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PATRICK F GILL, AUDITOR AND RECORDER  
WOODBURY COUNTY IOWA

**OPERATION AND EASEMENT AGREEMENT**

**BETWEEN**

**KOHL'S DEPARTMENT STORES, INC.**

**AND**

**LAKEPORT COMMONS, LLC**

**THIS DOCUMENT PREPARED BY  
AND AFTER RECORDING MAIL TO:**

Alan J. Salle  
Law Department  
Kohl's Department Stores, Inc.  
N56 W17000 Ridgewood Drive  
Menomonee Falls, Wisconsin 53051

## **OPERATION AND EASEMENT AGREEMENT**

11 THIS OPERATION AND EASEMENT AGREEMENT ("OEA") is made and entered into as of the day of March, 2005, by and between KOHL'S DEPARTMENT STORES, INC., a Delaware corporation, having its principal place of business at N56 W17000 Ridgewood Drive, Menomonee Falls, Wisconsin 53051 ("Kohl's"), and LAKEPORT COMMONS, LLC, an Iowa limited liability company, having its principal place of business at c/o Cormac Properties, 16820 Frances Street, Omaha, Nebraska 68130 ("Developer").

### **WITNESSETH**

**WHEREAS**, Kohl's is the owner of a certain tract of land legally described in EXHIBIT A attached hereto and made a part hereof and identified as the "Kohl's Tract" on the site plan attached hereto as EXHIBIT X and made a part hereof (the "SITE PLAN");

**WHEREAS**, Developer is the owner of certain tracts of land legally described in EXHIBIT B attached hereto and made a part hereof and identified as the "Developer Tract" on the SITE PLAN;

**WHEREAS**, Developer is also the owner of certain tracts of land legally described in EXHIBIT C attached hereto and made a part hereof and identified as the "Outlot Tracts" on the SITE PLAN;

**WHEREAS**, the Kohl's Tract, the Developer Tract and the Outlot Tracts (collectively, the "Shopping Center") are contiguous and adjacent to each other as shown on the SITE PLAN; and

**WHEREAS**, the signatories hereto intend to develop and operate their respective Tracts in conjunction with each other as integral parts of a retail shopping complex, and in order to effectuate the common use and operation thereof, they desire to enter into certain covenants and agreements, and to grant to each other certain reciprocal easements in, to, over and across their respective Tracts.

**NOW, THEREFORE**, in consideration of the premises, the covenants and agreements hereinafter set forth and in furtherance of the parties' understanding, it is agreed as follows:

### **ARTICLE 1**

#### **DEFINITIONS**

1.1 **Anchor Occupant**. "Anchor Occupant" shall mean any Occupant that occupies more than forty-five thousand (45,000) square feet of Floor Area within the Shopping Center.

1.2 **Approving Party**. "Approving Party" shall mean the Party designated from time to time to make certain decisions and/or give certain approvals pursuant to the terms of this OEA. There shall be one Approving Party representing the Developer Tract and one Approving Party representing the Kohl's Tract. The Approving Party representing the Developer Tract shall also represent the Outlot Tracts. Developer shall be the initial Approving Party for the Developer Tract, and Kohl's shall be the initial Approving Party for the Kohl's Tract. Each Approving Party shall have the right to assign its position as Approving Party pursuant to Section 12.4.

1.3 **Building**. "Building" shall mean any enclosed structure placed, constructed or located on a Tract, which for the purpose of this OEA shall include any appurtenant canopies, supports, loading docks, truck ramps and other outward extensions.

1.4 **Building Area.** "Building Area" shall mean those areas of the Shopping Center which are designated as such on the SITE PLAN and within which Buildings and Outside Sales Areas may be constructed, placed or located.

1.5 **Claims.** "Claims" shall mean claims, losses, liabilities, actions, proceedings, costs and expenses (including reasonable attorneys' fees and costs of suit).

1.6 **Common Area.** "Common Area" shall mean all areas within the Shopping Center, exclusive of Buildings and Outside Sales Areas.

1.7 **Constant Dollars.**

(a) "Constant Dollars" shall mean the present value of the dollars to which such phrase refers. The first adjustment of Constant Dollars shall occur on January 1, 2010, and Constant Dollars shall be adjusted every five (5) years thereafter. Constant Dollars shall be determined by multiplying the dollar amount to be adjusted by a fraction, the numerator of which is the Current Index Number and the denominator of which is the Base Index Number.

(b) "Base Index Number" shall mean the level of the Index for October, 2005.

(c) "Current Index Number" shall mean the level of the Index for the month of October of the year preceding the adjustment year.

(d) "Index" shall mean the Consumer Price Index for All Urban Consumers (CPI-U), U.S. City Average, published by the Bureau of Labor Statistics of the United States Department of Labor (base year 1982-84=100), or if publication of the Index is discontinued, a substitute index selected by the Approving Parties of comparable statistics computed by an agency of the United States Government or, if none, by a substantial and responsible periodical or publication of recognized authority most closely approximating the result which would have been achieved by the Index.

1.8 **Floor Area.** "Floor Area" shall mean the actual number of square feet of space contained on each floor within a Building, as measured from the exterior faces of the exterior walls or storefront and/or the centerline of any common walls, including mezzanine and basement space; provided, however, that the following areas shall not be included in such calculations:

(a) loading docks and platforms, transformer vaults, utility and mechanical penthouses, and utility enclosures;

(b) mezzanine space and basement space which are not used for the display or sale of merchandise;

(c) space attributable to multi-deck, platform, rack and other multi-level systems used solely for the storage of merchandise to the extent located above the ground floor; and

(d) Outside Sales Areas.

Within thirty (30) days after written request from another Party therefor, a Party shall certify to the requesting Party the amount of Floor Area applicable to each Building on its Tract. If any Party causes an as-built survey to be prepared with respect to any portion of the Shopping Center, such Party shall furnish a copy of the survey to the other Parties for informational purposes only.

1.9 **Indemnify.** "Indemnify" shall mean indemnify, protect, hold harmless and defend with counsel designated by the insurer charged with the obligation to defend (or if no insurer is involved, with counsel reasonably acceptable to the Person being defended).

1.10 **Laws.** "Laws" shall mean and include all applicable laws, rules, regulations, orders, ordinances, statutes and other requirements of all federal, state, county and municipal authorities having jurisdiction over the Shopping Center.

1.11 **Major Occupant.** "Major Occupant" shall mean any Occupant that occupies more than fifteen thousand (15,000) square feet of Floor Area within the Shopping Center.

1.12 **Occupant.** "Occupant" shall mean any Person from time to time entitled to the use and occupancy of any portion of a Building in the Shopping Center under an ownership right or any lease, sublease, license, concession or other similar agreement.

1.13 **Outlot Tracts.** "Outlot Tracts" shall mean the portions of the Shopping Center legally described on EXHIBIT C attached hereto and made a part hereof and identified on the SITE PLAN as "Outlot 2", "Outlot 3", "Outlot 4", "Outlot 5", "Outlot 6", "Outlot 7", "Outlot 8", "Outlot 9", "Outlot 10" and "Outlot 11".

1.14 **Outside Sales Area.** "Outside Sales Area" shall mean those areas, if any, designated on the SITE PLAN which from time to time may be used for sales, display and/or storage purposes.

1.15 **Party.** "Party" shall mean each signatory hereto and their respective successors and assigns who become owners of any portion of the Shopping Center.

1.16 **Permittee.** "Permittee" shall mean all Occupants and the officers, directors, employees, agents, contractors, customers, vendors, suppliers, visitors, invitees, licensees, subtenants, and concessionaires of Occupants insofar as their activities relate to the intended development, use and occupancy of the Shopping Center; provided, however, persons engaged in civic, public or political activities within the Shopping Center, including but not limited to the following activities, shall not be considered to be Permittees:

- (a) exhibiting any placard, sign or notice;
- (b) distributing any circular, handbill, placard or booklet;
- (c) soliciting memberships or contributions for private, civic, public or charitable purposes;
- (d) parading, picketing or demonstrating; and
- (e) failing to follow rules or regulations established by the Parties relating to the use of the Shopping Center.

1.17 **Person.** "Person" shall mean any individual, partnership, firm, association, corporation, limited liability company, trust, or any other form of business or government entity.

1.18 **Restaurant.** "Restaurant" shall mean any operation or business that requires a governmental permit, license and/or authorization to prepare and/or serve food for either on-site or

off-site consumption; provided, however, notwithstanding anything herein to the contrary, a supermarket, grocery store or similar operation shall not be deemed a Restaurant.

1.19 **Tract**. "Tract" shall mean that portion of the Shopping Center owned by a Party.

1.20 **Utility Lines**.

(a) "Utility Lines" shall mean those facilities and systems for the transmission of utility services, including the drainage and storage of surface water.

(b) "Common Utility Lines" shall mean those Utility Lines that are installed to provide the applicable service to both the Kohl's Tract and the balance of the Shopping Center. The surface water collection, retention and distribution facilities shall be deemed to be a Common Utility Line.

(c) "Separate Utility Lines" shall mean those Utility Lines that are installed to provide the applicable service to either the Kohl's Tract or the balance of the Shopping Center, but not both. For the purpose of this OEA, the portion of a Utility Line extending between a Common Utility Line and a Building shall be considered a Separate Utility Line.

## **ARTICLE 2**

### **EASEMENTS**

2.1 **Ingress, Egress and Parking**.

(a) During the term of this OEA each Party hereby grants and conveys to each other Party for its use and for the use of its Permittees, in common with others entitled to use the same, a non-exclusive easement for the passage and parking of vehicles over and across the parking and driveway areas of the grantor's Tract, as the same may from time to time be constructed and maintained for such use, and for the passage and accommodation of pedestrians over and across the parking, driveway and sidewalk areas of the grantor's Tract, as the same may from time to time be constructed and maintained for such use.

(b) Each Party hereby grants and conveys to each other Party for its use and for the use of its Permittees, in common with others entitled to use the same, a non-exclusive perpetual easement for the passage of vehicles over and across the access drives and service drives of the grantor's Tract, if any, that are designated on the SITE PLAN as "Perpetual Access".

(c) The easement rights granted under this Section 2.1 shall be subject to the following reservations as well as any other applicable provisions contained in this OEA:

(i) Each Party reserves the right to close off its portion of the Common Area for such reasonable period of time as may be legally necessary, in the reasonable opinion of such Party's counsel, to prevent the acquisition of prescriptive rights by anyone; provided, however, that prior to closing off any portion of the Common Area, as herein provided, such Party shall give written notice to each other Party of its intention to do so, and shall attempt to coordinate such closing with each other Party so that no unreasonable interference with the passage of pedestrians or vehicles shall occur;

(ii) Each Party that has established a staging and/or storage area on its Tract pursuant to Section 3.4 reserves the right to exclude and restrain persons from using the staging and/or storage area during the period of time it is used for such purposes;

(iii) Each Party reserves the right to exclude and restrain Occupants of the Outlot Tracts and their Permittees from parking vehicles on its Tract, and notwithstanding anything to the contrary contained in this OEA, the easements granted in this OEA for the parking of vehicles shall not extend to the Occupants of the Outlot Tracts and their Permittees; and

(iv) Each Party reserves the right at any time and from time to time to exclude and restrain any Person who is not a Permittee from using the Common Area on its Tract.

## 2.2 **Utilities.**

(a) Each Party hereby grants and conveys to each other Party non-exclusive perpetual easements in, to, over, under, along and across those portions of the Common Area (exclusive of any portion located within Building Areas) located on the grantor's Tract necessary for the installation, operation, flow, passage, use, maintenance, connection, repair, relocation, and removal of Utility Lines serving the grantee's Tract, including but not limited to, sanitary sewers, storm drains, and water (fire and domestic), gas, electrical, telephone and communication lines.

(b) All Utility Lines shall be underground except:

(i) ground mounted electrical transformers (which shall be appropriately screened from view);

(ii) above-ground surface water collection, retention and distribution facilities shown on the SITE PLAN;

(iii) as may be necessary during periods of construction, reconstruction, repair, or temporary service;

(iv) as may be required by governmental agencies having jurisdiction over the Shopping Center;

(v) as may be required by the provider of such service; and

(vi) fire hydrants.

(c) At least twenty (20) days prior to any installation, maintenance, connection, repair, relocation or removal of utility lines located on another party's tract pursuant to the easement granted herein (except in an emergency, the work may be initiated with reasonable notice), the grantee shall first provide the grantor with a written statement describing the need for such work, shall identify the proposed location of the Utility Line, the nature of the service to be provided, the anticipated commencement and completion dates for the work and shall furnish a certificate of insurance showing that its contractor has obtained the minimum insurance coverage required by Section 10.2.

(d) The initial location of any Utility Line shall be subject to the prior written approval of the Party whose Common Area is to be burdened thereby, such approval not to be unreasonably withheld or delayed. The easement area shall be no wider than necessary to reasonably satisfy the requirements of a private or public utility, or five feet (5') on each side of the centerline if the easement is granted to a Party. Upon request, the grantee shall provide to the grantor a copy of an as-built survey showing the location of such Utility Line.

(e) Except as otherwise agreed to by the grantor and the grantee, any Party installing Separate Utility Lines pursuant to the provisions of this subparagraph shall pay all costs and expenses with respect thereto and shall cause all work in connection therewith (including general clean-up and proper surface and/or subsurface restoration) to be completed as quickly as possible and in a manner so as to minimize interference with the use of the Common Area. In addition, the grantee of any Separate Utility Line shall indemnify the grantor from all Claims arising out of or resulting from the installation, maintenance and operation of the Utility Line.

(f) The grantor shall have the right to relocate a Utility Line upon twenty (20) days' prior written notice, provided that such relocation:

(i) shall not be commenced during the months of October, November or December;

(ii) shall not interfere with or diminish the utility service to the grantee during the grantee's business hours; and if an electrical line/computer line is being relocated, then the grantor and grantee shall coordinate such interruption to eliminate any detrimental effects;

(iii) shall not reduce or unreasonably impair the usefulness or function of such Utility Line;

(iv) shall be performed without cost or expense to grantee;

(v) shall be completed using materials and design standards which equal or exceed those originally used; and

(vi) shall have been approved by the provider of such service and the appropriate governmental or quasi-governmental agencies having jurisdiction thereover.

