retailers, including M. Gemi, have followed suit. The pros to the retailer include less need for space and therefore less rent, and less inventory and therefore fewer costs associated with that.

V. **Leases Evolve.** With all these changes to the retail landscape, it should come as no surprise that retail leases are seeing some changes themselves. Here are a few examples:

A. Permitted Use provisions, once very specific, are being drafted much broader, as retailers increasingly desire more flexibility not only in conducting ancillary activities (such as the yoga or cooking classes discussed above) but also in their product-mix, as what works today may not work (or will be obsolete) tomorrow. For similar reasons, restaurant leases often allow the restaurant to change its concept, subject to any restrictions negotiated by the restaurant and its landlord. Below are a few examples of Permitted Use add-ons that are products of the changing retail landscape.

1. "..., and other items typically sold at Tenant's stores."
2. "In addition to the foregoing and ancillary to the foregoing primary use of the Premises, ...
(ii) Tenant may conduct in-store product demonstrations (e.g., fashion shows, exercise classes) and hold receptions and other gatherings in compliance with applicable Legal Requirements, and, in connection therewith, may provide complimentary beverages (including alcoholic beverages, if in compliance with applicable Legal Requirements), snacks or hors d'oeuvres..."
3. "Tenant covenants and agrees that the Leased Premises shall be used for a, and Tenant shall be permitted to use the Leased Premises for any, *lawful commercial purpose* including any and/or all of the following uses: the operation of a *Restaurant X* (as that concept may change from time to time), including the sale and serving of prepared food and alcoholic beverages for on-site and off-site consumption, together with the sale of related merchandise."

B. Owners/developers have become more reluctant to offer **Exclusives/Restricted Use provisions**, and those that currently make their way into leases are much more specific with many exclusions and clarifications that allow the owner/developer the flexibility it needs to boost traffic while maintaining the integrity of the shopping center. Example 2 on **Exhibit A** attached hereto is a restricted use provision that is very similar to the one shown as Example 1, except that it includes many exclusions and clarifications (highlighted in gray) that address some of the same restricted uses that are highlighted in gray in Example 1.

C. For deals based, in whole or in part, on **Percentage Rent**, one of the more hotly contested lease provisions in the age of the internet is the definition of Gross Sales, the issue in particular being whether sales ordered *and/or* paid for online and picked up at, shipped to *and/or* fulfilled from the inventory of the premises ought to be included in the definition of Gross Sales for purposes of determining Percentage Rent. Unfortunately, there is no one-size-fits all answer to this dilemma as retailers seem to differ in the way they record, track and attribute a sale between their online and brick-mortar stores, and owner/developers differ in how far they are willing to push the issue. As far as the landlords are concerned, if the premises are utilized to facilitate a sale, then they should receive credit for it. Retailers would counter that argument, however, by pointing out that its online store brought a customer to the mall, thus creating even more opportunity for sales at that retailer's premises and the premises of other retailers in the shopping center.

- D. Retailers are still requiring, and owners/developers are still granting, **co-tenancy provisions** tied not only to a critical mass of occupants but also one or more, specified Anchor Tenants, e.g., department stores and other big-box retailers. What's changing, however, is the flexibility such owners/developers are now demanding, and such retailers are now allowing, to replace such named "Key Tenants". In some instances, not only may the replacement tenant be in a different category as the Key Tenant it is replacing (e.g., a Whole Foods for a Home Depot) but also, realizing that more and more department stores and big-box retailers are either taking less space or going bust, such Key Tenant may be replaced with more than one retailer, perhaps occupying in the aggregate X% of the square footage formerly occupied by the Key Tenant being replaced. Below is an example of how such replacement rights might read in a Lease.
1. "Notwithstanding the foregoing, Landlord may replace an Anchor Tenant with a suitable replacement tenant(s)/occupant(s) ("Suitable Replacement Tenant(s)") for purposes of satisfying the Co-Tenancy Requirement provided that the Suitable Replacement Tenant(s) is/are a national or regional tenant(s)/occupant(s), not to exceed two (2) tenants/occupants for each of Anchor Tenant One, Anchor Tenant Two and Anchor Tenant Three, each having at least twenty (20) stores and occupying, in the aggregate, at least seventy-five percent (75%) of the square footage occupied by such prior Anchor Tenant premises as of the date of this Lease."
- E. Given the increasing difficulty of owners/developers in finding same-sized replacements for vacating department/big-box stores, some owners/developers look to add certain flexibilities in the lease that, for example, allow them to lease the front half of a former big-box space and to "decommission" the back half, thereby pulling it out of the denominator of each tenant's **proportionate share determination** for CAM, Taxes, etc. Below is an example of how such "decommission" language might read in a Lease.
1. "Tenant's proportionate share of Taxes shall be the total amount of the Taxes multiplied by a fraction, the numerator of which shall be the number of square feet of gross leasable area within the Premises, and the denominator of which shall be the gross leasable area of the Shopping Center, but excluding the gross leasable area of... that portion of any Shopping Center building(s) which cannot be reasonably leased and has been decommissioned by Landlord for reasons such as, but not limited to, lack of access, reasonable visibility from the public right of way, and/or violations or lack of compliance with applicable building codes; provided, however, any such decommissioned space shall not front on a parking area of the Shopping Center and cannot be more than fifty percent (50%) of the depth of any building within the Shopping Center."

