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RICHARD N TAKECHI  
REGISTER OF DEEDS  
DOUGLAS COUNTY, NE

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**DECLARATION OF COVENANTS AND RESTRICTIONS**

THIS DECLARATION OF COVENANTS AND RESTRICTIONS (the "**Agreement**") is made and entered into as of this 5<sup>th</sup> day of May, 2003, by and between 168<sup>th</sup> and Dodge, L.P., a Nebraska limited partnership ("**Developer**"), having a mailing address of c/o RED Development of West Dodge, LLC, 4717 Central, Kansas City, MO 64112, Quantum Properties, L.L.C., a Nebraska limited liability company ("**QP**"), and Quantum Properties II, L.L.C., a Nebraska limited liability company ("**QPII**"), QP and QPII are collectively referred to as "Owner, and both have a mailing address of 1925 North 120th Street, Omaha, Nebraska 68154.

**RECITALS:**

**WHEREAS**, Developer is the owner in fee of that certain real property (the "**Developer Property**") located in Douglas County, Nebraska, more particularly described in **Exhibit A** attached hereto. Developer has subdivided, and anticipates further subdividing, the Developer Property into separate legal parcels (the "**Developer Parcels**").

**WHEREAS**, Owner is the owner in fee of that certain real property located in Douglas County, Nebraska, more particularly described in **Exhibit B** attached hereto (the "**Adjacent Parcel**"). The Adjacent Parcel and Developer Parcels may sometimes be referred to collectively herein as the "**Parcels**")

**WHEREAS**, Developer and Owner desire to construct or have constructed on their respective Parcels such buildings and other improvements as are consistent with the Site Plan attached hereto as **Exhibit C** and this Agreement.

**WHEREAS**, the Parties hereto recognize that for the optimum development and operation of the Parcels as a unified and coordinated project, it is necessary that they agree respecting certain matters, including, but not limited to, matters relating to the design and layout of facilities on, and the operation, use and restrictions on the use of, their respective Parcels, and that in the absence of such agreements neither Party hereto would be willing to undertake the development or operation of their respective Parcels, and the Parties desire that all persons or entities who acquire portions of either of the Parcels shall take subject to this Agreement in order that all development on the Parcels will be in conformity herewith.

**WHEREAS**, the parties hereto acknowledge and agree that substantial conflicts could develop in the future leasing and development of the Parcels and, thus, intend to reasonably resolve those conflicts by this Agreement, and further desire that the Adjacent Parcel be subject to the covenants, conditions, and restrictions hereinafter set forth;

**WHEREAS**, Developer has chosen HC Klover Architect as the architects for the project (hereinafter, the "**Project Architect**").

**NOW, THEREFORE**, in consideration of the foregoing promises and for the purpose of establishing certain covenants and restrictions, Developer and Owner, declare that the Adjacent Parcel shall be held and/or sold and conveyed subject to the covenants and restrictions stated herein.

1. **Design and Plan Approval.** No improvements shall be constructed, erected, expanded, or altered on the Adjacent Parcel until the design and layout of any structure shall be reasonably approved by Developer and is aesthetically compatible with the improvement of the Developer Parcels. In order to produce an aesthetically compatible

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development contemplated by this Agreement, Owner agrees to consult with the Project Architect and Developer for a reasonable period of time concerning the exterior design, color treatment and exterior materials to be used in the construction, alteration and reconstruction of all buildings and structures on its respective Parcel(s) and to consider the views of the Developer with respect thereto prior to selecting the specific materials and colors for its improvements. Owner agrees to cause its architect to work in good faith with the Project Architect or any subsequent architect, and Developer so that the buildings to be erected and constructed will be aesthetically compatible with the balance of the Developer Parcels improvements. Developer's approval of the elevation, site plan and materials shall be conclusive as to Owner's compliance with this section.

2. **Restrictions and Competition.** The parties agree that the following restrictions and covenants shall be and are binding upon the Adjacent Parcel (hereafter, the "**Protected Uses**") and same shall hereafter run with the land, thus, passing to each successor in interest thereto:

2.1 **Office Property.** For a period of ten (10) years from January 4, 2002, without the express written consent of Developer, Parcel 1 of the Adjacent Property, as shown on **Exhibit C**, may only be used for an "office use", with minor incidental retail uses permitted, such as a newsstand of no more than 500 square feet, however, not for any other retail use.