Documentation of the relocated easement area, including the furnishing of an "as-built" survey, shall be performed at the grantor's expense and shall be accomplished as soon as possible following completion of such relocation.

(g) Each Party hereby grants and conveys to each other Party owning an adjacent Tract the perpetual right and easement to discharge surface storm drainage and/or runoff from the grantee's Tract over, upon and across the Common Area of the grantor's Tract, upon the following conditions and terms:

(i) The Common Area grades and the surface water drainage/retention system for the Shopping Center shall be initially constructed in strict conformance with the details approved by the Approving Parties; and

(ii) No Party shall alter or permit to be altered the surface of the Common Area or the drainage/retention system constructed on its Tract if such alteration would materially increase the flow of surface water onto an adjacent Tract either in the aggregate or by directing the flow of surface water to a limited area.

### 2.3 **Building Encroachments.**

(a) In order to accommodate any Building improvements which inadvertently may be constructed beyond a Tract's boundary line, each Party grants to each Party owning an adjacent Tract an easement, not to exceed a maximum lateral distance of six inches (6"), in, to, over, under and across that portion of the grantor's Tract adjacent to such common boundary line for the maintenance and replacement of such encroaching Building improvements.

(b) If a constructing Party (the "Constructing Party") determines that it is necessary to place underground piers, footings and/or foundations ("Subsurface Construction Elements") across the boundary line of its Tract, the Constructing Party shall advise the Party owning the adjacent Tract (the "Adjacent Party") of its construction requirement and shall provide plans and specifications relating thereto, including proposed construction techniques for the Subsurface Construction Elements. The Adjacent Party hereby grants and conveys to the Constructing Party for the benefit of its Tract an easement, not to exceed a maximum lateral distance of five feet (5'), in, to, under and across that portion of the Adjacent Party's Tract not theretofore occupied by any then existing structure, for the installation, maintenance and replacement of such Subsurface Construction Elements.

(c) The Adjacent Party reserves the right to require the Constructing Party to make reasonable modifications to the design specifications for the Subsurface Construction Elements in order to permit the Adjacent Party the opportunity to use the same in connection with the construction of its Building improvements to the end that each Party shall be able to place its Building immediately adjacent to the common boundary line. If a common Subsurface Construction Element is used by the Parties, each shall assume and pay its reasonable share of the cost and expense of the design and construction thereof. If any Building using a common Subsurface Construction Element is destroyed and not replaced or is removed, the common Subsurface Construction Element shall remain in place for the benefit of the other Building using the same.

(d) The foregoing easement grants shall not diminish or waive any right of a Party to recover damages resulting from the constructing Party's failure to construct its Building within its Tract in the case of Section 2.3(a), or within the easement area limits in the case of Section 2.3(b). The easements in each instance shall:

(i) continue in effect for the term of this OEA and thereafter for so long as the Building using the easement area exists (including a reasonable period to permit reconstruction or replacement of such Building if the same shall be destroyed, damaged or demolished); and

(ii) include the reasonable right of access necessary to exercise and enjoy such grant upon terms and with the limitations described in Section 3.5.



(e) With respect to Buildings constructed along the common boundary line between Tracts, nothing herein shall be deemed to create or establish:

(i) a "common" or "party" wall to be shared with the adjacent Building; or

(ii) the right for a Building to receive support from or apply pressure to the adjacent Building.

2.4 **Sign Easements.** The Parties hereby grant and convey to each of the Parties entitled to place sign panels on Pylon Sign 1 and/or Pylon Sign 2 (as hereinafter defined), for their use and for the use of designated Occupants of their Tracts, a non-exclusive perpetual easement for the right and privilege to place sign panels on Pylon Sign 1 and/or Pylon Sign 2, together with reasonable access over, upon and across the lands upon which such pylons are constructed. Each Party shall have the right to use the panel space allocated to such Party in Section 9.1 and EXHIBIT D of this OEA and no other panel space whatsoever. The foregoing easement, together with the rights included therewith, shall be for the benefit of and appurtenant to the lands of each of the Parties entitled to place sign panels on Pylon Sign 1 and/or Pylon Sign 2 and shall be binding on and burden the lands upon which Pylon Sign 1 and Pylon Sign 2 are constructed.

2.5 **Restriction.** No Party shall grant any easement for the benefit of any property not within the Shopping Center; provided, however, that the foregoing shall not prohibit the granting or dedicating of easements by a Party on its Tract to governmental or quasi-governmental authorities or to public utilities.

### **ARTICLE 3**

#### **CONSTRUCTION OF BUILDINGS AND OUTSIDE SALES AREAS**

##### **3.1 General Requirements.**

(a) All construction activities performed within the Shopping Center shall be performed in compliance with all applicable Laws. All construction shall use new materials, and shall be performed in a good, safe, workmanlike manner.

(b) No construction activities performed by a Party shall:

(i) cause any unreasonable increase in the cost of constructing improvements upon another Party's Tract;

(ii) unreasonably interfere with construction work being performed on any other part of the Shopping Center;

(iii) unreasonably interfere with the use, occupancy or enjoyment of any part of the remainder of the Shopping Center by any other Party or its Permittees; or

(iv) cause any Building located on another Tract to be in violation of any Law.

(c) No enclosed mall shall be permitted within the Developer Tract without the prior written consent of the Approving Party for the Kohl's Tract.

**3.2 Permissible Building Areas.**

(a) Although no Party shall have an obligation to commence construction of any Building on its Tract, once construction of a Building has been commenced, such Building shall be completed. The following restrictions shall apply unless otherwise approved in writing by the Approving Parties, which approval may be granted or withheld in the sole and absolute discretion of the Approving Parties:

(i) Buildings may be constructed only within the Building Areas shown on the SITE PLAN;

(ii) If a Building Area has a maximum Floor Area designation on the SITE PLAN, such amount shall not be exceeded;

(iii) one or more Buildings may be constructed within a Building Area except that no more than one (1) Building may be constructed on each of the Outlot Tracts, except for Outlot 2, which may have two (2) Buildings thereon; and

(iv) Outside Sales Areas may be developed only in the Building Areas and Outside Sales Areas shown on the SITE PLAN.

(b) If a portion of any Building Area is at any time paved and used as Common Area, such portion may be subsequently used for building purposes provided that all parking requirements and other provisions relating to such Tract are complied with. Likewise, such building may be subsequently razed and, until replaced, the area shall thereafter be deemed part of the Common Area, and shall be improved to the same standards as the other Common Area, either as automobile parking and drive area or as landscaped area.

(c) If an Outside Sales Area is being used for the display and sale of merchandise, the Outside Sales Area shall be enclosed by a fence or other security barrier, but shall not be heated nor air-conditioned; otherwise the surrounding barrier, if any, shall be removed by the Occupant and the surface of the Outside Sales Area shall be used as Common Area, or if the Outside Sales Area is located within a Building Area, the Outside Sales Area may be used for the location of Buildings.

**3.3 Building Height Restrictions.**

(a) No Building shall exceed one story in height; provided, however, the foregoing restriction shall not prohibit the construction of mezzanines.

(b) No Building shall exceed the following height restrictions without the approval of the Approving Parties, which approval may be granted or withheld by the Approving Parties in their sole and absolute discretion:

- |       |  |           |
|-------|--|-----------|
| (i)   | On the Kohl's Tract  | - 47 feet |
| (ii)  | On the Developer Tract   | - 35 feet |
| (iii) | On the Outlot Tracts (except the Outlot Tract identified as "Outlot 2" on the <u>SITE PLAN</u> ) | - 25 feet |

(iv) Outlot Tract identified as "Outlot 2"  
on the SITE PLAN

- 47 feet

(c) The height of any Building shall be measured perpendicular from the finished floor elevation of the ground level of the Building to the top of the roof structure, including any screening, parapet, penthouse, mechanical equipment or similar appurtenance located on the roof of such Building. Any Party shall have the right to install, maintain, repair, replace and remove Communications Equipment used in connection with the business being conducted by an Occupant on the top of the Building on its Tract which may extend above the height limits established above; provided, however, such Communication Equipment shall be set back from the front of the Building to reduce visibility thereof by customers. As used herein, the phrase "Communications Equipment" means such things as satellite and microwave dishes, antennas and laser heads, together with associated equipment and cable.

### 3.4 Staging Areas.

(a) In connection with any construction, reconstruction, repair or maintenance on its Tract, each Party reserves the right to create a temporary staging and/or storage area in the Common Area or in the Building Area on its Tract at such location as will not (i) unreasonably interfere with access between such Tract and the other areas of the Shopping Center, (ii) obstruct the access drives and service drives, if any, which are designated on the SITE PLAN as "Perpetual Access", or (iii) obstruct any major access drive situated immediately in front of the Building Areas, except to extent otherwise approved by the Approving Parties.

The staging and/or storage area shall not exceed twelve thousand (12,000) square feet in area unless otherwise shown on the SITE PLAN or otherwise approved by the Approving Parties.

(b) If a business is operating on any Tract, then no other Party's staging and/or storage area shall be located within one hundred feet (100') of said operating business, unless located within a Building Area. If substantial work is to be performed, the constructing Party shall, at the request of any Approving Party, fence off the staging and/or storage area.

(c) Prior to the commencement of any work that requires the establishment of a staging and/or storage area on its Tract, a Party shall give at least twenty (20) days prior notice to the Approving Parties of the proposed location of such staging and/or storage area. All storage of materials and the parking of construction vehicles, including vehicles of workers, shall occur only on the constructing Party's Tract, and all laborers, suppliers, contractors and others connected with such construction activities shall use only the access points located upon the constructing Party's Tract, unless use of such access points is not reasonably practicable.

(d) Upon completion of such work, the constructing Party shall restore the affected Common Area to a condition equal to or better than that existing prior to commencement of such work.

**3.5 License to use Common Areas.**

(a) Each Party hereby irrevocably grants to each other Party and to its respective contractors, materialmen and laborers a temporary license during the term of this OEA for access and passage over and across the Common Area of the grantor's Tract as shall be reasonably necessary for the grantee to construct and/or maintain improvements upon the grantee's Tract; provided, however, such license shall be in effect only during periods when actual construction and/or maintenance is being performed and such license shall not be used in a manner that will unreasonably interfere with the use and operation of the Common Area by others. Prior to using the license granted herein, the grantee shall endeavor to notify the grantor of the work to be performed.

(b) Any Party availing itself of the temporary license shall promptly pay all costs and expenses associated with such work, shall complete such work as quickly as possible, and shall promptly clean the area and restore and/or repair the affected portion of the Common Area to a condition which is equal to or better than the condition which existed prior to the commencement of such work.

(c) If a dispute exists between the contractors, laborers, suppliers and/or others connected with construction activities, each Party shall have the right to prohibit the contractors, laborers, suppliers and/or others working for another Party from using the Common Area on its Tract.

**3.6 Adjacent Buildings.**

(a) The Parties hereby specifically consent to the placement of Buildings along their respective common boundary lines, and each Party shall support any request by another Party for a side-yard or setback variance if the same is required in order to accommodate such construction.

(b) The second Party to construct a Building adjacent to a common boundary line shall do so in a manner that does not result in damage to the improvements in place on the adjoining Tract, and such Party shall undertake and assume at its sole cost the obligation of completing and maintaining the nominal attachment (flashing and seal) of its Building to that of the existing Building on the other Tract, it being the intent of the Parties to establish and maintain the appearance of one continuous Building complex. In performing such attachment, the wall of one Building shall not receive support from nor apply pressure to the wall of the other Building.

**3.7 Side Yard Requirements.**

(a) The Parties acknowledge that Kohl's initially proposes to construct on the Kohl's Tract a Building which is classified as an "unlimited area" building under certain building codes (By way of explanation, but not limitation, an "unlimited area" building is designated II-N or V-N under the Uniform Building Code). All Buildings constructed within the Shopping Center shall comply with the following requirements:

(i) no Building shall be constructed within sixty feet (60') of the Building Area on an adjoining Tract unless such Building, hereinafter referred to as the "Adjacent Building," shall be located immediately adjacent to the common boundary line and is attached to the Building, if any, on the adjacent Tract in accordance with Section 3.6(b);

(ii) if an Adjacent Building exists, then no Building shall be located within sixty feet (60') of the Adjacent Building unless such Building is attached to the Adjacent Building in accordance with Section 3.6(b); the Adjacent Building and all other Buildings on the Tract that are attached to the Adjacent Building and to each other are hereinafter referred to as the "Building Group";

(iii) any Building that is not part of the Building Group, shall be located at least sixty feet (60') distant from the Building Group; and

(iv) the Adjacent Building or the Building Group, as the case may be, shall comply with the Building code requirements applicable to an "unlimited area" building, including without limitation the installation of an approved sprinkler system for fire protection.

(b) In addition to the requirements set forth above, no Building shall initially be placed or constructed on their respective Tracts in a manner which will, based on then existing governmental regulations, either preclude the construction of an "unlimited area" building within the Building Areas, or cause an existing "unlimited area" building thereon to no longer be in conformance with applicable building code requirements; provided, however, subsequent changes in governmental regulations shall not obligate a Party to modify or alter its existing Building.

(c) If required by any governmental authority, each Party shall join in a recordable declaration that confirms the existence of a sixty foot (60') clear area around the Building Areas.

### 3.8 **Liens.**

(a) If any mechanic's lien is filed against the Tract of one Party as a result of services performed or materials furnished for the use of another Party, the Party permitting or causing such lien to be so filed shall cause such lien to be discharged within fifteen (15) days after the entry of a final judgment (after all appeals) for the foreclosure of such lien and shall Indemnify the other Party and its Tract against all Claims on account of such lien or claim of lien.

(b) Nothing herein shall prevent a Party permitting or causing such lien from contesting the validity thereof in any manner such Party chooses so long as such contest is pursued with reasonable diligence and in good faith. If such contest is determined adversely (allowing for appeal to the highest appellate court), such Party shall promptly pay in full the required amount, together with any interest, penalties, costs or other charges necessary to release such lien.

(c) Notwithstanding the foregoing, upon request of the Party whose Tract is subject to such lien, the Party permitting or causing such lien to be filed shall promptly cause such lien to be released and discharged of record, either by paying the indebtedness which gave rise to such lien or by posting bond or other security as shall be required by law to obtain such release and discharge, unless such Party delivers to the other an undertaking from a title insurance company to discharge the lien in accordance with Section 3.8(a).