VI. **Where are we heading?**

- A. Less %-Rent deals... Or is it more %-Rent *only* deals?
 - i. Why less % Rent?

The unfocused retail climate creates an argument that the income structure on our next generation of leases should be portrayed in a manner that removes uncertainty and allows both parties to rely solely upon scheduled economics. This is to say that parties may consider moving forward with deal metrics that aren't dependent upon tenant sales at the location. For one thing, deals with readily measurable scheduled economics are viewed as far more financeable, both in the construction and permanent loan markets – depending on the type and size of the center, one or even several of these deals is not the end of the world, but the larger the tenant population of a given asset that is comprised of these types of deals, the less credit a lender will give you for the anticipated lease income. In addition, the changing nature of the retailers themselves calls into question the likelihood that the parties would meet minds in terms of how to forecast and measure sales. For example, many "e-tailers" are now taking brick/mortar "showroom" locations – can it be said with certainty that they are actually making *any sales* from the Premises? This sets up for either or both of a fight over gross sales exclusions or an auditing mess. Lastly, avoiding a heavy reliance on percentage rent means less vulnerability to poor local management of the retailer/operator or simply a "down period".

- ii. Why % Rent only?

The flipside of the above is that many retailers (and some risk-seeking landlords) invite and embrace the percentage rent only model. From the tenant's perspective, they know that, no matter how bad things get, they've

got a finite, measurable and (presumably) manageable health ratios/occupancy cost levels. This way, when they wake upon the morning, they think about overhead and cost of goods sold, but know that their occupancy cost is already normalized into their sales. Landlords who believe heavily in a concept or who may simply need the tenant to attract others may be inclined to gamble on a higher percentage rent deal. Many retailers sell products (e.g., Tesla showrooms) that cannot rationally fit into this economic model. Still others (e.g., vertically-integrated electronics users) probably could have at some point, but would come to regret it – why give the guy that cleans the parking lot so much of my hard-earned money?

B. Renewed focus on restaurant and entertainment concepts (Again!)

Until people can figure out how to dine out and watch a ballgame at a bar online, well-run/well-managed bars and restaurants are going to continue to need to play a dominant role in our retail culture. While this presents a wonderful opportunity to reposition dark (or dim) space, it also comes with its own set of challenges. First (and, perhaps, most importantly), there is a historic bias held on the part of many legacy retailers against becoming a restaurant's neighbor. These biases are manifest in almost every restricted use exhibit or provision carried under any vintage (and some not-so-vintage) lease – a schizophrenic paradox can be found in many leases where the tenants both prohibits restaurants but require them as a co-tenant.

i. Where do these biases come from?