2.2 **Excess Retail Property.** For a period of ten (10) years from January 4, 2002, Parcel 2 of the Adjacent Property, as shown on **Exhibit C**, may not be used for national brand retail typically located in a lifestyle shopping center nor shall Owner approach, solicit, or otherwise encourage or assist any of the tenants (the "**Protected Tenants**") listed on **Exhibit D** attached hereto and made a part hereof, with respect to locating at the Adjacent Property without the express written consent of Developer, which consent may be arbitrarily withheld. Said Exhibit D lists tenants typically in a lifestyle center and those excluded for the purpose of demonstration only, provided, however, Parcel 2 of the Adjacent Property shall not be restricted with regard to leasing or selling to convenient stores, gas stations, fast food restaurants, or service providers ("**Approved Uses**").

2.3 **Scheels Exclusive.** For a period of ten (10) years from January 4, 2004, provided a retail business primarily engaged in the sale of sporting goods and sports apparel is operating on the Developer Property, Owner will not lease, rent or permit any premises on the Adjacent Parcel to be occupied, whether by a tenant, sublessee, assignee, licensee or any other occupant, (hereinafter "User") for a purpose which includes the sale of branded athletic specific apparel and/or sporting goods or equipment (hereafter, the "Scheels Exclusive"); provided, however, the foregoing restrictions shall in no event restrict (i) a department store (as defined herein) from containing a shoe department that sells athletic shoes and (ii) one premises not to exceed (5,000) square feet which may be devoted primarily to athletic shoes such as Athletes Foot or Footlocker or (iii) any User who sells branded athletic specific apparel and/or sporting goods or equipment, provided that such User does not utilize in excess of 10% of gross leasable area of its space (including adjacent aisle space) for the sale or display of branded athletic specific apparel and/or sporting goods or equipment (considering all of such items in the aggregate). Owner agrees that provided it has the right to do so, it shall not approve a change in use which conflicts with or is in violation of the Scheels Exclusive. The foregoing restriction is intended to be for the benefit of and appurtenant to the Scheels parcel and may be directly enforced by Scheels All Sports, Inc. and/or the owner of the Scheels parcel. For purposes hereof,

"department store" shall be defined as a traditional general merchandise store occupying at least 75,000 square feet such as Sears, May Company, Marshall Fields, or Nordstrom.

**2.4 Bed, Bath & Beyond Exclusive.** The following exclusive use is hereby declared on behalf of Bed, Bath & Beyond Inc. for a period of ten (10) years from January 4, 2002: Provided Bed, Bath & Beyond is open and operating a retail business located in the Developer Parcels, Owner shall not lease, rent or occupy or permit any premises in the Adjacent Parcel to be occupied, whether by a tenant, sublessee, assignee, licensee or other occupant or itself, by a "Primary Competitor" (hereinafter defined) or a "Secondary Competitor" (hereinafter defined). For purposes hereof, a "Primary Competitor" shall mean a home store (such as, by way of illustration only, Linens 'n Things) whose primary use is the sale, rental or distribution, either singly or in any combination, of the following items (the "Exclusive Items"): linens and domestics, bathroom items, housewares, frames and wall art, window treatments, and closet, shelving and storage items; and a "Secondary Competitor" shall mean a store occupying more than five thousand (5,000) square feet of floor area whose primary use is the sale, rental or distribution, either singly or in any combination, of the Exclusive Items; provided, however, that any "Upscale Tenant" (hereinafter defined) shall not be deemed to be a Secondary Competitor. The term "Upscale Tenant" shall mean any first-class specialty retail tenant normally found in regional malls and primarily selling their respective merchandise under private labels (such as, by way of illustration only, Eddie Bauer, Williams Sonoma, Talbots and Victoria's Secret). Notwithstanding the foregoing, any tenant or subtenant of the Adjacent Parcel shall have the right to utilize its respective premises for the sale, rental or distribution of the Exclusive Items within an aggregate area (which shall include an allocable portion of the aisle space adjacent to such sales, rental and/or distribution area) not to exceed ten percent (10%) of the floor area of such tenant's or subtenant's premises. The restrictions set forth above shall not apply to a full-line national or regional: (i) department store [for example, Wal-Mart, Macy's, Target, the Jones Store or Dillards], (ii) discount club [for example, Costco, BJ's Wholesale Club, or Sam's Club], or (iii) home improvement center [for example, Home Depot or Lowe's], commonly located in first-class shopping centers in the state in which the Parcels are located, each occupying at least 80,000 square feet of floor area within the Parcels, as such stores are currently operated (as of the Effective Date of the Bed Bath & Beyond lease on the Developer Property, hereafter the "BBB Lease"). In addition, the restrictions set forth above shall not apply to the tenants operating under the tradenames "Organized Living", "Pier One Imports", "Cost Plus", "Wild Oats", as such stores are currently operated (as of the Effective Date of the BBB Lease) or to Lot 3 of the Developer Property.