## **ARTICLE 4**

### **DEVELOPMENT OF COMMON AREA**

4.1 **Common Area.** The Common Area of the Developer Tract and the Kohl's Tract shall be initially constructed as shown on the SITE PLAN; provided, however, no fence or other barrier which would prevent or unreasonably obstruct the passage of pedestrian or vehicular travel shall be erected or permitted within or across the Common Area located within the Developer Tract and the Kohl's Tract, exclusive of (i) the limited curbing and other forms of traffic control depicted on the SITE PLAN and (ii) the permitted staging and/or storage areas. Contemporaneously with the construction of a Building upon its Tract, the constructing Party shall cause the Common Area on its Tract to be substantially completed no later than the day on which the first Occupant of such Tract opens for business with the public. Such work shall be done in a good and workmanlike manner and in accordance with good engineering standards.

4.2 **Parking Requirements.**

(a) The parking area on the Kohl's Tract, on each separate Tract comprising the Developer Tract and on each of the Outlot Tracts shall contain sufficient uncovered ground level, parking spaces in order to comply with the following minimum requirements:

(i) five (5.0) parking spaces for each one thousand (1,000) square feet of Floor Area;

(ii) if a business use contains a drive-up unit (such as remote banking teller or food ordering/dispensing facility), then there shall also be created space for stacking not less than five (5) automobiles for each drive-up unit;

(iii) any Restaurant containing less than two thousand five hundred (2,500) square feet of Floor Area shall have five (5) parking spaces for each one thousand (1,000) square feet of Floor Area devoted to such use; and

(iv) any Restaurant containing two thousand five hundred (2,500) or more square feet of Floor Area shall have ten (10) parking spaces for each one thousand (1,000) square feet of Floor Area devoted to such use.

(b) If an Occupant operates a Restaurant incidentally to its primary business purpose, then so long as such incidental operation continues, the portion of the Floor Area occupied by such Restaurant shall be excluded from the application of (iii) above. For the purpose of this clause only, a Restaurant shall be an "incidental operation" if it occupies less than seven percent (7%) of the Occupant's Floor Area and does not have a separate customer entry/exit door to the outside of the Building. If an Occupant uses Floor Area for Restaurant and other purposes, only the portion of Floor Area allocated for Restaurant purposes shall be subject to the increased parking requirements.

(c) The foregoing requirements, together with the parking requirements imposed under all applicable Laws, shall be satisfied throughout the term of this OEA for each Tract and for each of the Outlot Tracts without reliance on the easements granted under Section 2.1, except to the extent otherwise indicated on the SITE PLAN. Except to the extent otherwise indicated on the SITE PLAN, (i) all parking spaces shall be at a 90° angle to the spine and initially shall be not less than nine (9.0') in width, and (ii) the distance between rows of parking stalls initially shall be at least sixty feet (60'), measured from spine to spine.

(d) If a condemnation of part of a Tract or sale or transfer in lieu thereof reduces the number of usable parking spaces below that which is required herein, the Party whose Tract is so affected shall use commercially reasonable efforts (including using proceeds from the condemnation award or settlement) to restore and/or substitute ground level parking spaces in order to comply with the parking requirements set forth in this OEA. If such compliance is not possible, such Party shall not be deemed in default hereunder, but such Party shall not be permitted to expand the amount of Floor Area located upon its Tract. If such Floor Area is thereafter reduced other than by casualty, then the Floor Area on such Tract may not subsequently be increased unless the parking requirement is satisfied.

4.3 **Lighting Requirements.** The lighting system shall be designed in accordance with photometric plans approved by the Approving Parties to produce a minimum maintained lighting intensity measured at grade at all points in the Common Area of at least the following:

- (a) 1.0 foot-candle at the extreme edge of the parking or driveway areas;
- (b) 5.0 foot-candles in the driveway areas immediately in front of the entrance to any Building; and
- (c) 2.0 foot-candles in the balance of the parking and driveway areas.

Each Party may elect to control the lighting system located on its Tract. The type and design of the Common Area light standards shall be approved by the Approving Parties. The provisions of this Section 4.3 shall not apply to the Outlot Tracts; provided, however, nothing in this OEA shall be construed to prohibit or limit Developer's right to impose requirements upon one or more of the Outlot Tracts related to the subject matter of this Section without requiring the consent of any other Party.

4.4 **Slope, Pavement Materials and Utility Line Depth.**

(a) The slope in the driveway areas shall not exceed a maximum of four percent (4%), nor be less than a minimum of one percent (1%). The slope in the parking areas shall not exceed a maximum of two and one-half percent (2.5%), nor be less than a minimum of one percent (1%).

(b) All sidewalks and pedestrian aisles shall be comprised of concrete or other materials approved by the Approving Parties; the automobile parking areas, drives, and access roads shall be designed in conformity with the recommendations of a registered soils engineer approved by the Approving Parties which shall require the installation of a suitable base and the surfacing with an asphaltic concrete or concrete wearing material.

(c) Utility Lines that are placed underground shall be at depths designated by consultants approved by the Approving Parties.

The provisions of this Section 4.4 shall not apply to the Outlot Tracts; provided, however, nothing in this OEA shall be construed to prohibit or limit Developer's right to impose requirements upon one or more of the Outlot Tracts related to the subject matter of this Section without requiring the consent of any other Party.

**4.5 Common Area Modifications.**

(a) No Party shall make changes to the improved Common Area on its Tract without the approval of the Approving Parties, except that each Party hereby reserves the right, from time to time without obtaining the consent or approval of any other Party, to make at its own expense any insignificant change, modification or alteration in its portion of the Common Area, provided that:

(i) the accessibility of such Common Area for pedestrian and vehicular traffic (as it relates to the remainder of the Shopping Center) is not unreasonably restricted or hindered, and all parking stalls and rows and vehicular traffic lanes shall remain generally as shown on the SITE PLAN;

(ii) there shall be maintained at all times within such Common Area, a sufficient number of vehicular parking spaces to meet the parking requirements set forth in Section 4.2;

(iii) all Laws applicable to such modifications shall be satisfied by the Party performing the same; and such action shall not result in any other Party being in violation of any Law;

(iv) no change shall be made in the access points between the Common Area and the adjacent public streets; provided, however, that additional access points may be created with the approval of the Approving Parties, which approval shall not be unreasonably withheld;

(v) at least thirty (30) days prior to making any such change, modification or alteration, the Party desiring to do such work shall deliver to each other Party copies of the plans therefor; and

(vi) such work shall not be performed during the months of November and December.

(b) The provisions of this Section 4.5 do not apply to any changes, modifications or alterations of Common Area located within Building Areas that result from or arise out of the construction, expansion or maintenance of Buildings or Outside Sales Areas.

(c) The provisions of this Section 4.5 shall not apply to the Outlot Tracts; provided, however, the other restrictions set forth in this OEA with respect to the improvements on Outlot Tracts, including, without limitation, the building area restrictions contained in Section 3.2 and the building height restrictions contained in Section 3.3, shall remaining applicable.



## **ARTICLE 5**

### **COMMON AREA MAINTENANCE AND REPAIR**

#### **5.1 Common Area Maintenance Standards.**

(a) Each Party shall maintain, or cause to be maintained, the Common Area on its Tract in a safe and attractive condition and in a good state of repair. The unimproved Common Area shall be mowed and kept litter-free. The minimum standard of maintenance for the improved Common Area shall be comparable to the standard of maintenance followed in other first-class retail developments of comparable size in the metropolitan area in which the Shopping Center is located; notwithstanding the foregoing, however, the Common Area shall be operated, maintained and repaired in compliance with all applicable Laws and with the provisions of this OEA. All Common Area improvements shall be repaired or replaced with materials of a quality which is at least equal to the quality of the materials being repaired or replaced so as to maintain the architectural and aesthetic harmony and integration of the Shopping Center as a whole.

(b) The maintenance and repair obligation shall include, but shall not be limited to, the following:

(i) *Drive and Parking Areas.* Maintaining all paved surfaces and curbs in a smooth and evenly covered condition, including, without limitation, replacing base, skin patching, resealing and resurfacing (for the purpose of this section, an overlay of the drives and parking areas shall be considered to be a maintenance item).

(ii) *Debris and Refuse.* Periodically removing of all papers, debris, filth, refuse, ice and snow, including periodic vacuuming and broom sweeping to the extent necessary to keep the Common Area in a first-class, clean and orderly condition. All sweeping shall be performed at appropriate intervals during such times as shall not interfere with the conduct of business or use of the Common Area by Permittees. Snow shall be plowed as soon as a two-inch accumulation occurs and replowed as necessary to maintain less than a two-inch accumulation at all times; upon cessation of the snowfall, the Common Area shall be plowed to the paved surface.

(iii) *Non-Occupant Signs and Markers.* Maintaining, cleaning, repairing and replacing directional, stop and handicapped parking signs and markers; restriping of parking lots and drive lanes as necessary to maintain parking space designation and traffic direction; and keeping clearly marked fire lanes, loading zones, no parking areas and pedestrian crosswalks.

(iv) *Lighting.* Maintaining, cleaning, repairing and replacing Common Area lighting facilities, including light standards, wires, conduits, lamps, ballasts and lenses, time clocks and circuit breakers.

(v) *Landscaping.* Maintaining and replacing all landscape plantings, trees and shrubs, including those adjacent to the exterior walls of Buildings, in an attractive and thriving condition, trimmed and weed free. Maintaining and replacing landscape planters, including those adjacent to exterior walls of Buildings. Modifying irrigation system to satisfy governmental water allocation or emergency requirements.

(vi) **Obstructions.** Keeping the Common Area free from any obstructions including those caused by the sale or display of merchandise, unless such obstruction is permitted under the provisions of this OEA.

(vii) **Sidewalks.** Maintaining, cleaning, repairing and replacing all sidewalks, including those adjacent and contiguous to Buildings located within the Shopping Center. Sidewalks shall be cleaned at least monthly and shall be swept at appropriate intervals during such times as shall not interfere with the conduct of business or use of the Common Area.

5.2 **Damage to the Common Area.** If any of the Common Area is damaged or destroyed by any cause whatsoever, whether insured or uninsured, during the term of this OEA, other than damage caused by ordinary use or wear and tear, the Party upon whose Tract such Common Area is located shall promptly repair or restore such Common Area at its sole cost and expense with all due diligence; provided that no Party shall be required to expend more than \$250,000 in Constant Dollars in excess of insurance proceeds which may be available (or which would have been available except for elections relating to deductibles or self-insurance for which the Party shall be responsible to contribute) for such repair or restoration. Notwithstanding the limitation set forth in the preceding sentence, a Party may require another Party to do such restoration work if the requiring Party has agreed in writing to pay the costs in excess of such sum. Except to the extent limited by Section 10.3, if such damage or destruction of Common Area is caused in whole or in part by another Party or by a third Person, the Party obligated to make such repair or restoration reserves and retains the right to proceed against such other Party or third Person for indemnity, contribution or damages.

## **ARTICLE 6**

### **MAINTENANCE OF BUILDINGS AND UTILITY LINES**

#### **6.1 Building Improvements and Outside Sales Areas.**

(a) After completion of construction, each Party shall maintain and keep the exterior portion of the Buildings and Outside Sales Areas, if any, located on its Tract in first-class condition and state of repair, in compliance with all applicable Laws, and in compliance with the provisions of this OEA, including the architectural theme. Each Party shall store all trash and garbage in adequate containers, to locate such containers so that they are not readily visible from the parking area, and to arrange for regular removal of such trash or garbage.

(b) If any of the Buildings are damaged by fire or other casualty (whether insured or not), the Party upon whose Tract such Building is located shall promptly remove the debris resulting from such event and provide a sightly barrier and, subject to governmental regulations and/or insurance adjustment delays, within a reasonable time thereafter shall perform one of the following alternatives:

(i) such Party shall repair or restore the Building so damaged to a complete unit, such repair or restoration to be performed in accordance with all applicable provisions of this OEA;

(ii) such Party shall erect another Building in such location, such construction to be performed in accordance with all applicable provisions of this OEA;  
or

(iii) such Party shall demolish the damaged portion and/or the balance of such Building and restore the cleared area to either a hard surface condition or a landscaped condition in which event the area shall be Common Area until a replacement Building is erected.

Within ninety (90) days from the date of the casualty, such Party shall give notice to each other Party of which alternative it elects.

(c) During any period of rebuilding, repairing, replacement or reconstruction of a Building, the Floor Area of that Building shall be deemed to be the same as existed immediately prior to that period. Upon completion of such rebuilding, repairing, replacement or reconstruction, the Party upon whose Tract such Building is located shall cause a new determination of Floor Area for such Building to be made in the manner described above, and such determination shall be sent to any Party requesting the same.

## **6.2 Utility Lines.**

(a) Each Party shall maintain and repair, or cause to be maintained and repaired, in a good state of repair and safe condition, all Separate Utility Lines used by such Party regardless of where located unless the provider of the utility service or a public or quasi-public authority has agreed to maintain such Utility Lines. Any maintenance, replacement and/or repair of nondedicated Utility Lines located on another Party's Tract shall be performed only after twenty (20) days' notice to the grantor (except in an emergency the work may be initiated with reasonable notice), after normal business hours whenever possible, and in such a manner as to cause as little disturbance in the use of the grantor's Tract as is practicable under the circumstances. Any Party performing or causing to be performed maintenance or repair work shall promptly pay all costs and expenses associated therewith, diligently complete such work as quickly as possible and promptly clean the area and restore the affected portion of the Common Area to a condition equal to or better than the condition which existed prior to the commencement of such work.

(b) Common Utility Lines shall be maintained, repaired and/or replaced by the Party on whose Tract the Common Utility Lines are located in accordance with the standards set forth in Section 6.2(a) above.