For many of us dinosaurs, the disinclination to allow restaurants stems from at least 3 common factors – (1) the perception (real or imagined) that the peak parking periods for the restricting tenant and the offending restaurant are the same, thus jeopardizing the retail customer to the benefit of the diner; (2) water (and pest) intrusion in adjacencies; and (3) odor transfer. It is more an operational lesson than a legal one to mitigate these issues, but they are all manageable, provided that you are willing to have a creative site plan, spend money and have a retail partner that is willing to listen and work with you.

iii. The Elephant Bar in the room

It goes without saying that the stress that restaurant deals put on a landlord pro forma is smothering. Indeed, the barriers to entry in the restaurant business are so extreme that almost no non-national chain restaurant can open without some (usually significant) financial assistance. For a tenant, this means either or both of taking on massive outside investment or cutting design or quality corners. For the landlord, the calculus is often between a chain (and stereotypically less desirable) operator or a heavy front-end construction allowance. Alas, a middle ground has emerged and seems to provide a landscape that can work for both parties – a traditional partnership with the landlord as investor, and restaurateur as operator. The initial structure for these partnerships differs depending on investment, but the concept is simply that the landlord's capital account (and corresponding member (or other equity) interest) is credited at an artificially high level until all of its initial capital investment, plus a preferred return, is returned to the investor. Thereafter, a "flip" would occur and the operator would be the dominant owner for the duration of the partnership. A sample rudimentary "flip" provision is included

C. Shorter-term/pop-up/temp-to-perm deals

A way to mitigate concerns for both landlord and tenant is to advance deals that don't have the initial commitment to the center. The appeal to the landlord is simply the opportunity to fill space and tempt the consumer with a novel concept, while a tenant is allowed to test its concept and the market with a very constrained risk profile.

However, the drawbacks for the landlord are, of course, innumerable. First, truncated lease terms are deemed "unfinanceable", which may or may not be true. However, it is almost certainly the case that the budget or lease plan upon which the loan is underwritten did not contemplate these types of deals – it is always worth checking your loan docs to confirm that you can simply put this deal through without talking to your lender. Next, many national retailers have taken to dictating the minimum duration of their neighboring tenants in order for them to be considered to be tenants of the shopping center – if this sounds incredulous, consider that the rationale is that true temporary or seasonal tenants do little to draw the loyal customer to the center and often skimp out on the design/construction side of things, downgrading the quality element of the center. Any tenant considering a strategy of shorter term leases should also expect that a landlord will not be inclined to put much, if any, capital into the deal (much less pay a full fee to a broker) – indeed, the landlord will need to remain focused on the constant reinvention of its asset and the inability to rely on you as a co-tenant. As an exercise, consider the difficulties of trying to backfill a vacated co-tenant in today's climate while navigating the following provision:

“Comparable Replacement Tenant shall mean, a national or regional retail chain that (i) has a net worth of at least Million and No/100 Dollars (\$,000,000.00), (ii) has

been operating for at least five (5) years, [and (iii)] has an initial lease term for its premises at the Shopping Center of at least five (5) years.” *

* the actual provision contained several more criteria that the author viewed as customary.

D. More Showroom/Fulfillment retail... Bonobos/M.Gemi

There will always be a use for our shopping centers and the challenge is making sure that we stay nimble enough to capitalize on the use that both pays the landlord's bills, but also enhances the experience for the other tenants at the centers. Bonobos blazed trails in the retailing world – a first of its kind “true showroom.” A men's apparel retail, Bonobos offers leather couches, free wifi and, of course, free beer. The stores carry a full array of merchandise, but none that you can take home. The merch is there purely as samples, with the salespeople measuring you and then sending you happily (and, perhaps, tipsily) on your way with your merchandise to arrive at your desired location the next day – all built into the price of the product. The appeal to all parties is obvious. The reverse-Bonobos would be an e-commerce fulfillment center – a place where the consumer can retrieve his or her order. While the fulfillment center today seems more targeted for business to business usage, the appeal at the consumer level would permit the recipient certainty of availability and an immediate introduction to the returns process.

E. Even less enclosed space

We've been hearing that the “mall is dead” for decades now. The truth? As always, it depends. In the authors' experience, the 2 main factors to keeping enclosed malls relevant are climate and absence of proximate retail alternative.

It is simply science that retail can't change the weather (at least, not yet!) and, whether we like it or not, we're always going to have extreme hot and extreme cold – this provides a tenable reason for retailers to continue to believe that their consumer will, in fact, continue to embrace the refuge provided by the interior mall. In more temperate climates, however, there is little appeal to the indoors for the shopper, and even less to the attendant common area costs tacked on to the tenant leases.