**2.5 Prohibited Uses.** The Adjacent Parcel shall not be used for any of the "Prohibited Uses" detailed in Exhibit E attached hereto.

**3 Developer Requested Exclusives.** Developer may propose at any time that an exclusive favoring Developer's particular lifestyle tenant be placed of record on the Adjacent Property.

**3.1 Owner Approval or Disapproval.** Owner shall, by giving notice to Developer within thirty (30) days of receipt of a written request for approval of any such proposed exclusive use, either approve or disapprove the same and specify in detail the reason for such disapproval. In the event Owner neither approves or disapproves such requested exclusive within such period, Owner shall be deemed to have approved such proposed exclusive use.

**3.2 Criteria for Approval of Exclusive Use.** Provided that (i) the proposed exclusive use does not affect or otherwise exclude any Approved Use set forth in Section 2.2 and any existing permitted use on the Adjacent Property, (ii) that the proposed exclusive use does not apply to stores occupying less than three thousand (3,000) square feet of floor area or stores that do not utilize in excess of ten percent (10%) of its floor area for the proposed exclusive use; (iii) that the exclusive use continues only for a period of ten (10) years from January 4, 2002; (iv) that the prospective tenant of Developer requires such exclusive use language; and (v) that the prospective use is a lifestyle use, Owner shall not refuse to approve any such exclusive use.

#### **4 Default and Remedies.**

**4.1 Notice and Cure.** A default shall occur under this Agreement if any party (a **"Defaulting Party"**) shall fail to perform any of the terms, provisions, covenants or conditions to be performed or complied with by the Defaulting Party pursuant to this Agreement and any such failure, except as to emergencies or as to a matter which shall put Developer or Owner into a default of another Agreement, shall remain uncured for a period of thirty (30) days after the other party (the **"Non-Defaulting Party"**) shall have served upon the Defaulting Party written notice of such failure.

**4.2 Entry.** Each party hereto hereby grants to the other a non-exclusive right of entry as herein after defined, in and over their respective real property (including the right to enter any buildings thereon) for the purposes reasonably necessary, to enable the other to determine that any of the terms, provisions, covenants or conditions of this Agreement are not being fully performed.

**4.3 Relief.** In the event of a breach, or attempted or threatened breach, of any terms, provisions, covenants or conditions of this Agreement, the Non-Defaulting Party shall be entitled forthwith to full and adequate relief including but not limited to any equitable relief, such as injunction and damages, and all other available legal and equitable remedies from the consequences of such breach.

**4.4 Attorney Fees.** The unsuccessful party in any action shall pay to the prevailing party a reasonable sum for attorney's fees, court costs and any other related expenses which shall be deemed to have accrued on the date such action was filed.

**5 Notices.** All notices, approvals, consents, or requests given or made pursuant to this Agreement shall be in writing and either (i) sent by a nationally recognized overnight courier, (ii) personally delivered, or (iii) sent by registered or certified mail with the postage prepaid. Notices personally delivered shall be deemed delivered on the date of delivery. Notices via overnight courier shall be deemed delivered on the date following deposit with such courier and certified or registered mail shall be deemed delivered three (3) business days after deposit with the U.S. Mail, as applicable. Any notice from counsel for either party shall be deemed an official notice from such party. Notices to Owner shall be addressed to the address listed above. Notices to Developer shall be addressed to the address listed above with copies to: Mr. Michael L. Ebert, Ebert & Rehorn, 6263 N. Scottsdale Road, Suite 222, Scottsdale, AZ 85250, and to Richard B. Katz, Esq., 6299 Nall Avenue, Suite 210, Mission, Kansas 66202. Such addresses may be changed from time to time by either party hereto by serving notice as herein provided. The parties hereto agree that if, at the time of the sending of any notice required or permitted to be given hereunder, the interests of any Party hereto in its respective property shall be encumbered by a first mortgage and the other

Party hereto has been notified in writing thereof and of the name and address of the mortgagee a copy of said notice shall also be sent to such mortgagee by registered or certified mail at the address so given.