## **ARTICLE 7**

### **USE OF THE SHOPPING CENTER**

#### **7.1 Permitted Uses.**

(a) The Shopping Center shall be used only for retail sales, offices, Restaurants or other commercial purposes. The following uses shall not be permitted without the prior written consent of the Approving Parties (which consent may be granted or withheld in the sole and absolute discretion of the Approving Parties):

(i) Any use which emits an obnoxious odor, noise, or sound which can be heard or smelled outside of any Building in the Shopping Center (except that this provision shall not prohibit normal cooking odors which are associated with a Restaurant operation);

(ii) Any operation primarily used as a storage warehouse operation and any assembling, manufacturing, distilling, refining, smelting, agricultural or mining operation;

(iii) Any "second hand" store or "surplus" store, thrift shop or other business principally engaged in the sale of used merchandise;

(iv) 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);

(v) Any dumping, disposing, incineration, or reduction of garbage (exclusive of garbage compactors located near the rear of any Building);

(vi) Any fire sale, going out of business sale, bankruptcy sale (unless pursuant to a court order) or auction house operation;

(vii) Any central laundry, central dry cleaning plant or laundromat (except that this provision shall not prohibit nominal supportive facilities for on-site service oriented to pickup and delivery by the ultimate consumer as the same may be found in first-class shopping centers);

(viii) Any automobile, truck, trailer or recreational vehicles sales, leasing, display, body shop or repair operation;

(ix) Any bowling alley or skating rink;

(x) Any movie theater, night club or live performance theater;

(xi) Any living quarters, sleeping apartments or lodging rooms;

(xii) Any veterinary hospital or animal raising facility (except that this prohibition shall not prohibit pet shops or pet supply superstores and veterinary services which are incidental thereto);

(xiii) Any mortuary, funeral home or crematory;

(xiv) Any adult book store, adult video store, adult movie theater or other establishment selling, renting or exhibiting pornographic materials or drug-related paraphernalia (except that this provision shall not prohibit the operation of a bookstore or video store which carries a broad inventory of books or videos and other materials directed towards the interest of the general public [as opposed to specific segment thereof]);

(xv) Any bar, tavern, Restaurant or other establishment whose reasonably projected annual gross revenues from the sale of alcoholic beverages for on-premises consumption exceeds forty percent (40%) of the gross revenues of such business;

(xvi) Any health spa, fitness center or athletic facility which occupies more than five thousand (5,000) square feet of Floor Area;

(xvii) Any flea market, amusement or video arcade, pool or billiard hall, car wash, tattoo parlor or dance hall (except that this provision shall not prohibit a Restaurant from including video games as an incidental use to its operations);

(xviii) Any training or educational facility, including, but not limited to, beauty schools, barber colleges, reading rooms, places of instruction or other operations catering primarily to students or trainees rather than to customers; provided, however, that this provision shall not prohibit: (i) on-site employee training [whether for employment at the Shopping Center or at another business location of such Occupant] by an Occupant incidental to the conduct of its business at the Shopping Center, and (ii) reading rooms operated as part of an operation of a book store such as Barnes & Noble;

(xix) Any church, school, day care center or related religious or educational facility or religious reading room;

(xx) Any massage parlor (except that this provision shall not prohibit massages in connection with a beauty salon, health club or athletic facility); and

(xxi) Any casino or other gambling facility or operation, including but not limited to, off-track or sports betting parlors, table games such as black-jack or poker, slot machines, video gambling machines and similar devices, and bingo halls (except that this provision shall not prohibit government sponsored gambling activities or charitable gambling activities if such activities are incidental to the business operation being conducted by the Occupant).

(b) "Retail Office" shall mean an office that provides services directly to consumers (i.e., financial institutions, real estate agencies, stock brokerages, title company and escrow offices, travel and insurance agencies, and medical, dental and legal clinics). Without the prior written consent of the Approving Parties (which consent may be granted or withheld in the sole and absolute discretion of the Approving Parties), the following restrictions shall apply:

(i) the only offices which may be permitted within the Shopping Center are Retail Offices;

(ii) not more than ten percent (10%) of the total Floor Area on the Developer Tract may be used for Retail Offices; and

(iii) no Retail Office Occupant shall occupy more than six thousand (6,000) square feet of Floor Area.

The incidental use of office space used by an Occupant for administrative purposes shall not be considered office use for the purpose of this Section 7.1(b);

(c) No Restaurant shall be located on the Developer Tract within 250 feet of the Building Area located on the Kohl's Tract; provided, however, a single Restaurant that occupies less than two thousand (2,000) square feet of Floor Area may be located within 250 feet of the Building Area located on the Kohl's Tract so long as said Restaurant is not located within 150 feet of the Building Area located on the Kohl's Tract.

(d) This OEA is not intended to, and does not, create or impose any obligation on a Party to operate, continuously operate, or cause to be operated a business or any particular business at the Shopping Center or on any Tract.

## 7.2 **Use of Common Area.**

(a) No merchandise, equipment or services, including, but not limited to, vending machines, promotional devices and similar items, shall be displayed, offered for sale or lease, or stored on the sidewalks in front of or alongside the Buildings or within the remainder of the Common Area without the prior written approval of the Approving Parties, which approval may be granted or withheld in their sole and absolute discretion; provided, however, that the foregoing prohibition shall not be applicable to the following:

- (i) the temporary storage of shopping carts in cart corrals;
- (ii) any recycling center required by law, the location of which shall be subject to the approval of the Approving Parties;
- (iii) trash enclosures designated on the SITE PLAN; and
- (iv) designated Outside Sales Areas.

(b) Notwithstanding anything to the contrary contained herein, the restrictions contained in Section 7.2(a) shall not limit outside dining areas or similar outside seating areas for coffee shops and restaurant uses and sidewalk displays and sales shall be permitted within the Shopping Center (and outside of designated Outside Sales Areas) provided that such displays and sales of merchandise shall comply with the following restrictions:

- (i) such displays and sales shall be conducted no more than four (4) times per calendar year and for no more than ten (10) consecutive days per time by any Occupant;
- (ii) the Occupants conducting such displays and sales must conduct similar displays and sales in the ordinary course of business at their other locations, if any;
- (iii) there shall be no displays of sheds, portable buildings or any commodity building materials (e.g., gravel and lumber);
- (iv) the sales and displays shall be conducted and made solely within the Occupant's building or the sidewalk directly in front of the Occupant's building and shall occupy no more than fifty percent (50%) of the linear frontage of the sidewalk adjoining such occupant's building and no more than fifty percent (50%) of the depth of the sidewalk;
- (v) all such displays and sales shall be maintained in a neat, clean and orderly condition;
- (vi) such displays and sales shall not interfere with the pedestrian traffic upon the sidewalk areas;

(vii) there shall be no exterior signs or banners relating to such displays or sales except for normal and customary signs identifying goods and prices and except for temporary promotional signs or banners which are professionally prepared; and

(viii) such sales shall not be permitted in the two (2) week period immediately preceding Easter Sunday or during the months of October, November and December.

Notwithstanding the foregoing, (x) the restrictions contained in clauses (i) – (viii) above shall not apply to the Kohl's Tract, (y) during the term of the lease agreement between Developer and Best Buy Stores, L.P., the restrictions contained in clauses (i) – (viii) above shall not apply to Outparcel 2, and (z) during the term of the lease agreement between Developer and Michaels Stores, Inc., the restriction contained in clause (i) above shall not apply to the premises leased to Michaels Stores, Inc. and the sidewalks immediately adjacent thereto.

(c) Except to the extent required by law, no Permittee shall be charged for the right to use the Common Area; for the purposes of this provision, a tax assessment or other form of charge applicable to parking spaces or parking lots may be deemed by the Approving Parties to be an imposition required by law.

(d) Each Party shall use reasonable efforts to cause the employees of the Occupants of its Tract to park their vehicles only on such Tract.

(e) The name "Kohl's" shall not be used to identify the Shopping Center or any business or trade conducted on the Developer Tract or any of the Outlot Tracts. Unless and until the Approving Parties agree upon a name change, the Shopping Center shall be called Lakeport Commons.

7.3 **Hazardous Materials.** No Party shall use or permit the use of Hazardous Materials (as hereinafter defined) on, about, under or in its Tract, or the Shopping Center, except in the ordinary course of its usual business operations conducted thereon, and any such use shall at all times be in compliance with all Environmental Laws (as hereinafter defined). Each Party shall Indemnify the other Parties from and against all Claims, including, but not limited to, costs of investigation, litigation and remedial response arising out of any Hazardous Materials used or permitted to be used by such Party, whether or not in the ordinary course of business. "Hazardous Materials" shall mean petroleum products, asbestos, polychlorinated biphenyls, radioactive materials and all other dangerous, toxic or hazardous pollutants, contaminants, chemicals, materials or substances listed or identified in, or regulated by, any Environmental Law. "Environmental Laws" shall mean all Laws which relate to or deal with human health or the environment, all as may be amended from time to time.

## **ARTICLE 8**

### **COMMON AREA LIGHTING**

8.1 **Common Area Lighting.** After completion of the Common Area lighting system on its Tract, each Party shall keep its Tract fully illuminated each day from dusk to at least 11:00 p.m. unless the Approving Parties agree upon a different time. Each Party shall keep any exterior Building security lights, plus each of the lights located on the light standards located adjacent to any main access drive or entry into the Shopping Center, illuminated from dusk until dawn. During the term of this OEA, each Party grants an irrevocable license to each other Party for the purpose of permitting the lighting from one Tract to incidentally shine on the adjoining Tract.

## **8.2 After Hours Lighting.**

(a) Each Party ("Requesting Party") shall have the right, at any time to require another Party ("Requested Party") to keep its Common Area lights operating beyond the hours set forth in Section 8.1 provided that the Requesting Party notifies the Requested Party of such request not less than five (5) days in advance. The Requesting Party shall state the period during which it wishes the lights to be kept operating and shall pay to the Requested Party a prepayment deposit as follows:

(i) If the period is less than thirty (30) days, then the deposit shall be equal to the reasonable cost for such additional operation (including electrical power, bulbs and manpower), as estimated by the Requested Party; or

(ii) If the period is greater than or equal to thirty (30) days, then the deposit shall be equal to the reasonable cost for such additional operation (including electrical power, bulbs and manpower) for thirty (30) days, as estimated by the Requested Party. If the period is greater than thirty (30) days, then the Requesting Party shall renew such prepayment at the end of each thirty (30) day period.

(b) The Requesting Party shall pay the cost to the Requested Party of electrical power to provide such extra-hours illumination, and the prepayment shall be applied to such obligation as incurred. If the Requesting Party is of the opinion that the deposits required by the Requested Party exceed such costs, the Parties shall attempt to agree to the cost of such electrical power and if they cannot do so, then the amount the Requesting Party is obligated to pay shall be determined from the power costs as estimated by the electrical utility company furnishing such power, or if the utility fails to do so, by a reputable engineer.

(c) Upon the failure of a Requesting Party to pay the aforesaid amount or renew a deposit as required hereby, the Requested Party shall have the right to discontinue such additional lighting and to exercise other remedies herein provided. Any such request for additional lighting may be withdrawn or terminated at any time by written notice from the Requesting Party, and a new request or requests for changed hours may be made from time to time.

## **8.3 Secondary Wiring System.**

(a) As an alternative to the process of lighting another Party's Tract as set forth in Section 8.2, the Requesting Party may install a secondary wiring system from the Requesting Party's Tract to the light standards on the Requested Party's Tract which will permit all or a portion of the lighting on the Requested Party's Tract to be operated contemporaneously with the lighting on the Requesting Party's Tract. All costs and expenses associated with the installation, maintenance, replacement, and operation of such secondary wiring, including the cost of energy to light any portion of the Requested Party's Tract, shall be assumed and promptly paid by the Requesting Party.

(b) The Requesting Party shall submit to the Requested Party appropriate plans and specifications for the installation of the secondary wiring system. The Requested Party shall have thirty (30) days to approve or disapprove of such submission, which approval shall not be unreasonably withheld. If the Requested Party does not disapprove of the submission within the thirty (30) day period, approval shall be deemed to have been given; if disapproval is given, the Requesting Party shall revise the submission to accommodate the reasonable



objections of the Requested Party and then may resubmit such plans and specifications to the Requested Party for its approval.

## **ARTICLE 9**

### **OCCUPANT SIGNS**

#### **9.1 Freestanding Signs.**

(a) No freestanding sign shall be permitted within the Shopping Center unless constructed in areas designated on the SITE PLAN, and only one such sign may be located in each designated area. The freestanding signs at the Shopping Center shall be used as follows:

(i) "Pylon Sign 1" may be used to identify the name of the Shopping Center, Occupants of the Kohl's Tract in the portion of Pylon Sign 1 allocated to Occupants of the Kohl's Tract (in the top panel position as shown in EXHIBIT D attached hereto) and Occupants of the Developer Tract in the portion of Pylon Sign 1 allocated to Occupants of the Developer Tract (as shown in EXHIBIT D attached hereto);

(ii) "Pylon Sign 2" may be used to identify the name of the Shopping Center, Occupants of the Kohl's Tract in the portion of Pylon Sign 2 allocated to Occupants of the Kohl's Tract (in the top panel position as shown in EXHIBIT D attached hereto) and Occupants of the Developer Tract in the portion of Pylon Sign 2 allocated to Occupants of the Developer Tract (as shown in EXHIBIT D attached hereto);

(iii) Each Outlot Tract may have a monument sign to identify the each Occupant of the Outlot Tract but only if such monument sign does not preclude the installation of Pylon Sign 1 and/or Pylon Sign 2.

(b) Each Occupant having a sign panel on Pylon Sign 1 and/or Pylon Sign 2 shall (i) install and maintain such panel at its expense, and (ii) be responsible for the cost of constructing, maintaining, illuminating, repairing and replacing the freestanding sign on a first-class basis in the proportion that the total square footage of each benefiting Occupant's designation or designations bears to the total square footage of all designations entitled to be displayed thereon. The Approving Parties shall have the right to approve the design and size of all freestanding signs, including the panel inserts; provided, however, any Anchor Occupant and Major Occupant shall have the unqualified right to use in the panel or space allocated to it on any freestanding sign its standard prototype identification as the same exists from time to time.

(c) The design and dimensions of each approved freestanding sign and, as applicable, the sign panels discussed herein are set forth in EXHIBIT D attached hereto and made a part hereof.