The flipside is that it may simply not matter depending on the location. Given the pioneering of some early mall developers, many mid-sized trade areas are dominated by legacy malls that absorb all willing retailers and competitive development is not practicable. Owners, however, would be well-served not to rest on their laurels and allow themselves to be outfoxed or underpriced by purchasers of failed department stores or outparcels.

F. Hybrid centers

A simple but practical response to the declining roster of deal-seeking tenants is to put all the warm bodies together. That is to say, create a marketplace that serves what the trade area demands rather than what a particular tenant may wish that the it demanded. In many centers, this causes traditional full-price retail to intersect with off-price or even outlet merchants – this often faces confrontation in terms of quality restrictions contained in certain tenant leases. See [Exhibit C](#) for an example of a detailed quality control provision.

It also means that apparel and restaurant concepts are increasingly finding themselves neighbors with bowling alleys, escape rooms and other non-traditional tenants. The challenges of implementation, of course, start with the existing leases. For reference, navigate the restrictions on Exhibit A and consider reinventing an 80's vintage shopping center with a Pinstripes, a block of restaurants, a luxury fitness center, some second-floor office space, a tap room for a local brewery and a dine-in movie theater. Does your head hurt yet?!?!?

VII. The 'It's-Not-the-End' End to the Workshop. There is still life in shopping centers, but the focus has changed/is changing and will continue to change from selling goods to selling experiences, and traditional, dry-goods retailers will play more of a supportive role.

In summation, we are still here. We will be here next year, the year after that and the year after that. The authors foresee that we will have this conversation for the next 50 ICSC Law Conferences to come. Indeed, it is incumbent upon us that we do. It is only by shared industry thought and consideration of alternative, legal pitfalls and common-sense solutions to keep our industry relevant. We don't make the clothes, cook or serve the food, train the gym members, brew the beer, apply the make-up, cut the hair, groom the pets, bag the groceries or assemble the iPhones, but we do have a huge role to play. Thanks for reading!

EXHIBIT A

EXAMPLES OF RESTRICTED USE PROVISIONS FROM A DEPARTMENT STORE AGREEMENTS

Example 1

Landlord covenants and agrees that the Shopping Center shall be constructed, leased, operated, maintained and managed as a first class shopping center and that no premises (and no portion of any premises) in the Shopping Center or on any land (hereinafter the "Related Land") contiguous or adjacent to the Shopping Center (which shall include land that would be contiguous, or adjacent to the Shopping Center but for any intervening road, street, alley or highway) owned now or at any time in the future by Landlord or any company controlling, controlled by or under common control with Landlord shall be used or occupied for any of the following: the Additional Prohibited Uses (as defined below); unlawful use, pornographic use, "second-hand" or "surplus" store, commercial laundry or dry cleaners (other than shops serving as a drop-off and pick-up establishment), film processing (except if located in a building whose entrance is not within three hundred (300) feet from the front entrance to the Premises and then only if such film processing is incidental to an otherwise permitted retail use), veterinary office, living quarters, manufacturing, bowling alley, off-track betting parlor or other gambling establishment (provided that the foregoing shall not prohibit the sale of lottery tickets as an incidental use to an otherwise permitted retail use), funeral parlor, skating rink, so called "head shop", catering or banquet hall, children's entertainment or activity facility (except for no more than one (1) such children's entertainment facility such as Discovery Zone provided such facility is no larger than twelve thousand five hundred (12,500) square feet of Floor Area and is located in a building whose entrance is not within four hundred fifty (450) feet from the front entrance to the Premises), meeting hall, auction hall, place of religious worship, sporting event, karate center, auditorium, warehouse, theater, automobile repair shop, gasoline or service station, supermarket [except if located (i) in any building not within one hundred (100) feet from the Premises, and (ii) in the area labeled "Tenant's Wing" on Exhibit B (which Landlord and Tenant agree shall not be within one hundred (100) feet of the Premises) provided that any permitted supermarket in Tenant's Wing shall not contain a Floor Area greater than thirty-five thousand (35,000) square feet] , restaurant serving meals for on or off premises consumption (except (i) a "coffee bar" shall be permitted to be located within the Premises and the premises of other tenants in the Shopping Center only if (A) incidental to an otherwise permitted retail use, and (B) such coffee bar does not have a separate exterior entrance, and (ii) in that portion of the Shopping Center labeled "Permitted Restaurant Area" on Exhibit B and then only if such restaurant is no larger than five thousand (5,000) square feet of Floor Area] beauty parlor or nail salon (except if located in a building whose entrance is not within three hundred (300) feet from the front entrance to the Premises and then only if such nail salon or beauty parlor is no larger than two thousand five hundred (2,500) square feet of Floor Area), billiard parlor, sales office or showroom for automobiles or other vehicles, an establishment serving alcoholic beverages for on or off premises consumption (except in that portion of the Shopping Center labeled "Permitted Restaurant Area" on Exhibit B and then only if incidental to their primary use of serving food for on-premises consumption, which for the purposes hereof shall mean that such restaurants realize a maximum of forty (40%) percent of their gross sales from the sale of alcoholic beverages), massage parlor, health spa or similar type business, car wash, a so-called "flea market", video/pinball arcade (provided such restriction shall not preclude other tenants of the Shopping Center from maintaining no more than three (3) such video and/or pinball games within the interior of their premises) customer viewing, entertainment or educational uses (provided such restriction shall not preclude training classes incidental to an otherwise permitted retail use) any use generally deemed to be obnoxious or a nuisance (including, without limitation, a use which generates offensive odors or noise), medical offices or any other non-retail uses (except storage and office space incidental to an otherwise permitted retail use and a bank, travel agency, title agency of less than three thousand (3,000) square feet of Floor Area, commercial real estate office of less than two thousand five hundred (2,500) square feet of Floor Area, and telephone store customarily found in first class shopping centers (collectively "Retail Office Uses") provided such Retail Office Uses do not exceed in the aggregate twenty thousand (20,000) square feet of Floor Area, and provided further that such Retail Offices Uses are not located within three hundred (300) feet from the front entrance to the Premises) (herein collectively called the "Prohibited Uses").