- 6 **Term.** The term of this Agreement shall be for ten (10) years. Notwithstanding any other provision however, any Exclusive shall have the term provided in the particular exclusive and if no term is provided, the Exclusive shall continue as long as the tenant for whom the Exclusive was declared remains a tenant in the Developer Parcels.
- 7 **Legal Representation of the Parties.** This Agreement was negotiated by the Parties hereto with the benefit of legal representation and any rules of construction or interpretation otherwise requiring this Agreement to be construed or interpreted against any Party shall not apply to any construction or interpretation hereof or thereof. The Parties recognize that this Agreement was negotiated by the Katz Law Firm and the Brown & Wolff Law Firm and each waives any conflict of interest those firms may have.
- 8 **Headings.** The headings herein are inserted only as a matter of convenience and for reference and in no way define, limit, or describe the scope or intent of this document nor in any way affect the terms and provisions hereof.
- 9 **Entire Agreement.** This Agreement constitutes the entire agreement by Developer and Owner with respect to the Adjacent Parcel. This Agreement once executed and delivered shall not be modified or altered in any respect except by a writing executed and delivered in the same manner as required by this document. This Agreement shall be considered to have been executed by a person if there exists a photocopy, facsimile copy, or a photocopy of a facsimile copy of an original hereof or of a counterpart hereof which has been signed by such person. Any photocopy, facsimile copy, or photocopy of facsimile copy of this Agreement or a counterpart hereof shall be admissible into evidence in any proceeding as though the same were an original.
- 10 **Governing Law.** These covenants and restrictions shall be governed by and construed under the laws of Nebraska.
- 11 **Severability.** If any provision of this Declaration of Covenants and Restrictions or the application thereof to any persons or circumstances shall, to any extent, be invalid or unenforceable under applicable law, the remainder of this Declaration of Covenants and Restrictions, or the application of such provision to other persons or circumstances, shall not be affected thereby, and each provision of these covenants and restrictions shall be valid and enforceable to the fullest extent permitted by law.
- 12 **Further Assistance.** Developer and Owner agree to perform such other acts, and to execute, acknowledge, and/or deliver subsequent to the Closing such other instruments, documents and other materials as Developer or Owner may reasonably request in order to further effectuate any of the terms and conditions, agreements, restrictions, or covenants of this Agreement.
- 13 **Time of Essence.** The parties agree that time is an essential element to the performance of their respective obligations hereunder.

**Exhibits**

- Exhibit A Legal Description of Developer Property
- Exhibit B Legal Description of Adjacent Parcel
- Exhibit C Site Plan
- Exhibit D Restricted Tenants
- Exhibit E Prohibited Uses

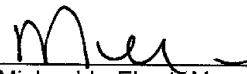
**IN WITNESS WHEREOF**, the undersigned has executed this Declaration of Covenants and Restrictions the day and year first written above.

**"DEVELOPER"**

168<sup>TH</sup> AND DODGE, L.P., a Nebraska limited partnership

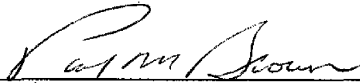
By: RED DEVELOPMENT OF WEST DODGE, LLC, a Missouri limited liability company, its general partner

By: E&R Holdings, LLC, an Arizona limited liability company, Manager

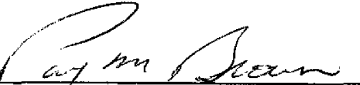
By:   
Michael L. Ebert, Manager

**"OWNER"**

QUANTUM PROPERTIES, L.L.C., a Nebraska limited liability company

By:   
Paul M. Brown, Manager

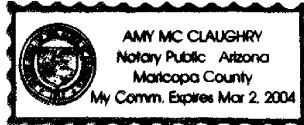
QUANTUM PROPERTIES II, L.L.C., a Nebraska limited liability company

By:   
Paul M. Brown, Manager

STATE OF ARIZONA )  
 ) ss.  
COUNTY OF MARICOPA )

On May 7, 2003, before me, the undersigned, a Notary Public in and for said state, personally appeared Michael L. Ebert, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument, the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

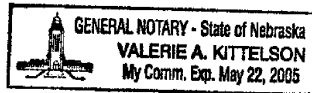


[Signature]  
Notary Public in and for said State

STATE OF NEBRASKA )  
 ) ss.  
COUNTY OF DOUGLAS )

On May 5, 2003, before me, the undersigned,, a Notary Public in and for said state, personally appeared Paul M. Brown, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument, the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

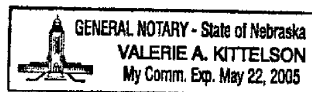


[Signature]  
Notary Public in and for said State

STATE OF NEBRASKA )  
 ) ss.  
COUNTY OF DOUGLAS )

On May 5, 2003, before me, the undersigned,, a Notary Public in and for said state, personally appeared Paul M. Brown, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument, the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.



