

2003

West Valley City v. Douglas W. Martin, dba Fantastic Sam's and Does 1-10 : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY,
a Utah municipal corporation,

Plaintiff and Appellant,

vs.

DOUGLAS W. MARTIN, d.b.a.
FANTASTIC SAM'S;
and DOES 1 THROUGH 10,

Defendant and Appellee;

Case No. 20030299-CA

DOUGLAS W. MARTIN, d.b.a.
FANTASTIC SAM'S;

Counterclaim Plaintiff,

vs.

WEST VALLEY CITY,
a Utah municipal corporation,

Counterclaim Defendant.

BRIEF OF THE APPELLANT
Appeal from the Third Judicial District Court,
in and for Salt Lake County, State of Utah;
the Honorable Joseph C. Fratto, Jr.

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STATEMENT OF JURISDICTION

Appellate jurisdiction over this case is rested in the Utah Court of Appeals pursuant to §78-2a-3(2)(j), Utah Code Annotated.

STATEMENT OF THE ISSUES

ISSUE I. Did the trial court incorrectly interpret the provisions of the Martin Lease Agreement (the “Martin Lease”) which prohibit Martin from receiving compensation in the event the premises is acquired through eminent domain?

A trial court’s interpretation of the words of an unambiguous, integrated contract is a question of law and is reviewed for correctness on appeal. *Elm, Inc., v. M.T. Enterprises, Inc.*, 968 P.2d 861 (Utah App. 1998).

The propriety of a trial court’s summary judgment order is a matter of law. In deciding whether summary judgment is appropriate, the appellate court need only review whether the trial court erred in applying the relevant law and whether a material fact was in dispute. *WebBank v. American General Annuity Service Corp.*, 2002 UT 88 ¶10, 54 P.3d 1139,1143 (Utah 2002).

ISSUE II. Does the phrase “If the whole of the premises shall be acquired or condemned by eminent domain for any public or quasi-public use or purpose...” in §19.01 of the Martin Lease refer only to acquisition by eminent domain, or is this provision of the Lease also triggered if the City purchases the property for a public use?

A trial court’s interpretation of the words of an unambiguous, integrated contract is a question of law and is reviewed for correctness on appeal. *Elm, Inc., v. M.T. Enterprises,*

Inc., 968 P.2d 861 (Utah App. 1998).

The propriety of a trial court's summary judgment order is a matter of law. In deciding whether summary judgment is appropriate, the appellate court need only review whether the trial court erred in applying the relevant law and whether a material fact was in dispute. *WebBank v. American General Annuity Service Corp.*, 2002 UT 88 ¶10, 54 P.3d 1139,1143 (Utah 2002).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND RULES

This case is a matter of contract interpretation and there are no relevant constitutional provisions, statutes, ordinances or rules.

STATEMENT OF THE CASE

NATURE OF THE CASE

This case involves the exercise of the City's power of eminent domain to acquire a certain premises in which Martin held a leasehold interest. The premises leased by Martin was located on a larger parcel which had been purchased by the City for remodeling into a Justice Court and Public Safety Complex.

COURSE OF PROCEEDINGS

On July 1, 2001, the West Valley Justice Court began operation. The court entered into a one-year lease with the Court Administrator's Office to lease space in the Third District Court, West Valley Department courthouse until June 30, 2002; therefore, on July 1,

2002, the Justice Court was required to move to a different location. (Record pages 109-117) Also, the West Valley City Police department had grown to over 180 sworn officers and had outgrown its accommodations at West Valley City Hall.

Located next to West Valley City Hall at 3575 South Market Street is a three-story office/retail building (the “Heartland Building”), which was owned by Heartland West Valley Commercial Limited Partners II. Early in 2001, the West Valley City Council recognized that the most efficient solution to the City’s Justice Court and Police-housing dilemma was the conversion of the Heartland Building into a Justice Court and Public Safety Complex. In furtherance of that goal, the City Council took the following actions. First, on June 19, 2001, the City Council adopted Resolution No. 01-131 (Record pages 138-147) which authorized the issuance of up to \$21,500,000 in municipal bonds for, among other things, acquiring and improving a building and related appurtenances to be used as a Public Safety Complex. Shortly thereafter, on July 3, 2001, the City Council adopted Resolution No. 01-154 (Record 135-137) which authorized purchase of the Heartland Building. Following a period of negotiation, the closing on the building took place on September 19, 2001, and ownership of the building passed from Heartland to West Valley City.

When the City purchased the Heartland Building on September 19, 2001, Douglas W. Martin, d.b.a. Fantastic Sam’s, was a first-floor tenant of the Heartland Building. The approximately 1500 square-foot area leased by Martin was located in the center of the proposed Justice Court facility, and it was necessary for the City to use that space in order to

construct the Justice Court.