Neither the Premises nor the Shopping Center, including any premises occupied by Existing Tenants, shall be used for any of the following prohibited uses ("Additional Prohibited Uses"):

1. For any unlawful use or any activity which constitutes a public or private nuisance or which generates excessive noise, litter, dust or odor.
2. For any unusual fire, explosive or other damaging or dangerous hazards (including the storage, display or sale of explosives or fireworks).

3. Warehouse operation, or any assembling, manufacturing, distilling, refining, smelting, industrial, agricultural, drilling, mining operation.
4. Trailer court, mobile home park, lot for sale of new or used motor vehicles, labor camp, junk yard, stock yard or animal raising.
5. Dumping, disposal, incineration or reduction of garbage or refuse other than handling or reducing such waste if produced on the premises from authorized uses and, in such latter event, only if handled in a reasonably clean and sanitary manner.
6. Commercial laundry or dry cleaning plant (other than shops serving as a drop-off and pick-up establishment with minimal pressing done on-site), laundromat, veterinarian or veterinary hospital (except as an incidental use to a full service pet supply store such as PetSmart), or car washing establishment.
7. Automobile servicing or repair work (e.g., oil change, tire change, body or paint shop, tune-up, brake or muffler service), automobile showrooms and used car lots.
8. Gasoline or automobile service stations.
9. Massage parlor, or off-track betting establishment.
10. Adult book store or similar store selling or exhibiting pornographic materials [provided such restriction shall not preclude the sale or rental of adult videos as an incidental part of the business of a general video store (which video store shall contain a Floor Area of at least six thousand four hundred (6,400) square feet) normally found in first class shopping centers].
11. Pawn shop, employment agency or living quarters.
12. Health club, exercise studio, fitness center, karate school, or gym or gymnasium.
13. Game room, arcade or other entertainment facility [except for no more than one (1) such children's entertainment facility such as Discovery Zone provided such facility is no larger than twelve thousand five hundred (12,500) square feet of Floor Area and is located in a building whose entrance is not within four hundred fifty (450) feet from the front entrance to the Premises], catering or banquet hall.
14. Funeral establishment, mortuary or similar service.
15. Flea market, flea circus or other operation for the sale of used goods.
16. For any office use (other than as an incidental use to an otherwise retail use permitted hereunder).
17. Outdoor circus or other outdoor entertainment use.
18. Outdoor meetings, meeting hall or other place of assembly.
19. Bowling alley, pool or billiard establishment, or skating rink.
20. Operation of "elephant trains" or similar transportation devices.
21. Auction or bankruptcy sale, second hand or surplus store.
22. Shooting gallery or gun range.
23. Theater (motion picture or live); restaurant serving meals for on or off premises consumption [except (i) a "coffee bar" shall be permitted to be located within the Premises and the premises of other tenants in the Shopping Center only if (A) incidental to an otherwise permitted retail use, and (B) such coffee bar does not have a separate exterior entrance and (ii) in that portion of the Shopping Center labeled "Permitted Restaurant Area" on Exhibit B and then only if such restaurant is no larger than five thousand (5,000) square feet of Floor Area]; supermarket [except if located U) in any building not within one hundred (100) feet from the Premises, and (ii) in the area labeled "Tenant's Wing" on Exhibit B (which Landlord and Tenant agree shall not be within one hundred (100) feet of the Premises) provided that any permitted supermarket in Tenant's Wing shall not contain a Floor Area greater than thirty-five thousand (35,000) square feet].
24. Bar serving alcoholic beverages (except in that portion of the Shopping Center labeled "Permitted Restaurant Area" on Exhibit B to this Lease and then only if incidental to the primary use of serving food for on-premises consumption, which for purposes hereof shall mean that such restaurant realizes a maximum of forty (40%) percent of its gross sales from the sale of alcoholic beverages), nightclub, discotheque or dance hall.
25. Hotel or other lodging facilities
26. Day care or school (including trade school or class sessions of any kind) except class or training sessions incidental to a full retail use as a convenience or service to retail customers and/or employees.