(d) Notwithstanding anything to the contrary contained in this Section 9.1, Developer shall reasonably cooperate with Kohl's (including, subject to the following terms and conditions, amending this OEA) to allow Kohl's to construct, operate and maintain a freestanding monument sign on the Developer Tract to display Kohl's sign panel, provided: (i) the location and design of the freestanding sign are approved in advance in writing by

Developer, such approval not to be unreasonably withheld (it being agreed that it shall not be unreasonable for Developer to withhold its approval to any proposed location or design of any such sign which would adversely affect the construction, operation and use of any improvements within the Shopping Center, including without limitation, the construction, operation and use of Pylon Signs #1 and #2); (ii) any such sign shall be completed using materials and design standards which equal or exceed those used in Pylon Signs #1 and #2; and (iii) Kohl's shall obtain all necessary permits and approvals for such sign from the appropriate governmental or quasi-governmental agencies having jurisdiction thereover, and shall pay any and all costs of obtaining such permits and approvals and of constructing, operating and maintaining such sign, without contribution by Developer, and any conditions of such permits and approvals which affect the Developer Tract shall subject to prior written consent of Developer, such consent not to be unreasonably withheld. Developer shall grant and convey to Kohl's for its use and for the use of designated Occupants of the Kohl's Tract, a non-exclusive perpetual easement over, under, upon and across the Developer Tract for the construction, reconstruction, replacement, operation, maintenance and repair of such sign structure, including the right and privilege to place thereon or affix thereto sign panels, together with reasonable access over, under, upon, through and across the Developer Tract to install, replace, maintain, repair and operate a Separate Utility Line pursuant to the terms and conditions set forth in Section 2.2 in order to provide such sign structure and panels with power to illuminate the same. Kohl's shall have the exclusive right to affix sign panels on such sign structure.

## 9.2 **Building Signs.**

(a) Each Occupant may have only one (1) identification sign placed on the exterior of the Building it occupies; provided, however, that (i) if such Occupant is located at the corner of a Building, then such Occupant may have an identification sign on each side of such corner, and (ii) if such Occupant occupies the entire Building, then such Occupant may have an identification sign on each side of the Building. The restrictions set forth in this Section 9.2(a) shall not apply to Anchor Occupants and Major Occupants, and each Anchor Occupant and Major Occupant may have more than one identification sign placed on the exterior of the Building it occupies.

(b) No Occupant identification sign attached to the exterior of a Building shall be:

(i) placed on canopy roofs extending above the Building roof, placed on penthouse walls, or placed so as to project above the parapet, canopy or top of the wall upon which it is mounted;

(ii) placed at any angle to the Building; provided, however, the foregoing shall not apply to any sign located under a sidewalk canopy if such sign is at least eight (8) feet above the sidewalk; or

(iii) painted on the surface of any Building.

(c) No Occupant shall have an exterior sign which identifies leased departments and/or concessionaires operating under the Occupant's business or trade name, nor shall such sign identify specific brands or products for sale or services offered within a business establishment, unless such identification is used as part of the Occupant's trade name; provided, however, the foregoing restriction shall not apply to Anchor Occupants.

**9.3 Sign Restrictions.**

(a) No exterior identification signs shall be permitted within the Shopping Center except as expressly permitted in this Article 9.

(b) No Occupant identification sign attached to the exterior of Building nor any exterior freestanding sign shall consist of:

(i) flashing, moving or audible signs except that in the case of a bank, a moving sign that shows the Dow Jones Industrial Average, time and temperature, and similar information customarily shown on first-class bank signs may be used;

(ii) signs employing exposed raceways, exposed neon tubes, exposed ballast boxes, or exposed transformers; provided, however, exposed raceways shall be permitted if either: (A) the primary purpose of the raceways are to limit damage to the Buildings to which the raceways are attached, and the raceways do not draw undue attention when viewed from the Common Area; or (B) the raceway signage is compatible with the design of the Buildings to which they are affixed; or

(iii) paper or cardboard signs, temporary signs (exclusive of contractor signs), stickers or decals; provided, however, the foregoing shall not prohibit (A) the placement at the entrance of each Occupant's space of a small sticker or decal, indicating hours of business, emergency telephone numbers, acceptance of credit cards, and other similar information, or (B) with the prior approval of the Approving Parties "For Sale" signs, "For Lease" signs, "Coming Soon" signs and "Grand Opening" signs placed within the Shopping Center for a period of time not to exceed ninety (90) days per instance.

(c) Notwithstanding anything contained herein to the contrary, each Party shall be permitted to place the following signs within the Common Area located on its Tract:

(i) directional signs or informational signs such as "Handicapped Parking";

(ii) temporary signs displaying leasing information; and

(iii) one (1) temporary sign identifying each contractor working on a construction job.

**ARTICLE 10**

**INSURANCE**

**10.1 Commercial General Liability Insurance.**

(a) Each Party (as to its Tract only) shall maintain or cause to be maintained in full force and effect commercial general liability insurance with a combined single limit of liability of not less than Five Million Dollars (\$5,000,000.00) in Constant Dollars for bodily injury, personal injury and property damage arising out of any one occurrence; the other Parties shall be "additional insureds" under such policy as it applies to the insuring Party's Tract.

(b) Each Party shall Indemnify each other Party from and against all Claims asserted or incurred in connection with or arising from or as a result of the death of or injury to any Person or loss or damage to the property of any Person which shall occur on the Tract owned by the indemnifying Party, except to the extent such claims are caused by the negligence or the willful act or omission of the indemnified Person or its agents or employees.

## 10.2 **Insurance During Construction.**

(a) Prior to commencing any construction activities within the Shopping Center, each Party shall obtain or require its contractor to obtain and thereafter maintain so long as such construction activity is occurring, at least the minimum insurance coverages in Constant Dollars set forth below:

(i) Workers' compensation and employer's liability insurance:

(A) Worker's compensation insurance as required by any applicable law or regulation.

(B) Employer's liability insurance in the amount of \$300,000 each accident for bodily injury, \$500,000 policy limit for bodily injury by disease and \$300,000 each employee for bodily injury by disease.

(ii) Commercial general liability insurance covering all operations by or on behalf of the contractor, which shall include the following minimum limits of liability and coverages:

(A) Required coverages:

(1) Premises and Operations;

(2) Products and Completed Operations;

(3) Contractual Liability, insuring the indemnity obligations assumed by the contractor under the contract documents;

(4) Broad Form Property Damage (including Completed Operations);

(5) Explosion, Collapse and Underground ("XCU") Hazards;  
and

(6) Personal Injury Liability.

(B) Minimum limits of liability:

(1) \$1,000,000 each occurrence (for bodily injury and property damage);

(2) \$1,000,000 for Personal Injury Liability;

(3) \$2,000,000 aggregate for Products and Completed Operations (which shall be maintained for a two (2) year period following final completion of the work); and

(4) \$2,000,000 general aggregate applying separately to this project.

(iii) Automobile liability insurance (bodily injury and property damage liability) including coverage for owned, hired, and non-owned automobiles with limits of liability which shall be not less than \$1,000,000 combined single limit each accident for bodily injury and property damage combined.

(b) If the construction activity involves the use of another Party's Tract, then the owner of such Tract shall be an additional insured and such insurance shall provide that the same shall not be cancelled, or reduced in amount or coverage below the requirements of this OEA, without at least thirty (30) days prior written notice to the named insureds and each additional insured. If such insurance is cancelled or expires, then the constructing Party shall immediately stop all work on or use of the other Party's Tract until either the required insurance is reinstated or replacement insurance obtained.

(c) Each Party shall Indemnify each other Party from and against all Claims, including liens, and from any accident, injury or loss or damage whatsoever occurring to any Person or to the property of any Person arising out of or resulting from any construction activities performed or authorized by such indemnifying Party; provided, however, that the foregoing shall not be applicable to either events or circumstances caused by the negligence or willful act or omission of such indemnified Party, its licensees, concessionaires, agents, servants, employees, or anyone claiming by, through or under any of them, or claims covered by the release set forth in Section 10.3.

### 10.3 **Casualty Loss Insurance**

(a) Effective upon the commencement of construction of any Building on its Tract and so long as such Building exists, each Party shall carry, or cause to be carried, casualty insurance with "extended" or "all-risk" coverage, in the amount of one hundred percent (100%) of full replacement cost thereof (excluding footings, foundations or excavations). At a minimum, the insurance coverage required by this Section 10.3(a) shall extend to loss or damage by fire, windstorm, cyclone, tornado, hail, explosion, riot, riot attending a strike, civil commotion, malicious mischief, vandalism, aircraft, vehicle, smoke damage and sprinkler leakage.

(b) Each Party (the "Releasing Party") hereby releases and waives for itself, and each Person claiming by, through or under it, each other Party (the "Released Party") from any liability for any loss or damage to all property of such Releasing Party located upon any portion of the Shopping Center, which loss or damage is of the type generally covered by the insurance required to be maintained under Section 10.3(a), irrespective either of any negligence on the part of the Released Party which may have contributed to or caused such loss, or of the amount of such insurance required to be carried or actually carried, including any deductible or self insurance reserve. Each Party shall use its reasonable efforts to obtain, if needed, appropriate endorsements to its policies of insurance with respect to the foregoing release; provided, however, that failure to obtain such endorsements shall not affect the release hereinabove given.

(c) To the full extent permitted by law, each Party ("Indemnitor") shall Indemnify each other Party ("Indemnitee") from and against all Claims asserted by or through any Permittees of the Indemnitor's Tract for any loss or damage to the property of such Permittee located upon the Indemnitor's Tract, which loss or damage is of the type generally covered by the insurance required to be maintained under Section 10.3(a), irrespective of any negligence on the part of the Indemnitee which may have contributed to or caused such loss.

#### 10.4 **Insurance Policy Requirements.**

(a) All insurance coverage required by this Article 10 shall be provided under one or more of the following:

(i) an individual policy covering this location;

(ii) a blanket policy which includes other liabilities, properties and locations of such Person; provided, however, that if a blanket commercial general liability insurance policy contains a general policy aggregate of less than Twenty Millions Dollars (\$20,000,000) in Constant Dollars, then the insuring Person shall also maintain excess liability coverage necessary to establish a total liability insurance limit of Twenty Million Dollars (\$20,000,000) in Constant Dollars;

(iii) a plan of self-insurance, provided that any Person so self-insuring notifies the other Parties of its intent to self-insure and shall upon request deliver to such other Parties each calendar year a copy of its annual report or Form 10-K that is audited by an independent certified public accountant which discloses that such Person has One Hundred Million Dollars (\$100,000,000) in Constant Dollars or more of net current assets;

(iv) a plan of self-insurance maintained by such Person's parent company provided that the parent company complies with the requirements of (iii) above and guarantees such Person's insurance obligations under this OEA; or

(v) a combination of any of the foregoing insurance programs.

(b) All insurance provided under Section 10.4(a)(i) or Section 10.4(a)(ii) shall be procured from companies authorized to issue such insurance in the state in which the Shopping Center is located and shall be rated by Best's Insurance Reports not less than B+/X.

To the extent any deductible is permitted or allowed as a part of any insurance policy carried by a Person, such Person shall be deemed to be covering the amount thereof under an informal plan of self-insurance; provided, however, that in no event shall any deductible exceed Fifty Thousand Dollars (\$50,000.00) in Constant Dollars unless such Person complies with the requirements regarding self-insurance pursuant to Section 10.4(a)(iii) or Section 10.4(a)(iv).

Each Party shall furnish to any Party requesting the same, a certificate(s) of insurance, or statement of self-insurance, as the case may be, evidencing that the insurance required to be carried by such Person is in full force and effect.

(c) The following shall apply to the insurance required pursuant to Section 10.1:

(i) the insurance policy may not be canceled or materially reduced in amount or coverage below the requirements of this OEA, without at least thirty (30) days prior written notice by the insurer to each insured and to each additional insured;

- (ii) the insurance shall provide for severability of interests;
- (iii) the insurance shall provide that an act or omission of one of the insureds or additional insureds which would void or otherwise reduce coverage, shall not reduce or void the coverage as to the other insureds; and
- (iv) the insurance shall provide for contractual liability coverage with respect to the indemnity obligations set forth in this OEA.

## **ARTICLE 11**

### **DEFAULT**

**11.1 Default.** The occurrence of any one or more of the following events shall constitute a material default and breach of this OEA by the non-performing Party (the "Defaulting Party"):

- (a) The failure to make any payment required to be made under this OEA within ten (10) days after the Defaulting Party has received notice of its failure to make such payment on or before the due date for such payment; or
- (b) The failure to observe or perform any of the covenants, conditions or obligations of this OEA, other than as described in (a) above, within thirty (30) days after the issuance of a notice by another Party (the Non-Defaulting Party") specifying the nature of the default claimed; provided, however, if such matter is not susceptible of being cured within thirty (30) days, the cure period shall be extended for a reasonable period of time provided that the Defaulting Party commences the cure within said thirty (30) day period and thereafter diligently prosecutes the cure to completion.

Each Party shall be responsible for the default of its Occupants.

### **11.2 Right to Cure.**

- (a) With respect to any default under Section 11.1, any Non-Defaulting Party shall have the right, but not the obligation, to cure such default by the payment of money or the performance of some other action for the account of and at the expense of the Defaulting Party; provided, however, if an event that would become a default under Section 11.1(b) with the passage of time shall constitute an emergency condition, the Non-Defaulting Party, acting in good faith, shall have the right to cure such failure prior to the passage of the time period set forth in Section 11.1(b) upon such advance notice as is reasonably possible under the circumstances or, if necessary, without advance notice, so long as notice is given as soon as possible thereafter.
- (b) If any Non-Defaulting Party shall cure a default, the Defaulting Party shall reimburse the Non-Defaulting Party for all costs and expenses incurred in connection with such curative action, plus interest as provided herein, within ten (10) days after receipt of demand therefor, together with reasonable documentation supporting the expenditures made.
- (c) To effectuate any such cure, the Non-Defaulting Party shall have the right to enter upon the Tract of the Defaulting Party (but not into any Building) to perform any necessary work or furnish any necessary materials or services to cure the default of the Defaulting Party.