By certified letter dated November 27, 2001, which was delivered on November 29, 2001, West Valley City provided Martin with notice of the City's intent to begin construction of the Justice Court and Public Safety Complex on March 1, 2002 and of the requirement that he vacate the premises prior to that date. (Record 170-176) Martin indicated by letter to the City that he would not vacate the property on March 1, 2002; therefore, on or about January 30, 2002, the City filed this action in unlawful detainer and eminent domain to acquire the leasehold interest of Martin in the Heartland Building. (Record pages 1-59) The City also filed a Motion for Immediate Occupancy of the premises. (Record pages 65-67) The case was assigned to Judge Brian of the West Valley Department of the Third District Court. Martin filed a counter claim against the City on or about February 5, 2002. (Record pages 68-81) Martin also filed a Motion for Change of Venue, which was granted by Judge Brian. (Record pages 86-88, 156-158) The case was then transferred to Judge Fratto in the Murray Department of the Third District Court.

On February 25, 2002, following a hearing before Judge Fratto, the trial court issued an Order of Immediate Occupancy to the City. (Record pages 221-223) Pursuant to the terms of that Order, the City deposited the sum of \$30,100 into the court. (Record 269) Martin subsequently withdrew that sum from the court. (Record pages 397-402)

During July and August 2002, the parties cross filed Motions for Summary Judgment. (Record pages 227-229, 283-285) Following oral argument of the parties, Judge Fratto issued

a Memorandum Decision on March 18, 2003. (A copy of the Memorandum Decision is attached hereto as Exhibit A). (Record pages 356-361) Judge Fratto's decision eliminated many of the claims of the parties, but allowed the issue of compensation for a taking under the eminent domain statutes to proceed to trial. On April 8, 2003, the City filed a Petition for Permission to Appeal an Interlocutory Order with the Utah Court of Appeals. (Record pages 362-364) That Petition was transferred to the Utah Supreme Court by the Court of Appeals on May 15, 2003. (Record pages 377-378)

On July 25, 2003, the Utah Supreme Court granted the City's Petition for Permission to Appeal an Interlocutory Order. (Record pages 403-404) Subsequently, the case was transferred back to the Court of Appeals for resolution. (Record 406-407)

DISPOSITION IN THE TRIAL COURT

The trial court issued a Memorandum Decision on March 18, 2003. (A copy of the Memorandum Decision is attached hereto as Exhibit A). The Memorandum Decision determined at there were no material facts in dispute and that the motions for summary judgment could be resolved by interpretation of the lease agreement between the parties and by application of applicable law. (Record pages 357-361) The trial court determined that because the City had purchased the underlying fee interest in the property, the City could not take the property by eminent domain. However, the trial court also determined that the City, as fee owner of the property, does have the authority to use eminent domain to acquire the leasehold interest of Martin.

Based on that analysis, the trial court issued a Memorandum Decision which dismissed the City's unlawful detainer claim, but retained the eminent domain claim to acquire the leasehold interest of Martin. The trial court's Memorandum Decision also dismissed all of the counterclaims of Martin, except Martin's claim for compensation for the leasehold interest under §63-30-10.5 Utah Code Annotated.

STATEMENT OF THE FACTS

The following facts are undisputed and material to the Court's consideration of the City's appeal.

a. In June 1998, Martin and Heartland West Valley Commercial Limited Partners II executed a lease (the "Martin Lease") for the Fantastic Sam's hair salon located on the first floor of the office building located at 3575 South Market Street, West Valley City, Utah. (Record page 96) (A copy of the Martin Lease is attached hereto as Exhibit B).

b. On September 19, 2001, West Valley City (the "City") purchased the above-mentioned office building from Heartland West Valley Commercial Limited Partners II. This purchase included an assignment of the Martin Lease from Heartland to the City. (Record pages 9-11)

c. The City commenced an eminent domain action against Martin's property interest on or about January 30, 2002 and the court granted the City's Motion for Order of Immediate Occupancy on or about February 25, 2002. (Record pages 221-223).

d. The City took actual possession of the leasehold premises on or about March 4,

2002. The building was remodeled into a Justice Court and Public Safety Building. (Record pages 280-282)

e. Section 19.01 of the Martin Lease states:

19.01 Total Condemnation of Premises.

If the whole of the premises shall be acquired or condemned by eminent domain for any public or quasi-public use or purpose, then the Lease Term shall cease and terminate as of the day possession of the premises is taken by the condemning authority and all rentals shall be paid up to that date and Tenant shall have no claim against Landlord nor the condemning authority for the value of any unexpired Lease Term of this Lease.