Example 2

Landlord will not use space in the Center for the following Prohibited Uses:

1. Tanning, health, exercise or racquet club or spa, gymnasium, bowling alley, fitness center, skating rink, or other sports or recreational facility;
2. School, library, reading room, beauty school, barber college or house of worship, except that a Sylvan Learning Center and/or a Mathnasium shall be permitted on the West Area of the Shopping Center as depicted on Exhibit B to the Lease;
3. Theater (movie or live), gallery, auditorium, meeting hall, banquet facility, dance hall or ballroom;
4. Hotel or motel;
5. Massage parlor (except that a bona fide therapeutic massage business such as Massage Envy shall be permitted on the West Area of the Shopping Center), adult bookstore (which will include a store which sells or offers sexually explicit videos, DVDs, audiotapes, films, devices, apparel and the like), "peep show" store, or topless or strip club;
6. A so-called "second hand" or surplus store, pawn shop, flea market, swap meet or junk yard;
7. Off- track betting, gambling or gaming facility;
8. Drag paraphernalia store or so-called "head" shop;
9. Car wash, automobile repair work, automotive service, automobile body shop or gas station;
10. Automobile, boat, trailer, mobile home or track leasing or sales;
11. Bar or other establishment whose annual gross sales (or projected annual gross sales) from the sale of alcoholic beverages for on- premises consumption exceeds 50% of the gross sales for such business (provided that the foregoing restriction shall not apply to bars operated within a restaurant);
12. Amusement park, carnival, fair, disco, nightclub or other entertainment facility including video game room, pool hall, arcade, indoor children's recreational facility or other amusement center (provided, however, that incidental interactive kiosks, games and equipment related to the otherwise permitted primary use of an owner, occupant or tenant, will not be prohibited hereunder), except that a Gymboree and/or a Chuck E Cheese Pizza shall be permitted in the West Area of the Shopping Center;
13. Any manufacturing, assembling, distribution, warehouse or office use other than: (i) an incidental office located within a business establishment and used for the purposes of managing the business being operated therein; and (ii) offices that provide services directly to consumers, which are customarily found in first class neighborhood shopping centers such as financial institution, real estate agency, stock brokerage, title company, escrow office, travel agency, insurance agencies, law office, and medical or dental office that does not admit patients for overnight stays;
14. Funeral parlor;
15. Animal raising or storage or veterinary hospital (except in connection with a full service pet store such as Petsmart or Petco provided such use constitutes an incidental portion of such tenant's business);
16. Gun range or the sale of fireworks;
17. Central laundry, on-site dry cleaning plants (as opposed to off sites), or laundromat;
18. Drilling for or removal of subsurface substances, dumping, disposal, incineration or reduction of garbage or refuse, other than in enclosed receptacles intended for such purposes;
19. Any use which constitutes a public or private nuisance or produces objectionable noise, smell or vibration;
or
20. Any business operated only on a seasonal or part-time basis (provided that this provision does not impose any continuous operation requirement).