[Signature]  
Notary Public in and for said State

This instrument was prepared by Richard B. Katz, The Katz Law Firm, 6299 Nall Avenue, Suite 210, Shawnee Mission, Kansas 66202.

EXHIBIT A

LEGAL DESCRIPTION OF DEVELOPER PROPERTY

Lots 1 through 10, Outlot A and Outlot B, Village Pointe, a subdivision in Douglas County, Nebraska.



EXHIBIT B

LEGAL DESCRIPTION OF PARCEL 1 OF ADJACENT PROPERTY

Lots 11 and 12, Village Pointe, a subdivision in the City of Omaha, Douglas County, Nebraska.

LEGAL DESCRIPTION OF PARCEL 2 OF ADJACENT PROPERTY

Lots 1 through 5 and Outlot A, Town Center at Pacific Springs, a subdivision in Douglas County, Nebraska.

Exhibit "C"

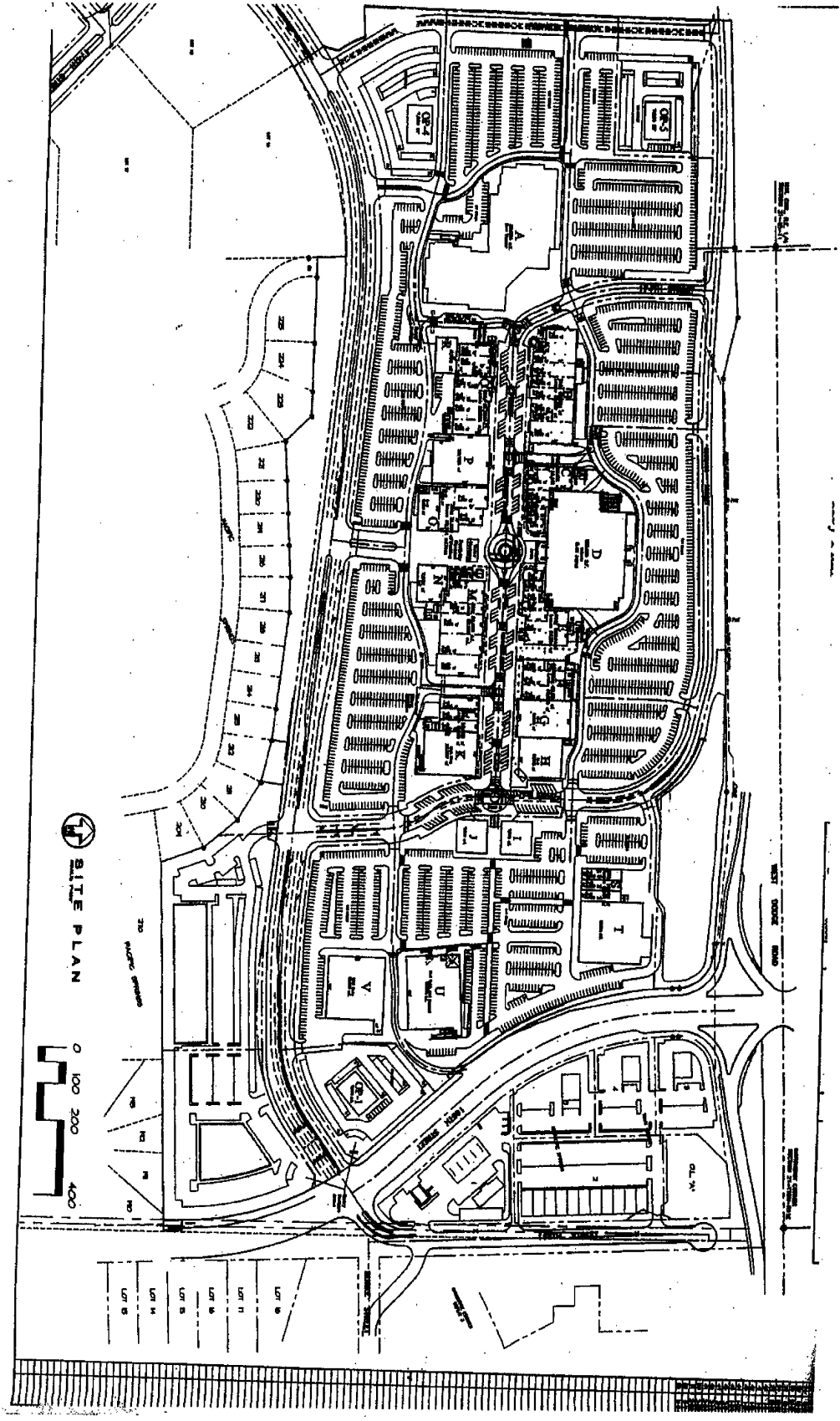


EXHIBIT D  
PROTECTED TENANTS

The following list is a representation of typical lifestyle center tenants:

Abercrombie  
Abercrombie & Fitch  
Acorn  
Adreinne Vittadini  
Aeropostale  
Albertsons  
AMC Theatres  
American Eagle  
Ann Taylor Loft  
Anthropologie  
Apple Computer  
Aveda  
Banana Republic  
Barnes & Noble  
Bath & Body Works  
Bebe  
Bed, Bath & Beyond  
Big Bowl  
Blondies  
Bombay Company  
Borders  
Bose  
Bravo  
Brighton's  
Brooks Brothers  
Brookstone  
Buckle  
Build A Bear  
California Pizza Kitchen  
Candleman  
Casual Corner  
Charlotte Russe  
Cheesecake Factory  
Chico's  
Christopher and Banks  
Claire's  
Coach  
Coldwater Creek  
Cosi  
Cost Plus  
Crate & Barrel  
Dick's Sporting Goods  
DSW

Eddie Bauer / Home  
Express  
Finishline  
Flemings  
Galyans  
Gap/Gap Kids/Baby/Body  
Hallmark  
Harolds  
Helzberg  
Hollister Co.  
J Crew  
J Jill  
Jillian's  
Johnston Murphy  
Jos A Banks  
KB Toys  
Kona Grill  
Landmark Luggage  
Lane Bryant  
Learning Express  
Lencrafters  
Limited TOO  
Macaroni Grill  
Mikasa  
Michaels  
Motherhood Maternity  
Nine West  
Northface  
Old Navy  
Origins  
Pacific Sunwear  
Panda Express  
Panera Bakery  
PF Changs  
Pottery Barn / Pottery Barn Kids  
Sam Goody  
Scheel's  
Starbucks  
Sunglass Hut  
Talbot's  
Timberland  
Ulta  
Victoria's Secret  
Von Maur  
Walking Company  
White House/Black Market  
Whole Foods  
Williams-Sonoma  
Wet Seal



Wild Oats  
Yankee Candle  
Z Gallerie

## EXHIBIT E

## PROHIBITED USES

As used in this Declaration of Covenants and Restrictions, the term "**Prohibited Uses**" shall mean any of the following uses:

1. Any use which emits or results in strong, unusual or offensive odors, fumes, dust or vapors, is a public or private nuisance, emits noise or sounds which are objectionable due to intermittence, beat, frequency, shrillness or loudness, creates a hazardous condition, or is used in whole or in part, as for warehousing or the dumping or disposing of garbage or refuse;
2. Any operation primarily used as a storage facility and any assembling, manufacturing, distilling, refining, smelting, agricultural, or mining operation;
3. Any mobile home park, trailer court, labor camp, junkyard, or stockyard (except that this provision shall not prohibit the temporary use of construction trailers during periods of construction, reconstruction, or maintenance);
4. Any dumping, disposing, incineration, or reduction of garbage (exclusive of trash compactors or trash containers located near the rear of any building);
5. Any "Pornographic Use", which shall include, without limitation, a store displaying for sale or exhibition books, magazines or other publications containing any combination of photographs, drawings or sketches of a sexual nature, which are not primarily scientific or educational, or a store offering for exhibition, sale or rental video cassettes or other medium capable of projecting, transmitting or reproducing, independently or in conjunction with another device, machine or equipment, an image or series of images, the content of which has been rated or advertised generally as NC-17 or "X" or unrated by the Motion Picture Rating Association, or any successor thereto; the parties hereto acknowledge and agree the sale of books, magazines and other publications by a national bookstore of the type normally located in first-class shopping centers in the State in which the Shopping Center is located (such as, for example, Borders and Barnes & Noble, as said stores currently operate) shall not be deemed a "pornographic use" hereunder; or massage parlor;
6. Any so-called "head shop", or other establishment primarily selling or exhibiting drug-related paraphernalia;
7. Any unlawful use;
8. Any pawn shop, gun shop, or tattoo parlor; and
9. Any carnival, amusement park or circus.