Section 19.04 of the Martin Lease states:

19.04 Landlord's Damages. In the event of any condemnation or taking as aforesaid, whether in whole or in part, Tenant shall not be entitled to any part of the award paid for such condemnation, and Landlord shall be entitled to receive the full amount of such award; Tenant hereby expressly waiving any right or claim to any part thereof.

(Record pages 29-30)

SUMMARY OF THE ARGUMENTS

I. MARTIN'S LEASE CLEARLY STATES THAT HE SHALL RECEIVE NO COMPENSATION AS A RESULT OF THE ACQUISITION OF THE PREMISES BY EMINENT DOMAIN.

Article XIX of the Martin Lease contains a valid "condemnation clause" by which Martin agrees to accept no compensation for the taking of his leasehold for a public use. One of the triggering mechanisms for the "condemnation clause" is the acquisition of the "premises" by eminent domain. The Martin Lease defines premises as the leasehold interest of Martin in a portion of the entire property; therefore, the "condemnation clause" is

triggered by the City's acquisition of the leasehold interest by eminent domain and, under the terms of the Martin Lease, he receives no compensation for his leasehold interest. The trial court misinterpreted these sections of the Martin Lease and its summary judgment decision that Martin is entitled to a trial on the value of his leasehold interest should be reversed.

Also, under common law relating to "automatic lease termination clauses", lessees are is not entitled to compensation for their leasehold interest unless the lease specifies otherwise. The trial court found and enforced such a clause in the Martin Lease; therefore, Martin is entitled to no compensation for his leasehold interest and the City's motion for summary judgment on that issue should have been granted by the trial court.

II. THE MARTIN LEASE UNAMBIGUOUSLY STATES THAT THE LEASEHOLD INTEREST TERMINATES UPON ACQUISITION OF THE PREMISES FOR A PUBLIC PURPOSE AND THAT MARTIN RECEIVES NO COMPENSATION.

The trial court failed to use proper rules of contract construction when it found that the City's purchase of the entire parcel of property did not trigger the provisions of Article XIX of the Martin Lease (the "condemnation clause" provisions). The unambiguous terms of §19.01 and §19.04 of the Martin Lease indicate that the provisions of those sections can be triggered by any acquisition of the premises for a public use, not just through eminent domain. If the trial court was correct in interpreting the term "premises" to mean the property purchased by the City, rather than the Martin leasehold interest, then the "no lessee compensation" provisions of §19.01 and §19.04 should have been triggered by the City's

purchase of the underlying interest in the property, or a combination of that purchase and the condemnation of the Martin Lease.

DETAIL OF THE ARGUMENTS

I. IN THE MARTIN LEASE AGREEMENT, MARTIN CLEARLY AGREES TO FOREGO COMPENSATION IN THE EVENT THAT THE PREMISES IS ACQUIRED BY EMINENT DOMAIN.

The facts of this case are not in dispute. The City has acquired the property it needed to construct the Justice Court and Public Safety Complex by both purchasing the underlying fee interest and then acquiring the Martin Lease through eminent domain. Through clear and unambiguous lease terms, Martin bargained away his claim to any compensation or a condemnation award. Although this result may seem harsh, Martin is bound by the terms of the bargain that he made. The trial court failed to recognize this and refused to grant summary judgment to the City with respect to the issue of Martin's compensation for the taking of his leasehold interest.

The basic common law rule is that a lessee may share, with the lessor, eminent domain compensation to the extent of the lessee's interest. However, the parties may agree otherwise in their lease. *Alamo Land & Cattle Co., Inc. v. Arizona*, 424 U.S. 295, 304, 96 S.Ct. 910, 916 (Ariz. 1976).

In this case, Martin has explicitly bargained away his right to receive any compensation for the taking of his leasehold for public use. Article XIX of the Martin Lease controls the actions of the parties when the premises is acquired for a public use. The two

specifically applicable sections of the Martin Lease are as follows:

SECTION 19.01 Total Condemnation of Premises.

If the whole of the premises shall be acquired or condemned by eminent domain for any public or quasi-public use or purpose, then the Lease Term shall cease and terminate as of the day possession of the premises is taken by the condemning authority and all rentals shall be paid up to that date *and Tenant shall have no claim against Landlord nor the condemning authority for the value of any unexpired Lease Term of this Lease.* (Emphasis added.)

SECTION 19.04 Landlord's Damages.

In the event of any condemnation or taking as aforesaid, whether in whole or in part, *Tenant shall not be entitled to any part of the award paid for such condemnation,* and Landlord shall be entitled to receive the full amount of such award; *Tenant hereby expressly waiving any right or claim to any part thereof.* (Emphasis added.)