11.3 **Interest.** Any time a Party shall not pay any sum payable hereunder to another within five (5) days of the due date, such delinquent Party shall pay interest on such amount from the due date to and including the date such payment is received by the Person entitled thereto, at the lesser of (i) three percent (3%) per annum plus the prime rate of interest from time to time published by *The Wall Street Journal* (or that of another publication or of financial institution selected by the Approving Parties if *The Wall Street Journal* shall cease to publish a prime rate) or (ii) the highest rate permitted by law to be paid on such type of obligation.

11.4 **Lien Rights.**

(a) Costs and expenses accruing and/or assessed pursuant to Section 11.2 shall be secured by and constitute a lien against the Defaulting Party's Tract. The lien shall attach and take effect only upon recordation of a claim of lien in the official real estate records of the County of the State in which the Shopping Center is located by the Party making the claim. The claim of lien shall include the following:

- (i) The name of the lien claimant;
- (ii) A statement concerning the basis for the claim of lien and identifying the lien claimant as the Non-Defaulting Party;
- (iii) An identification of the owner or reputed owner of the Tract or interest therein against which the lien is claimed;
- (iv) A description of the Tract against which the lien is claimed;
- (v) A description of the work performed which has given rise to the claim of lien and a statement itemizing the amount thereof; and
- (vi) A statement that the lien is claimed pursuant to the provisions of this OEA, reciting the date of recordation and the recorded document number (or book and page) hereof.

(b) The claim of lien shall be duly verified, acknowledged and contain a certificate that a copy thereof has been served upon the Party against whom the lien is claimed pursuant to Section 12.1. The lien so claimed may be enforced in any judicial proceedings allowed by law, including without limitation, a suit in the nature of a suit to foreclose a mortgage or mechanic's lien under the applicable provisions of the law of the State in which the Shopping Center is located. The lien shall be subject and subordinate to any mortgages or deeds of trust which are of record on or before the date on which the claim of lien is placed of record.

11.5 **Costs of Enforcement.** If either Party brings an action at law or in equity to enforce or interpret this OEA, the prevailing party in such action (as determined by the court having jurisdiction over such action) shall be entitled to recover reasonable attorney's fees and court costs and expert witness fees for all stages of litigation, including, but not limited to, appellate proceedings, in addition to any other remedy granted.



**11.6 Remedies Cumulative.**

(a) Each Non-Defaulting Party shall have the right to prosecute any proceedings at law or in equity against any Defaulting Party hereto, or any other Person violating or attempting to violate or default upon any of the provisions contained in this OEA, and to recover damages for any such violation or default. Such proceeding shall include the right to restrain by injunction any violation or threatened violation by another of any of the terms, covenants or conditions of this OEA, or to obtain a decree to compel performance of any such terms, covenants or conditions, it being agreed that the remedy at law for a breach of any such term, covenant, or condition (except those, if any, requiring the payment of a liquidated sum) is not adequate.

(b) All of the remedies permitted or available to a Party under this OEA or at law or in equity shall be cumulative and not alternative, and invocation of any such right or remedy shall not constitute a waiver or election of remedies with respect to any other permitted or available right or remedy.

(c) In all situations arising out of this OEA, all Parties shall attempt to avoid and mitigate the damages resulting from the conduct of any other Party. Each Party hereto shall take all reasonable measures to effectuate the provisions of this OEA.

(d) No breach of this OEA shall (i) entitle any Party to cancel, rescind or otherwise terminate this OEA, or (ii) defeat or render invalid the lien of any mortgage or trust deed made in good faith and for value as to any part of the Shopping Center. However, such limitation shall not affect in any manner any other rights or remedies which a Party may have hereunder by reason of any such breach.

**11.7 No Waiver.** The failure of any Party to insist upon strict performance of any of the terms, covenants or conditions hereof shall not be deemed a waiver of any rights or remedies which that Party may have hereunder, at law or in equity and shall not be deemed a waiver of any subsequent breach or default in any of such terms, covenants or conditions. No waiver by any Party of any default under this OEA shall be effective or binding on such Party unless made in writing by such Party and no such waiver shall be implied from any omission by a Party to take action in respect to such default. No express written waiver of any default shall affect any other default or cover any other period of time other than any default and/or period of time specified in such express waiver. One or more written waivers or any default under any provision of this OEA shall not be deemed to be a waiver of any subsequent default in the performance or the same provision or any other term or provision contained in this OEA.

**ARTICLE 12**

**MISCELLANEOUS**

**12.1 Notices.**

(a) All notices, demands, statements and requests (collectively, "notices") required or permitted to be given under this OEA must be in writing and shall be delivered by one of the following methods of delivery:

(i) personal service, in which event the notice shall be deemed to have been given upon actual receipt;

(ii) Federal Express, Airborne Express or another nationally recognized overnight courier service, in which event the notice shall be deemed to have been given on the first business day after the notice is deposited with the courier service (or the next business day thereafter if the notice is deposited with the courier service on a day other than a business day);

(iii) United States registered or certified mail, postage prepaid and return receipt requested, in which event the notice shall be deemed to have been given three (3) business days after the notice is deposited with the United States Postal Service; or

(iv) facsimile transmission, in which event the notice shall be deemed to have been given upon confirmation of the facsimile transmission provided that the original counterpart of the notice is sent by (i), (ii) or (iii) above on the same day.

Notwithstanding the foregoing, a notice sent by first class mail shall be effective and deemed to have been given on the date received by the Person to whom it was sent.

(b) The initial addresses of the Parties shall be:

Kohl's: Kohl's Department Stores, Inc.  
N56 W17000 Ridgewood Drive  
Menomonee Falls, Wisconsin 53051  
Attention: Chairman  
Fax: (262) 703-7274

with a copy to: Kohl's Department Stores, Inc.  
N56 W17000 Ridgewood Drive  
Menomonee Falls, Wisconsin 53051  
Attention: Law Department  
Fax: (262) 703-7274

Developer: Lakeport Commons, LLC  
c/o Cormac Properties  
16820 Frances Street  
Omaha, Nebraska 68130  
Attention: Mr. Jeff Johnson  
Fax: (402) 691-6001

(c) Each Person shall have the right from time to time to change its address for notice purposes to any other address within the United States of America upon at least ten (10) days prior written notice to the other Parties in accordance with the provisions of this Section 12.1. Refusal to accept delivery of a notice or the inability to deliver a notice because of an address change which was not properly communicated shall not defeat or delay the giving of a notice hereunder.

## 12.2 **Estoppel Certificate.**

(a) Each Party shall, within thirty (30) days of written request (which shall not be more frequent than three (3) times during any calendar year) of any other Party, issue to such Person, or its prospective mortgagee or successor, an estoppel certificate stating to the best of the issuer's knowledge that as of such date:

(i) whether it knows of any default under this OEA by the requesting Person, and if there are known defaults, specifying the nature thereof;

(ii) whether this OEA has been assigned, modified or amended in any way by it and if so, then stating the nature thereof; and

(iii) whether this OEA is in full force and effect.

(b) An estoppel certificate issued pursuant to this Section 12.2 shall bar the Person issuing such certificate from asserting any claim that is based upon facts contrary to those asserted in the estoppel certificate to the extent the claim is asserted against a bona fide encumbrancer or purchaser for value who has acted in reasonable reliance upon the estoppel certificate without knowledge of facts to the contrary of those contained therein.

(c) Notwithstanding anything to the contrary contained in this OEA or otherwise, the Person issuing an estoppel certificate shall in no event be subject to damages arising out of the negligent or inadvertent failure of such Person to disclose correct and/or relevant information in the estoppel certificate, nor shall such Person be barred from challenging acts committed by other Parties for which approval by the Approving Parties was required but not sought or obtained.

12.3 **Modification of OEA.** This OEA may be modified or amended by, and only by, a written agreement signed by all of the then current Approving Parties and shall be effective only when recorded in the official real estate records of the county and state where the Shopping Center is located; provided, however, that no such amendment shall impose any materially greater obligation on, or materially impair any right of, a Party or its Tract without the consent of such Party. No consent to the amendment of this OEA shall ever be required of any Occupant or Person other than the Parties. Because the submission of a proposed amendment to the Parties is not an item of "consent" or "approval", each Party may consider, approve or disapprove any proposed amendment to this OEA in its sole and absolute discretion without regard to reasonableness or timeliness.

## 12.4 **Approval Rights.**

(a) Whenever the consent or approval ("approval") of the Approving Parties is required under this OEA, the following shall apply:

(i) unanimous approval of the Approving Parties must be given;

(ii) each Approving Party shall have absolute discretion to make the decisions on behalf of the entire real estate represented by such position even if the Approving Party then owns less than all of such real estate;

(iii) if this OEA provides that an Approving Party may grant or withhold its approval in its sole and absolute discretion, the approval may be unreasonably

withheld or conditioned and the Approving Party shall not be obligated to state the reasons for withholding its approval;

(iv) if this OEA does not expressly provide that an Approving Party may grant or withhold its approval in its sole and absolute discretion, the Approving Party shall not unreasonably withhold or condition its approval, and disapproval shall be in writing and the reasons therefor shall be clearly stated;

(v) the sole remedy of the Person seeking the approval if such approval is unreasonably withheld shall be an action for specific performance and the Approving Parties shall not be liable to such Person for damages; and

(vi) no exercise of any approval right shall subject an Approving Party to liability for breach of any covenant of good faith and fair dealing otherwise implied by law to be part of this OEA.

(b) Unless provision is made for a specific time period, each response to a request for an approval or consent required to be considered pursuant to this OEA shall be given by the Person to whom directed within thirty (30) days of receipt of such request. If a response is not given in writing within the required time period, the requested Party shall be deemed to have given its approval if the original notice stated in capitalized letters that failure to respond within the applicable time period will be deemed an approval.

(c) The holder of the Approving Party position shall have the right to assign such position to any other Party owning a Tract within the Developer Tract or the Kohl's Tract, as the case may be. If an Approving Party fails to assign its Approving Party position at the time of the transfer of the last Tract owned by such Approving Party, then such Approving Party position shall automatically be deemed assigned to the Party acquiring the last Tract owned by the transferring Approving Party.

## 12.5 **Taxes and Assessments.**

(a) Each Party shall pay, or cause to be paid, prior to delinquency, all taxes and assessments with respect to its Tract, the Building and other improvements located thereon, and any personal property owned or leased by such Party in the Shopping Center; provided, however, if the taxes or assessments or any part thereof may be paid in installments, the Party responsible therefor may pay each such installment as and when the same becomes due and payable. Nothing contained in this section shall prevent any Party from contesting at its cost and expense any such taxes and assessments with respect to its Tract in any manner such Party elects, so long as such contest is maintained with reasonable diligence and in good faith. At the time as such contest is concluded (allowing for appeal to the highest appellate court), the contesting Party shall promptly pay all such taxes and assessments determined to be owing, together with all interest, penalties and costs thereon.

(b) If a tax parcel covers more than a single Tract, each Party owning a Tract within the larger tax parcel shall be responsible for the payment of its proportionate share of the tax bills for the larger tax parcel on or before the due date therefor. Each Party's proportionate share of the tax bill for the larger tax parcel shall be determined by dividing the square footage of the portion of such Party's Tract within the larger tax Parcel by the square footage of the larger tax parcel; provided, however, if Buildings have been constructed on the larger tax parcel, the taxes assessed upon the Buildings shall be allocated on the basis of the Floor Area of such Buildings. At the request of any Party owning a Tract within the larger tax parcel, the

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PATRICK F GILL, AUDITOR AND RECORDER  
WOODBURY COUNTY IOWA *DF*

**OPERATION AND EASEMENT AGREEMENT**

**BETWEEN**

**KOHL'S DEPARTMENT STORES, INC.**

**AND**

**LAKEPORT COMMONS, LLC**

**THIS DOCUMENT PREPARED BY  
AND AFTER RECORDING MAIL TO:**

Alan J. Salle  
Law Department  
Kohl's Department Stores, Inc.  
N56 W17000 Ridgewood Drive  
Menomonee Falls, Wisconsin 53051

## **OPERATION AND EASEMENT AGREEMENT**

11 THIS OPERATION AND EASEMENT AGREEMENT ("OEA") is made and entered into as of the day of March, 2005, by and between KOHL'S DEPARTMENT STORES, INC., a Delaware corporation, having its principal place of business at N56 W17000 Ridgewood Drive, Menomonee Falls, Wisconsin 53051 ("Kohl's"), and LAKEPORT COMMONS, LLC, an Iowa limited liability company, having its principal place of business at c/o Cormac Properties, 16820 Frances Street, Omaha, Nebraska 68130 ("Developer").

### **WITNESSETH**

**WHEREAS**, Kohl's is the owner of a certain tract of land legally described in EXHIBIT A attached hereto and made a part hereof and identified as the "Kohl's Tract" on the site plan attached hereto as EXHIBIT X and made a part hereof (the "SITE PLAN");

**WHEREAS**, Developer is the owner of certain tracts of land legally described in EXHIBIT B attached hereto and made a part hereof and identified as the "Developer Tract" on the SITE PLAN;

**WHEREAS**, Developer is also the owner of certain tracts of land legally described in EXHIBIT C attached hereto and made a part hereof and identified as the "Outlot Tracts" on the SITE PLAN;

**WHEREAS**, the Kohl's Tract, the Developer Tract and the Outlot Tracts (collectively, the "Shopping Center") are contiguous and adjacent to each other as shown on the SITE PLAN; and

**WHEREAS**, the signatories hereto intend to develop and operate their respective Tracts in conjunction with each other as integral parts of a retail shopping complex, and in order to effectuate the common use and operation thereof, they desire to enter into certain covenants and agreements, and to grant to each other certain reciprocal easements in, to, over and across their respective Tracts.

**NOW, THEREFORE**, in consideration of the premises, the covenants and agreements hereinafter set forth and in furtherance of the parties' understanding, it is agreed as follows:

### **ARTICLE 1**

#### **DEFINITIONS**

1.1 **Anchor Occupant**. "Anchor Occupant" shall mean any Occupant that occupies more than forty-five thousand (45,000) square feet of Floor Area within the Shopping Center.

1.2 **Approving Party**. "Approving Party" shall mean the Party designated from time to time to make certain decisions and/or give certain approvals pursuant to the terms of this OEA. There shall be one Approving Party representing the Developer Tract and one Approving Party representing the Kohl's Tract. The Approving Party representing the Developer Tract shall also represent the Outlot Tracts. Developer shall be the initial Approving Party for the Developer Tract, and Kohl's shall be the initial Approving Party for the Kohl's Tract. Each Approving Party shall have the right to assign its position as Approving Party pursuant to Section 12.4.