EXHIBIT B

PROVISIONS FROM RESTAURANT OPERATING AGREEMENT

4.1 Allocations of Net Profits. Net Profits for each Fiscal Year shall be allocated to the Members and Economic Interest Owners in the following order and priority:

(a) Net Profits shall be allocated to offset any Net Losses allocated pursuant to Subsection 4.2(b).

(b) The remaining Net Profits shall be allocated to the Members and Economic Interest Owners in the following order and priority:

(i) Through and including the date on which each Member has received distributions of Distributable Cash from the Company equal to its accrued and unpaid Preferred Return plus its aggregate unreturned Capital Contributions, twenty percent (20%) of all Distributable Cash shall be distributed to Operator and eighty percent (80%) of all Distributable Cash shall be distributed to Investor.

(ii) Thereafter, eighty percent (80%) to Operator and twenty percent (20%) to Investor.

4.2 Allocations of Net Losses. Net Losses for each Fiscal Year shall be allocated to the Members and Economic Interest Owners in the following order and priority:

(a) Net Losses shall be allocated to offset any Net Profits allocated pursuant to Subsection 4.1(b).

(b) Except as provided in Subsection 4.2(a), through and including the date on which each Member has received distributions of Distributable Cash from the Company equal to its accrued and unpaid Preferred Returns plus its aggregate unreturned Capital Contributions, Net Losses shall be allocated twenty percent (20%) to Operator and eighty percent (80%) to Investor; and thereafter, eighty percent (80%) to Operator and twenty percent (20%) to Investor.

EXHIBIT C

QUALITY CONDITIONS

C. Notwithstanding anything in this Lease to the contrary, neither Landlord, nor any parent, subsidiary or affiliate of Landlord shall operate, or permit to be operated, at the Shopping Center any of the following: (i) a number of Discount Stores (defined below) in excess of the Discount Store Cap (defined below), (ii) any Prohibited Discount Store (defined below), or (iii) any second-hand store or so-called "schlock operation" (as described below). Further, notwithstanding anything in this Lease to the contrary, no Discount Store in excess of the Discount Store Cap, no more than one (1) yoga studio, no Prohibited Discount Store and no second-hand store or so-called "schlock operation" shall be counted towards satisfaction of the Possession Co-Tenancy or Opening Co-Tenancy, or be included in any determination that a Co-Tenancy Failure does not exist; provided, however, that for avoidance of doubt, the foregoing shall not be read to prohibit the Floor Area of a number of Discount Stores equal to or below the Discount Store Cap towards satisfaction of the Possession GLA Co-Tenancy Requirement, the Opening GLA Co-Tenancy Requirement, or the GLA Co-Tenancy Requirement. As used herein, the term:

a. "Discount Store Cap" means four (4) Discount Stores, provided, however, in the event that any one or more of the following Discount Stores: _____ (collectively, the "High-End Department Store Discount Stores") are open and operating for business at the Shopping Center, then the Discount Store Cap shall mean five (5) Discount Stores (inclusive of all High-End Department Store Discount Stores open and operating for business at the Shopping Center).

b. "Discount Store" means any off-price, wholesale, outlet or discount store;

c. "Prohibited Discount Store" means and shall be limited to those Discount Stores operating under the following trade names or ones substantially similar thereto: _____; and

d. "schlock operation" refers to the sale and display of goods and wares in a disorganized manner, in disarray, frequently involving goods that are damaged, irregular or used, and carried out in a manner similar to a flea market, pushcart or bazaar operation. The descriptive terminology used to characterize the use of the term "schlock operation", however, is not intended to be a substitute for the general connotative meaning associated with the term in the trade, but is proposed to be descriptive of elements that, in combination characterize an operation which is referred to as a so-called "schlock operation."