In interpreting Article XIX of the Martin Lease, the trial court took the clearly inconsistent positions that the acquisition of the Martin leasehold interest by eminent domain did not trigger the language of §19.01 for purposes of the compensation provision, but did trigger the §19.01 provision relating to the termination of the Martin Lease. The trial court stated in the Memorandum Decision that: “Article XIX of the lease, taken as a whole, must be interpreted to mean that defendant has no claim for damages if the property is taken by eminent domain. The City purchased the property and it is by that commercial transaction plaintiff owns the property and building in fee. It could not then, and in fact has not, taken the property by eminent domain.” The court then found that “The effect of condemning the leasehold interest is that the lease is terminated, and the termination leaves no contract upon which there can be a breach.” (Record pages 356-361)

Obviously both positions cannot be correct and it is clear that the “no lessee compensation” provisions are the sections that the trial court misconstrued. In every other instance in this case, the trial court finds that the City is exercising its power of eminent domain. It first made that determination when it issued the Order of Immediate Occupancy and stated “The Court hereby finds that pursuant to §78-34-3, Utah Code Annotated, the Plaintiff has the right of eminent domain to acquire the leasehold interests of the Defendant.” (Record page 222) Then, in the Memorandum Decision it specifically found that the “City has the authority to condemn the defendant’s leasehold interest.” (Record page 358)

The disconnect seems to be in the trial court’s determination that the City’s acquisition of the underlying fee interest in the property did not trigger the condemnation provisions of Article XIX of the Martin Lease. The trial court specifically found that the City’s purchase of the entire parcel did not terminate the leasehold interest of Martin. Then it found that the filing of an eminent domain action by the City did trigger the same termination provision. Apparently the trial court simply forgot to apply that rationale to the compensation provisions of the same sections of the Martin Lease.

Also, the trial court seems to make a distinction between the condemnation of the leasehold interest of Martin and the “property” or “premises”, which it apparently viewed as the entire parcel that was purchased by the City. Although this is also inconsistent, the trial court may have determined that the condemnation of the leasehold interest was not a

condemnation of the “premises” as used in the “no lessee compensation” portions of §19.01 and §19.04 of the Martin Lease.

This interpretation conflicts with other provisions of the Martin Lease itself. In §2.02, the Martin Lease defines “premises” as:

SECTION 2.02 Premises Defined

For the purposes hereof, the premises shall be deemed to extend to and include the interior faces of all exterior walls, or to the building line where there is no wall, or to the center line of any walls separating the premises from other Tenant premises (whether Leased or not, and whether used for store purposes or not) in the Shopping Center, and shall consist of the space therein, including the structural floors and the bottom of the roof above, together with all permitted mezzanines, balconies and outside selling areas, if any (herein called the “floor area”) and other appurtenances specifically granted herein, but excepting and reserving to Landlord and other Tenants the use of the exterior walls and roof.

Also, §2.01 of the Martin Lease provides as follows:

SECTION 2.01 Lease of Premises

Landlord, in consideration of the rent to be paid and the covenants to be performed by Tenant, does hereby demise and Lease unto Tenant, and Tenant hereby Leases and takes from Landlord, for the Lease Term, at the rental and upon the covenants and conditions hereinbefore and hereinafter set forth, that space located in the Shopping Center and described on Exhibit C attached hereto and made a part hereof (herein called the “premises”).

Clearly, the “premises” as used in Article XIX of the Martin Lease refers to Martin’s leasehold interest; his physical occupation of a portion of the building owned by the City. Premises is not defined as, nor does it refer to, the property and building as a whole. It is precisely this right to physically occupy a portion of the building that the City is acquiring

through the eminent domain action. In the bundle of sticks that make up complete ownership of property, it is the one stick that the City did not own. When §19.01 of the Martin Lease states that: “If the whole of the premises shall be acquired or condemned by eminent domain for any public or quasi-public use or purpose...,” it is referring to the acquisition or condemnation of the “premises” as defined in §2.02 of the Martin Lease, which is the leasehold interest, not the underlying fee interest in the property which had been purchased by the City.