1.3 **Building**. "Building" shall mean any enclosed structure placed, constructed or located on a Tract, which for the purpose of this OEA shall include any appurtenant canopies, supports, loading docks, truck ramps and other outward extensions.

1.4 **Building Area.** "Building Area" shall mean those areas of the Shopping Center which are designated as such on the SITE PLAN and within which Buildings and Outside Sales Areas may be constructed, placed or located.

1.5 **Claims.** "Claims" shall mean claims, losses, liabilities, actions, proceedings, costs and expenses (including reasonable attorneys' fees and costs of suit).

1.6 **Common Area.** "Common Area" shall mean all areas within the Shopping Center, exclusive of Buildings and Outside Sales Areas.

1.7 **Constant Dollars.**

(a) "Constant Dollars" shall mean the present value of the dollars to which such phrase refers. The first adjustment of Constant Dollars shall occur on January 1, 2010, and Constant Dollars shall be adjusted every five (5) years thereafter. Constant Dollars shall be determined by multiplying the dollar amount to be adjusted by a fraction, the numerator of which is the Current Index Number and the denominator of which is the Base Index Number.

(b) "Base Index Number" shall mean the level of the Index for October, 2005.

(c) "Current Index Number" shall mean the level of the Index for the month of October of the year preceding the adjustment year.

(d) "Index" shall mean the Consumer Price Index for All Urban Consumers (CPI-U), U.S. City Average, published by the Bureau of Labor Statistics of the United States Department of Labor (base year 1982-84=100), or if publication of the Index is discontinued, a substitute index selected by the Approving Parties of comparable statistics computed by an agency of the United States Government or, if none, by a substantial and responsible periodical or publication of recognized authority most closely approximating the result which would have been achieved by the Index.

1.8 **Floor Area.** "Floor Area" shall mean the actual number of square feet of space contained on each floor within a Building, as measured from the exterior faces of the exterior walls or storefront and/or the centerline of any common walls, including mezzanine and basement space; provided, however, that the following areas shall not be included in such calculations:

(a) loading docks and platforms, transformer vaults, utility and mechanical penthouses, and utility enclosures;

(b) mezzanine space and basement space which are not used for the display or sale of merchandise;

(c) space attributable to multi-deck, platform, rack and other multi-level systems used solely for the storage of merchandise to the extent located above the ground floor; and

(d) Outside Sales Areas.

Within thirty (30) days after written request from another Party therefor, a Party shall certify to the requesting Party the amount of Floor Area applicable to each Building on its Tract. If any Party causes an as-built survey to be prepared with respect to any portion of the Shopping Center, such Party shall furnish a copy of the survey to the other Parties for informational purposes only.

1.9 **Indemnify.** "Indemnify" shall mean indemnify, protect, hold harmless and defend with counsel designated by the insurer charged with the obligation to defend (or if no insurer is involved, with counsel reasonably acceptable to the Person being defended).

1.10 **Laws.** "Laws" shall mean and include all applicable laws, rules, regulations, orders, ordinances, statutes and other requirements of all federal, state, county and municipal authorities having jurisdiction over the Shopping Center.

1.11 **Major Occupant.** "Major Occupant" shall mean any Occupant that occupies more than fifteen thousand (15,000) square feet of Floor Area within the Shopping Center.

1.12 **Occupant.** "Occupant" shall mean any Person from time to time entitled to the use and occupancy of any portion of a Building in the Shopping Center under an ownership right or any lease, sublease, license, concession or other similar agreement.

1.13 **Outlot Tracts.** "Outlot Tracts" shall mean the portions of the Shopping Center legally described on EXHIBIT C attached hereto and made a part hereof and identified on the SITE PLAN as "Outlot 2", "Outlot 3", "Outlot 4", "Outlot 5", "Outlot 6", "Outlot 7", "Outlot 8", "Outlot 9", "Outlot 10" and "Outlot 11".

1.14 **Outside Sales Area.** "Outside Sales Area" shall mean those areas, if any, designated on the SITE PLAN which from time to time may be used for sales, display and/or storage purposes.

1.15 **Party.** "Party" shall mean each signatory hereto and their respective successors and assigns who become owners of any portion of the Shopping Center.

1.16 **Permittee.** "Permittee" shall mean all Occupants and the officers, directors, employees, agents, contractors, customers, vendors, suppliers, visitors, invitees, licensees, subtenants, and concessionaires of Occupants insofar as their activities relate to the intended development, use and occupancy of the Shopping Center; provided, however, persons engaged in civic, public or political activities within the Shopping Center, including but not limited to the following activities, shall not be considered to be Permittees:

- (a) exhibiting any placard, sign or notice;
- (b) distributing any circular, handbill, placard or booklet;
- (c) soliciting memberships or contributions for private, civic, public or charitable purposes;
- (d) parading, picketing or demonstrating; and
- (e) failing to follow rules or regulations established by the Parties relating to the use of the Shopping Center.

1.17 **Person.** "Person" shall mean any individual, partnership, firm, association, corporation, limited liability company, trust, or any other form of business or government entity.

1.18 **Restaurant.** "Restaurant" shall mean any operation or business that requires a governmental permit, license and/or authorization to prepare and/or serve food for either on-site or



off-site consumption; provided, however, notwithstanding anything herein to the contrary, a supermarket, grocery store or similar operation shall not be deemed a Restaurant.

1.19 **Tract.** "Tract" shall mean that portion of the Shopping Center owned by a Party.

1.20 **Utility Lines.**

(a) "Utility Lines" shall mean those facilities and systems for the transmission of utility services, including the drainage and storage of surface water.

(b) "Common Utility Lines" shall mean those Utility Lines that are installed to provide the applicable service to both the Kohl's Tract and the balance of the Shopping Center. The surface water collection, retention and distribution facilities shall be deemed to be a Common Utility Line.

(c) "Separate Utility Lines" shall mean those Utility Lines that are installed to provide the applicable service to either the Kohl's Tract or the balance of the Shopping Center, but not both. For the purpose of this OEA, the portion of a Utility Line extending between a Common Utility Line and a Building shall be considered a Separate Utility Line.

## **ARTICLE 2**

### **EASEMENTS**

2.1 **Ingress, Egress and Parking.**

(a) During the term of this OEA each Party hereby grants and conveys to each other Party for its use and for the use of its Permittees, in common with others entitled to use the same, a non-exclusive easement for the passage and parking of vehicles over and across the parking and driveway areas of the grantor's Tract, as the same may from time to time be constructed and maintained for such use, and for the passage and accommodation of pedestrians over and across the parking, driveway and sidewalk areas of the grantor's Tract, as the same may from time to time be constructed and maintained for such use.

(b) Each Party hereby grants and conveys to each other Party for its use and for the use of its Permittees, in common with others entitled to use the same, a non-exclusive perpetual easement for the passage of vehicles over and across the access drives and service drives of the grantor's Tract, if any, that are designated on the SITE PLAN as "Perpetual Access".

(c) The easement rights granted under this Section 2.1 shall be subject to the following reservations as well as any other applicable provisions contained in this OEA:

(i) Each Party reserves the right to close off its portion of the Common Area for such reasonable period of time as may be legally necessary, in the reasonable opinion of such Party's counsel, to prevent the acquisition of prescriptive rights by anyone; provided, however, that prior to closing off any portion of the Common Area, as herein provided, such Party shall give written notice to each other Party of its intention to do so, and shall attempt to coordinate such closing with each other Party so that no unreasonable interference with the passage of pedestrians or vehicles shall occur;

(ii) Each Party that has established a staging and/or storage area on its Tract pursuant to Section 3.4 reserves the right to exclude and restrain persons from using the staging and/or storage area during the period of time it is used for such purposes;

(iii) Each Party reserves the right to exclude and restrain Occupants of the Outlot Tracts and their Permittees from parking vehicles on its Tract, and notwithstanding anything to the contrary contained in this OEA, the easements granted in this OEA for the parking of vehicles shall not extend to the Occupants of the Outlot Tracts and their Permittees; and

(iv) Each Party reserves the right at any time and from time to time to exclude and restrain any Person who is not a Permittee from using the Common Area on its Tract.

## 2.2 **Utilities.**

(a) Each Party hereby grants and conveys to each other Party non-exclusive perpetual easements in, to, over, under, along and across those portions of the Common Area (exclusive of any portion located within Building Areas) located on the grantor's Tract necessary for the installation, operation, flow, passage, use, maintenance, connection, repair, relocation, and removal of Utility Lines serving the grantee's Tract, including but not limited to, sanitary sewers, storm drains, and water (fire and domestic), gas, electrical, telephone and communication lines.

(b) All Utility Lines shall be underground except:

(i) ground mounted electrical transformers (which shall be appropriately screened from view);

(ii) above-ground surface water collection, retention and distribution facilities shown on the SITE PLAN;

(iii) as may be necessary during periods of construction, reconstruction, repair, or temporary service;

(iv) as may be required by governmental agencies having jurisdiction over the Shopping Center;

(v) as may be required by the provider of such service; and

(vi) fire hydrants.

(c) At least twenty (20) days prior to any installation, maintenance, connection, repair, relocation or removal of utility lines located on another party's tract pursuant to the easement granted herein (except in an emergency, the work may be initiated with reasonable notice), the grantee shall first provide the grantor with a written statement describing the need for such work, shall identify the proposed location of the Utility Line, the nature of the service to be provided, the anticipated commencement and completion dates for the work and shall furnish a certificate of insurance showing that its contractor has obtained the minimum insurance coverage required by Section 10.2.

(d) The initial location of any Utility Line shall be subject to the prior written approval of the Party whose Common Area is to be burdened thereby, such approval not to be unreasonably withheld or delayed. The easement area shall be no wider than necessary to reasonably satisfy the requirements of a private or public utility, or five feet (5') on each side of the centerline if the easement is granted to a Party. Upon request, the grantee shall provide to the grantor a copy of an as-built survey showing the location of such Utility Line.

(e) Except as otherwise agreed to by the grantor and the grantee, any Party installing Separate Utility Lines pursuant to the provisions of this subparagraph shall pay all costs and expenses with respect thereto and shall cause all work in connection therewith (including general clean-up and proper surface and/or subsurface restoration) to be completed as quickly as possible and in a manner so as to minimize interference with the use of the Common Area. In addition, the grantee of any Separate Utility Line shall indemnify the grantor from all Claims arising out of or resulting from the installation, maintenance and operation of the Utility Line.

(f) The grantor shall have the right to relocate a Utility Line upon twenty (20) days' prior written notice, provided that such relocation:

(i) shall not be commenced during the months of October, November or December;

(ii) shall not interfere with or diminish the utility service to the grantee during the grantee's business hours; and if an electrical line/computer line is being relocated, then the grantor and grantee shall coordinate such interruption to eliminate any detrimental effects;

(iii) shall not reduce or unreasonably impair the usefulness or function of such Utility Line;

(iv) shall be performed without cost or expense to grantee;

(v) shall be completed using materials and design standards which equal or exceed those originally used; and

(vi) shall have been approved by the provider of such service and the appropriate governmental or quasi-governmental agencies having jurisdiction thereover.

Documentation of the relocated easement area, including the furnishing of an "as-built" survey, shall be performed at the grantor's expense and shall be accomplished as soon as possible following completion of such relocation.

(g) Each Party hereby grants and conveys to each other Party owning an adjacent Tract the perpetual right and easement to discharge surface storm drainage and/or runoff from the grantee's Tract over, upon and across the Common Area of the grantor's Tract, upon the following conditions and terms:

(i) The Common Area grades and the surface water drainage/retention system for the Shopping Center shall be initially constructed in strict conformance with the details approved by the Approving Parties; and

(ii) No Party shall alter or permit to be altered the surface of the Common Area or the drainage/retention system constructed on its Tract if such alteration would materially increase the flow of surface water onto an adjacent Tract either in the aggregate or by directing the flow of surface water to a limited area.

### 2.3 **Building Encroachments.**

(a) In order to accommodate any Building improvements which inadvertently may be constructed beyond a Tract's boundary line, each Party grants to each Party owning an adjacent Tract an easement, not to exceed a maximum lateral distance of six inches (6"), in, to, over, under and across that portion of the grantor's Tract adjacent to such common boundary line for the maintenance and replacement of such encroaching Building improvements.

(b) If a constructing Party (the "Constructing Party") determines that it is necessary to place underground piers, footings and/or foundations ("Subsurface Construction Elements") across the boundary line of its Tract, the Constructing Party shall advise the Party owning the adjacent Tract (the "Adjacent Party") of its construction requirement and shall provide plans and specifications relating thereto, including proposed construction techniques for the Subsurface Construction Elements. The Adjacent Party hereby grants and conveys to the Constructing Party for the benefit of its Tract an easement, not to exceed a maximum lateral distance of five feet (5'), in, to, under and across that portion of the Adjacent Party's Tract not theretofore occupied by any then existing structure, for the installation, maintenance and replacement of such Subsurface Construction Elements.

(c) The Adjacent Party reserves the right to require the Constructing Party to make reasonable modifications to the design specifications for the Subsurface Construction Elements in order to permit the Adjacent Party the opportunity to use the same in connection with the construction of its Building improvements to the end that each Party shall be able to place its Building immediately adjacent to the common boundary line. If a common Subsurface Construction Element is used by the Parties, each shall assume and pay its reasonable share of the cost and expense of the design and construction thereof. If any Building using a common Subsurface Construction Element is destroyed and not replaced or is removed, the common Subsurface Construction Element shall remain in place for the benefit of the other Building using the same.

(d) The foregoing easement grants shall not diminish or waive any right of a Party to recover damages resulting from the constructing Party's failure to construct its Building within its Tract in the case of Section 2.3(a), or within the easement area limits in the case of Section 2.3(b). The easements in each instance shall:

(i) continue in effect for the term of this OEA and thereafter for so long as the Building using the easement area exists (including a reasonable period to permit reconstruction or replacement of such Building if the same shall be destroyed, damaged or demolished); and

(ii) include the reasonable right of access necessary to exercise and enjoy such grant upon terms and with the limitations described in Section 3.5.