Given the language of Article XIX of the Martin Lease, the trial court clearly made an error in not enforcing the unambiguous Lease provisions and in denying summary judgment to the City. It is not unusual for a lessor and lessee to apportion eminent domain compensation through such lease terms. “Condemnation clauses” are fully enforceable lease provisions. *United States v. Petty Motor Co.*, 327 U.S. 372, 376, 66 S.Ct. 596, 90 L.Ed. 729 (1946). Utah courts have also relied on the terms of a lease to apportion compensation to a lessee. *Redevelopment Agency of Salt Lake City v. Daskalas*, 785 P.2d 1112, 1120 (Utah Ct. App. 1989). (“To resolve this issue we look to the terms of the lease agreements.”) This concept is so well settled that the Court of Appeals of Ohio stated, “We think it is not to be controverted that a landlord and tenant may, by a properly worded contract, provide that the tenant shall receive no compensation when the leased premises are taken by right of eminent domain. It is also not subject to dispute that a landlord and tenant may, by a properly worded contract, provide that in the event that the leased premises are taken by condemnation

proceedings, the lease shall terminate. These rules are so elementary that they need no citation of authority to support them...” *City of Columbus v. Huntington National Bank*, 143 N.E. 2d 874, 877 (Ohio Ct. App.1956).

Regardless of the trial court’s misinterpretation of the term “premises,” Martin is not entitled to compensation under basic common law principles relating to lease clauses containing “automatic termination clauses” such as §19.01 of the Martin Lease. The trial court specifically found that the City’s acquisition of the leasehold interest by eminent domain did trigger the automatic termination of the Martin Lease. (Record pages 358) Under common law, an automatic termination of the leasehold upon acquisition by eminent domain results in no compensation for the lessee, unless the lease explicitly states otherwise.

For example, an excellent discussion of the effect of automatic termination clauses is contained in the Colorado case of *Fiberglas Fabricators, Inc. v. Kylberg*, 799 P.2d 371 (Colo. 1990). In the *Fiberglas Fabricators* case, the Colorado Supreme Court considered a condemnation clause very similar to the one contained in the Martin Lease. It stated that if “the entire leased premises shall be taken as a result of the exercise of the power of eminent domain or sold to the governmental authority in lieu of condemnation..., this lease agreement shall terminate.” *Fiberglas Fabricators*, at page 375. The Colorado Court found this to be a typical condemnation clause.

After examining this “automatic termination clause”, the Colorado Supreme Court determined that by agreeing to such a clause, the lessee had contracted away its common law

right to share in condemnation proceeds. *Fiberglas Fabricators*, at page 377. The court stated, “Most jurisdictions that have considered the legal effect of a condemnation clause providing only for automatic termination of the lease upon condemnation have held that because the lessee’s leasehold interest is destroyed at the time of condemnation, the lessee no longer has any interests in the condemned property for which he or she should be compensated, and the lessee is foreclosed from sharing in the condemnation proceeds. (Citations omitted.)” *Fiberglas Fabricators*, at page 375, 376.

Based upon the foregoing, it is clear that the Martin Lease contains a valid “condemnation clause” by which Martin agrees to accept no compensation for the taking of his leasehold interest for a public use. One of the triggering mechanisms for the “condemnation clause” is the acquisition of the “premises” by eminent domain. The Martin Lease defines premises as the leasehold interest of Martin in a portion of the entire property, therefore, the “condemnation clause” is triggered by the City’s acquisition of the leasehold interest by eminent domain and Martin receives no compensation for his leasehold interest. Also, under relevant common law principles, Martin is not entitled to compensation since his Lease contained a valid automatic termination clause. The trial court misinterpreted these sections of the Martin Lease and its summary judgment decision that Martin is entitled to a trial on the value of his leasehold interest should be reversed.

II. THE MARTIN LEASE UNAMBIGUOUSLY STATES THAT THE LEASEHOLD INTEREST TERMINATES UPON ACQUISITION OF THE PREMISES FOR A PUBLIC PURPOSE AND THAT MARTIN RECEIVES NO COMPENSATION.

In its Memorandum Decision, the trial court found that the City's purchase of the underlying fee interest in the property did not trigger the "condemnation clause" sections of the Martin Lease. The City believes that the trial court's determination was in error and was based upon misapplication of the rules of contract construction. This argument only becomes important because the trial court seemed to rule that the "premises" as used in §19.01 and §19.04 referred to the entire parcel of property purchased by the City, rather than just the Martin leasehold. As set forth above, the City does not agree with that ruling; however, if the trial court was correct, then the "no lessee compensation" provisions of §19.01 and §19.04 should have been triggered by the City's purchase of the underlying interest in the property, or a combination of that purchase and the condemnation of the Martin Lease.

Section 19.01 of the Martin Lease provides for termination of the Martin Lease if the premises are "acquired ...for a public or quasi-public use." Section 19.01 states in its entirety:

SECTION 19.01 Total Condemnation of Premises.

If the whole of the premises shall be acquired or condemned by eminent domain for any public or quasi-public use or purpose, then the Lease Term shall cease and terminate as of the day possession of the premises is taken by the condemning authority and all rentals shall be paid up to that date and Tenant shall have no claim against Landlord nor the condemning authority for the value of any unexpired Lease Term of this Lease.

Section 19.01 of the Martin Lease must be read in accordance with ordinary rules of contract construction and according to its plain and ordinary meaning. *ELM, Inc. v. M.T.*

Enterprises, Inc., 968 P.2d 861 (Utah Ct. App. 1998). In this case, the plain meaning of §19.01 is that the Lease Term ends when the property is appropriated for public use either through acquisition “or” condemnation.

The trial court ignores the disjunctive word “or” in the first line of §19.01. The phrase reads, “If the whole of the premises shall be acquired or condemned by eminent domain for any public or quasi-public use or purpose...” The trial court chose to ignore the disjunctive “or” and read the phrase redundantly when it determined that “The court is not persuaded that purchase of the property by the City for a public purpose is the equivalent of condemning the property.” (Record page 358) In other words, the court reads this phrase in the Martin Lease as two phrases: “acquired by eminent domain” and “condemned by eminent domain,” which mean the same thing. This reading is in conflict with relevant Utah caselaw.

Utah courts have made clear that the word “or” has an important disjunctive meaning that cannot simply be ignored. *The 49th Street Galleria v. Tax Commission*, 860 P.2d 966 (Utah Ct. App. 1993); *Brown v. Harry Heathman, Inc.*, 744 P.2d 1016 (Utah Ct. App. 1987); *Caster v. West Valley City*, 2001 UT App 212 (29 P.3d 22) (Utah Ct. App. 2001); *Young v. Salt Lake County*, 2002 UT 70 ¶9, 452 Utah Adv. Rep. 66, 67 (Utah 2002). The only plausible way to give meaning to the words “acquired” and “or” in Section 19.01 is to read it disjunctively. The phrase should be read as “acquired” *or* “condemned by eminent domain.” In that reading both the words “acquired” and “or” are given meaning.

In order for the trial court to reach its conclusion, it must read the applicable sentence

of the Martin Lease as if it essentially says “acquired by eminent domain or condemned by eminent domain.” In other words, the court reads both “acquired” and “condemned” as relating to the phrase “eminent domain.” Under that construction, the disjunctive “or” is entirely superfluous and the words “acquired” and “condemned” are redundant. Obviously, that reading of §19.01 is not in keeping with the laws of statutory construction.

The trial court also ignores other similar passages in the Martin Lease. Section 19.01 must be read in harmony with the other provisions of the Martin Lease, such as §19.05 which also describes alternative ways for a public entity to take possession of the property. The first phrase of §19.05 reads, “In the event of any condemnation or taking as aforesaid, whether in whole or in part....” Apparently the trial court also ignored the first appearance of the word “or” in this section. Clearly, the Martin Lease envisions that condemnation is not the only way that a public entity can acquire property. Taken as a whole, it is obvious that these provisions of the Martin Lease apply when the property is appropriated for public use, regardless of the method of acquisition by the public entity.

Based upon the foregoing, it is apparent that even if the trial court is correct in assuming that the term “premises” in Article XIX of the Martin Lease refers to the entire parcel and not just the Martin leasehold interest, the City was still entitled to summary judgment on the issue of compensation. The unambiguous terms of §19.01 and §19.04 indicate that the provisions of those sections can be triggered by any acquisition of the premises for a public use, not just through eminent domain. To hold otherwise violates the

principles of contract construction, and would also be unsound public policy. If the trial court is correct, then the wise thing for the City to have done would have been to condemn the entire property from Heartland and thereby cut off lessee claims, rather than negotiating a purchase from Heartland. Such a holding, which would promote the use of eminent domain at the expense of negotiated purchase, is clearly not in the public interest.

CONCLUSION

Based on the facts of this case and the unambiguous terms of the Martin Lease, it is clear that the City's purchase of the property and/or condemnation of the Martin leasehold interest terminated the Lease. Under the unambiguous terms of the Martin Lease, and based upon common law principles, Martin bargained away his right to any portion of compensation or condemnation award related to his leasehold property.

Based on the foregoing, the City's Motion for Summary Judgment on the issue of Martin's compensation should have been granted by the trial court.

DATED this 12TH day of NOVEMBER, 2003.

WEST VALLEY CITY



J. Richard Catten, Deputy City Attorney
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I, J. Richard Catten, certify that on the 12th day of November, 2003, I served upon James L. Christensen and Christopher G. Jessop, Attorneys for Defendant/Appellee, two (2) copies each of the Brief of the Appellant, by causing said Briefs to be mailed to them, by first class mail, with sufficient postage prepaid, to the following address:

James L. Christensen
Christopher G. Jessop
Corbridge Baird & Christensen
39 Exchange Place, #100
Salt Lake City, Utah 84111

WEST VALLEY CITY

A handwritten signature in black ink, appearing to read "J. Richard Catten", written over a horizontal line.