(e) With respect to Buildings constructed along the common boundary line between Tracts, nothing herein shall be deemed to create or establish:

(i) a "common" or "party" wall to be shared with the adjacent Building; or

(ii) the right for a Building to receive support from or apply pressure to the adjacent Building.

2.4 **Sign Easements.** The Parties hereby grant and convey to each of the Parties entitled to place sign panels on Pylon Sign 1 and/or Pylon Sign 2 (as hereinafter defined), for their use and for the use of designated Occupants of their Tracts, a non-exclusive perpetual easement for the right and privilege to place sign panels on Pylon Sign 1 and/or Pylon Sign 2, together with reasonable access over, upon and across the lands upon which such pylons are constructed. Each Party shall have the right to use the panel space allocated to such Party in Section 9.1 and EXHIBIT D of this OEA and no other panel space whatsoever. The foregoing easement, together with the rights included therewith, shall be for the benefit of and appurtenant to the lands of each of the Parties entitled to place sign panels on Pylon Sign 1 and/or Pylon Sign 2 and shall be binding on and burden the lands upon which Pylon Sign 1 and Pylon Sign 2 are constructed.

2.5 **Restriction.** No Party shall grant any easement for the benefit of any property not within the Shopping Center; provided, however, that the foregoing shall not prohibit the granting or dedicating of easements by a Party on its Tract to governmental or quasi-governmental authorities or to public utilities.

### **ARTICLE 3**

#### **CONSTRUCTION OF BUILDINGS AND OUTSIDE SALES AREAS**

##### **3.1 General Requirements.**

(a) All construction activities performed within the Shopping Center shall be performed in compliance with all applicable Laws. All construction shall use new materials, and shall be performed in a good, safe, workmanlike manner.

(b) No construction activities performed by a Party shall:

(i) cause any unreasonable increase in the cost of constructing improvements upon another Party's Tract;

(ii) unreasonably interfere with construction work being performed on any other part of the Shopping Center;

(iii) unreasonably interfere with the use, occupancy or enjoyment of any part of the remainder of the Shopping Center by any other Party or its Permittees; or

(iv) cause any Building located on another Tract to be in violation of any Law.

(c) No enclosed mall shall be permitted within the Developer Tract without the prior written consent of the Approving Party for the Kohl's Tract.

**3.2 Permissible Building Areas.**

(a) Although no Party shall have an obligation to commence construction of any Building on its Tract, once construction of a Building has been commenced, such Building shall be completed. The following restrictions shall apply unless otherwise approved in writing by the Approving Parties, which approval may be granted or withheld in the sole and absolute discretion of the Approving Parties:

(i) Buildings may be constructed only within the Building Areas shown on the SITE PLAN;

(ii) If a Building Area has a maximum Floor Area designation on the SITE PLAN, such amount shall not be exceeded;

(iii) one or more Buildings may be constructed within a Building Area except that no more than one (1) Building may be constructed on each of the Outlot Tracts, except for Outlot 2, which may have two (2) Buildings thereon; and

(iv) Outside Sales Areas may be developed only in the Building Areas and Outside Sales Areas shown on the SITE PLAN.

(b) If a portion of any Building Area is at any time paved and used as Common Area, such portion may be subsequently used for building purposes provided that all parking requirements and other provisions relating to such Tract are complied with. Likewise, such building may be subsequently razed and, until replaced, the area shall thereafter be deemed part of the Common Area, and shall be improved to the same standards as the other Common Area, either as automobile parking and drive area or as landscaped area.

(c) If an Outside Sales Area is being used for the display and sale of merchandise, the Outside Sales Area shall be enclosed by a fence or other security barrier, but shall not be heated nor air-conditioned; otherwise the surrounding barrier, if any, shall be removed by the Occupant and the surface of the Outside Sales Area shall be used as Common Area, or if the Outside Sales Area is located within a Building Area, the Outside Sales Area may be used for the location of Buildings.

**3.3 Building Height Restrictions.**

(a) No Building shall exceed one story in height; provided, however, the foregoing restriction shall not prohibit the construction of mezzanines.

(b) No Building shall exceed the following height restrictions without the approval of the Approving Parties, which approval may be granted or withheld by the Approving Parties in their sole and absolute discretion:

- |       |  |           |
|-------|--|-----------|
| (i)   | On the Kohl's Tract  | - 47 feet |
| (ii)  | On the Developer Tract   | - 35 feet |
| (iii) | On the Outlot Tracts (except the Outlot Tract identified as "Outlot 2" on the <u>SITE PLAN</u> ) | - 25 feet |

(iv) Outlot Tract identified as "Outlot 2"  
on the SITE PLAN

- 47 feet

(c) The height of any Building shall be measured perpendicular from the finished floor elevation of the ground level of the Building to the top of the roof structure, including any screening, parapet, penthouse, mechanical equipment or similar appurtenance located on the roof of such Building. Any Party shall have the right to install, maintain, repair, replace and remove Communications Equipment used in connection with the business being conducted by an Occupant on the top of the Building on its Tract which may extend above the height limits established above; provided, however, such Communication Equipment shall be set back from the front of the Building to reduce visibility thereof by customers. As used herein, the phrase "Communications Equipment" means such things as satellite and microwave dishes, antennas and laser heads, together with associated equipment and cable.

### 3.4 Staging Areas.

(a) In connection with any construction, reconstruction, repair or maintenance on its Tract, each Party reserves the right to create a temporary staging and/or storage area in the Common Area or in the Building Area on its Tract at such location as will not (i) unreasonably interfere with access between such Tract and the other areas of the Shopping Center, (ii) obstruct the access drives and service drives, if any, which are designated on the SITE PLAN as "Perpetual Access", or (iii) obstruct any major access drive situated immediately in front of the Building Areas, except to extent otherwise approved by the Approving Parties.

The staging and/or storage area shall not exceed twelve thousand (12,000) square feet in area unless otherwise shown on the SITE PLAN or otherwise approved by the Approving Parties.

(b) If a business is operating on any Tract, then no other Party's staging and/or storage area shall be located within one hundred feet (100') of said operating business, unless located within a Building Area. If substantial work is to be performed, the constructing Party shall, at the request of any Approving Party, fence off the staging and/or storage area.

(c) Prior to the commencement of any work that requires the establishment of a staging and/or storage area on its Tract, a Party shall give at least twenty (20) days prior notice to the Approving Parties of the proposed location of such staging and/or storage area. All storage of materials and the parking of construction vehicles, including vehicles of workers, shall occur only on the constructing Party's Tract, and all laborers, suppliers, contractors and others connected with such construction activities shall use only the access points located upon the constructing Party's Tract, unless use of such access points is not reasonably practicable.

(d) Upon completion of such work, the constructing Party shall restore the affected Common Area to a condition equal to or better than that existing prior to commencement of such work.

**3.5 License to use Common Areas.**

(a) Each Party hereby irrevocably grants to each other Party and to its respective contractors, materialmen and laborers a temporary license during the term of this OEA for access and passage over and across the Common Area of the grantor's Tract as shall be reasonably necessary for the grantee to construct and/or maintain improvements upon the grantee's Tract; provided, however, such license shall be in effect only during periods when actual construction and/or maintenance is being performed and such license shall not be used in a manner that will unreasonably interfere with the use and operation of the Common Area by others. Prior to using the license granted herein, the grantee shall endeavor to notify the grantor of the work to be performed.

(b) Any Party availing itself of the temporary license shall promptly pay all costs and expenses associated with such work, shall complete such work as quickly as possible, and shall promptly clean the area and restore and/or repair the affected portion of the Common Area to a condition which is equal to or better than the condition which existed prior to the commencement of such work.

(c) If a dispute exists between the contractors, laborers, suppliers and/or others connected with construction activities, each Party shall have the right to prohibit the contractors, laborers, suppliers and/or others working for another Party from using the Common Area on its Tract.

**3.6 Adjacent Buildings.**

(a) The Parties hereby specifically consent to the placement of Buildings along their respective common boundary lines, and each Party shall support any request by another Party for a side-yard or setback variance if the same is required in order to accommodate such construction.

(b) The second Party to construct a Building adjacent to a common boundary line shall do so in a manner that does not result in damage to the improvements in place on the adjoining Tract, and such Party shall undertake and assume at its sole cost the obligation of completing and maintaining the nominal attachment (flashing and seal) of its Building to that of the existing Building on the other Tract, it being the intent of the Parties to establish and maintain the appearance of one continuous Building complex. In performing such attachment, the wall of one Building shall not receive support from nor apply pressure to the wall of the other Building.

**3.7 Side Yard Requirements.**

(a) The Parties acknowledge that Kohl's initially proposes to construct on the Kohl's Tract a Building which is classified as an "unlimited area" building under certain building codes (By way of explanation, but not limitation, an "unlimited area" building is designated II-N or V-N under the Uniform Building Code). All Buildings constructed within the Shopping Center shall comply with the following requirements:

(i) no Building shall be constructed within sixty feet (60') of the Building Area on an adjoining Tract unless such Building, hereinafter referred to as the "Adjacent Building," shall be located immediately adjacent to the common boundary line and is attached to the Building, if any, on the adjacent Tract in accordance with Section 3.6(b);



(ii) if an Adjacent Building exists, then no Building shall be located within sixty feet (60') of the Adjacent Building unless such Building is attached to the Adjacent Building in accordance with Section 3.6(b); the Adjacent Building and all other Buildings on the Tract that are attached to the Adjacent Building and to each other are hereinafter referred to as the "Building Group";

(iii) any Building that is not part of the Building Group, shall be located at least sixty feet (60') distant from the Building Group; and

(iv) the Adjacent Building or the Building Group, as the case may be, shall comply with the Building code requirements applicable to an "unlimited area" building, including without limitation the installation of an approved sprinkler system for fire protection.

(b) In addition to the requirements set forth above, no Building shall initially be placed or constructed on their respective Tracts in a manner which will, based on then existing governmental regulations, either preclude the construction of an "unlimited area" building within the Building Areas, or cause an existing "unlimited area" building thereon to no longer be in conformance with applicable building code requirements; provided, however, subsequent changes in governmental regulations shall not obligate a Party to modify or alter its existing Building.

(c) If required by any governmental authority, each Party shall join in a recordable declaration that confirms the existence of a sixty foot (60') clear area around the Building Areas.

### 3.8 **Liens.**

(a) If any mechanic's lien is filed against the Tract of one Party as a result of services performed or materials furnished for the use of another Party, the Party permitting or causing such lien to be so filed shall cause such lien to be discharged within fifteen (15) days after the entry of a final judgment (after all appeals) for the foreclosure of such lien and shall Indemnify the other Party and its Tract against all Claims on account of such lien or claim of lien.

(b) Nothing herein shall prevent a Party permitting or causing such lien from contesting the validity thereof in any manner such Party chooses so long as such contest is pursued with reasonable diligence and in good faith. If such contest is determined adversely (allowing for appeal to the highest appellate court), such Party shall promptly pay in full the required amount, together with any interest, penalties, costs or other charges necessary to release such lien.

(c) Notwithstanding the foregoing, upon request of the Party whose Tract is subject to such lien, the Party permitting or causing such lien to be filed shall promptly cause such lien to be released and discharged of record, either by paying the indebtedness which gave rise to such lien or by posting bond or other security as shall be required by law to obtain such release and discharge, unless such Party delivers to the other an undertaking from a title insurance company to discharge the lien in accordance with Section 3.8(a).

## **ARTICLE 4**

### **DEVELOPMENT OF COMMON AREA**

4.1 **Common Area.** The Common Area of the Developer Tract and the Kohl's Tract shall be initially constructed as shown on the SITE PLAN; provided, however, no fence or other barrier which would prevent or unreasonably obstruct the passage of pedestrian or vehicular travel shall be erected or permitted within or across the Common Area located within the Developer Tract and the Kohl's Tract, exclusive of (i) the limited curbing and other forms of traffic control depicted on the SITE PLAN and (ii) the permitted staging and/or storage areas. Contemporaneously with the construction of a Building upon its Tract, the constructing Party shall cause the Common Area on its Tract to be substantially completed no later than the day on which the first Occupant of such Tract opens for business with the public. Such work shall be done in a good and workmanlike manner and in accordance with good engineering standards.

4.2 **Parking Requirements.**

(a) The parking area on the Kohl's Tract, on each separate Tract comprising the Developer Tract and on each of the Outlot Tracts shall contain sufficient uncovered ground level, parking spaces in order to comply with the following minimum requirements:

(i) five (5.0) parking spaces for each one thousand (1,000) square feet of Floor Area;

(ii) if a business use contains a drive-up unit (such as remote banking teller or food ordering/dispensing facility), then there shall also be created space for stacking not less than five (5) automobiles for each drive-up unit;

(iii) any Restaurant containing less than two thousand five hundred (2,500) square feet of Floor Area shall have five (5) parking spaces for each one thousand (1,000) square feet of Floor Area devoted to such use; and

(iv) any Restaurant containing two thousand five hundred (2,500) or more square feet of Floor Area shall have ten (10) parking spaces for each one thousand (1,000) square feet of Floor Area devoted to such use.

(b) If an Occupant operates a Restaurant incidentally to its primary business purpose, then so long as such incidental operation continues, the portion of the Floor Area occupied by such Restaurant shall be excluded from the application of (iii) above. For the purpose of this clause only, a Restaurant shall be an "incidental operation" if it occupies less than seven percent (7%) of the Occupant's Floor Area and does not have a separate customer entry/exit door to the outside of the Building. If an Occupant uses Floor Area for Restaurant and other purposes, only the portion of Floor Area allocated for Restaurant purposes shall be subject to the increased parking requirements.

(c) The foregoing requirements, together with the parking requirements imposed under all applicable Laws, shall be satisfied throughout the term of this OEA for each Tract and for each of the Outlot Tracts without reliance on the easements granted under Section 2.1, except to the extent otherwise indicated on the SITE PLAN. Except to the extent otherwise indicated on the SITE PLAN, (i) all parking spaces shall be at a 90° angle to the spine and initially shall be not less than nine (9.0') in width, and (ii) the distance between rows of parking stalls initially shall be at least sixty feet (60'), measured from spine to spine.