J. Richard Catten, Deputy City Attorney
Attorney for Plaintiff/Appellant

Exhibit A

EXHIBIT A

MEMORANDUM DECISION

Trial Court No. 020201239

In The Third Judicial District Court Of Salt Lake County
State of Utah

WEST VALLEY CITY,

Plaintiff,

vs.

DOUGLAS W MARTIN, d.b.a.
FANTASTIC SAM'S

Defendant.

NOTICE OF DECISION

Judge: Joseph C Fratto, Jr

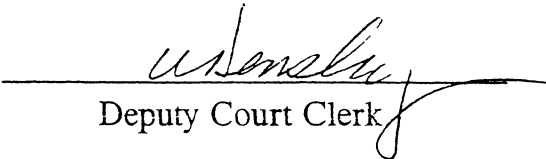
Case No.020201239

RE: Cross Motions for Summary Judgment.

Having been submitted for decision without oral argument pursuant to rule 4-501,
Rules of Practice, and the Court being now fully advised in the premises.

Please see attached decision.

Dated this 19 day of March, 2003.


Deputy Court Clerk

WEST VALLEY CITY
V.
DOUGLAS W. MARTIN, d.b.a.
FANTASTIC SAM'S

MEMORANDUM DECISION
Case No. 020201239
Judge Fratto

The matter is before the court to consider cross-motions for summary judgment.

Defendant was a tenant of Heartland West Valley Commercial Limited Partners , in a property located at 3575 South Market Street, West Valley City. The City purchased the property from "Heartland" to locate court facilities.

On January 24, 2002 the City delivered a letter to defendant, citing provisions of the lease as authority for their action, demanding defendant vacate the premises within five days. This not occurring, on January 30, 2002 plaintiff filed a complaint with two causes of action: unlawful detainer and eminent domain. The City sought immediate occupancy of defendant's leased premises, obtained an order on March 5, 2002, and posted a bond of \$60,000.

Defendant counterclaimed, alleging: breach of contract; violation of implied covenant of good faith and fair dealing; abuse of process; attorney fees; just compensation and punitive damages.

Defendant seeks summary judgment on his First Cause of Action: Breach of Contract, requesting that the court determine which facts are not in dispute or "issues" controverted, and enter judgment accordingly. Plaintiff, citing four bases, request a summary judgment.

The material facts are not in dispute. The motions are resolved by an interpretation of the

lease agreement and application of law.

Article XIX of the lease, taken as a whole, must be interpreted to mean that defendant has no claim for damages if the property is taken by eminent domain. The City purchased the property and it is by that commercial transaction plaintiff owns the property and building in fee. It could not then, and in fact has not, taken the property by eminent domain.

The lease further provides that defendant's leasehold interest will , ".... terminate as of the day possession of the premises is taken by the condemning authority...." That date represents both termination of the lease and the time beyond which defendant would be in unlawful detainer. However, because the City has not condemned the property, this contractual triggering event has not occurred. The court is not persuaded that purchase of the property by the City for a "public purpose" is the equivalent of condemning the property.

The City has the authority to condemn defendant's leasehold interest. That authority is not negated or precluded because the City is also the landlord obligated under the lease. The effect of condemning the leasehold interest is that the lease is terminated, and termination of the lease leaves no contract upon which there can be a claim of breach. In other words, the City cannot both have the ability to terminate a lease through condemnation of the leasehold interest and then be in breach of the lease for doing so. Thus, all claims arising from or based on the agreement cannot be maintained.

This having been said, the court considers each cause of action.

Plaintiff's first cause, unlawful detainer, cannot be maintained. The notice to quit is insufficient as a matter of law. The first opportunity for the City to be able to serve an effective legal notice to quit would be March 5, 2002, the entry of the Order of Immediate Occupancy.

There was no timely notice, and in any event there is no evidence defendant remained in the premises after this date.

Defendant's claims for breach of contract, violation of the implied covenant of good faith and fair dealing, and attorney's fees based on the contract cannot be maintained because the lease was terminated, as discussed above.

Defendant's third cause is grounded in the legal rather than factual claim that it is an abuse of process for the City to purchase and own property and then, by eminent domain, condemn the leasehold interests of others in that property. Having found that plaintiff does have that authority, the cause cannot be maintained.

Defendant's sixth cause is a demand for punitive damages based on the allegation that plaintiff has acted willfully, maliciously and recklessly. The claim appears to be based on the same proposition as defendant's abuse of process claim: procedurally, the City cannot buy the property and then condemn the lease. Having found that argument legally insufficient, it follows that punitive damages cannot be awarded, and thus the claim cannot be maintained.

This would leave plaintiff's second claim, wherein the City seeks, through eminent domain, to condemn defendant's leasehold; and defendant's fifth cause, seeking compensation pursuant to 63-30-10.5 *U.C.A.* These claims cannot be resolved through the motions before the court. The value of defendant's leasehold interest is in dispute. It will be for the trier of fact to determine its value.

Accordingly, plaintiff's First Claim for Relief: Unlawful Detainer and defendant's First, Second, Third, Fourth and Sixth causes are dismissed. The cross-motions for summary judgment, as they request dismissal of plaintiff's Second Claim: Eminent Domain and defendant's Fifth

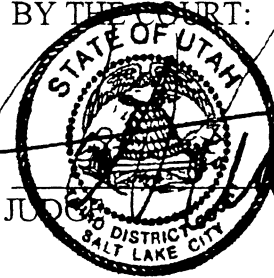
Cause of Action: Just Compensation, are denied.

This memorandum decision constitutes the order regarding the matters addressed herein.

No further order is required.

Dated this 18th day of March, 2003

BY THE COURT:



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 020201239 by the method and on the date specified.

METHOD	NAME
Mail	RICHARD CATTEN ATTORNEY PLA 3600 CONSTITUTION BLVD WEST VALLEY, UT 84119-0000
Mail	JAMES L. CHRISTENSEN ATTORNEY DEF 39 EXCHANGE PLACE SUITE 100 SALT LAKE CITY UT 84111-2705
Mail	JOHN HUBER ATTORNEY PLA SUITE 414 KEARNS BUILDING 136 SOUTH MAIN SALT LAKE CITY UT 84101-0000
Mail	CHRISTOPHER G JESSOP ATTORNEY DEF 39 EXCHANGE PLACE, SUITE 100 SALT LAKE CITY UT 84111

Dated this 19 day of March, 2003.

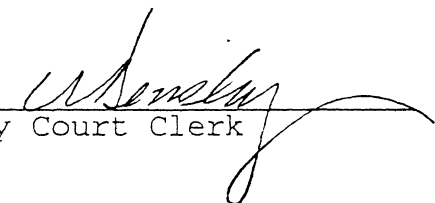

Deputy Court Clerk

Exhibit B

EXHIBIT B

MARKET STREET CENTER LEASE
“MARTIN LEASE”

LEASE SUMMARY FORM

Summary: September 9, 1999 Supersedes

Tenant : Fantastic Sams Phone No. :
 Address : 3500 South 2700 West Unit No. :
 Property : Market Street Shopping Center

New Lease Lease Renewal Amendment

Contact Phone :
 After Hour Emergency Contact: Phone :
 Monthly Base Rent: See Schedule Percentage Lease: Yes/No
 Security Deposit: \$1,500.00 Base Sales Amount:
 Other Deposits Annual Sales Amount:

Lease Information

Bill To

Term Begin Date : June 1, 1998 Name:
 Term End Date : May 31, 2008 Address:
 Term : 10 Years
 Move-In Date :
 Option Date :
 Lease Type : Full Service X NNN Other
 Late Charge 10%

Percentage of Common Area : 1.71%
 Rentable Square Feet : 1,500 sq. ft.
 Useable Square Feet :

Charges Schedule

<u>Charge Code</u>	<u>Description</u>	<u>Date</u>	<u>Recur/Once</u>	<u>Amount</u>
RNT	Monthly Rent	6-1-99	R/O	\$1,750.00
RNT	Monthly Rent	6-1-00	R/O	\$1,812.50
RNT	Monthly Rent	6-1-01	R/O	\$1,875.00
RNT	Monthly Rent	6-1-02	R/O	\$1,937.50
RNT	Monthly Rent	6-1-03	R/O	\$2,000.00
RNT	Monthly Rent	6-1-04	R/O	\$2,062.50
RNT	Monthly Rent	6-1-05	R/O	\$2,125.00
RNT	Monthly Rent	6-1-06	R/O	\$2,187.50
RNT	Monthly Rent	6-1-07	R/O	\$2,250.00

Other Information:

MARKET STREET CENTER LEASE

THIS SHOPPING CENTER Lease (the "Lease") is entered into this 8 Th day of June, 1998 between HEARTLAND WEST VALLEY COMMERCIAL LIMITED PARTNERS, (the "Landlord") whose address for the purposes hereof is 77 West 200 South Suite 400, Salt Lake City Utah 84101 and Douglas W Martin, d b a, Fantastic Sams (the "Tenant") whose address for the purposes hereof is 1595 South State Street, Orem, UT, 84097

ARTICLE I -- INTRODUCTORY PROVISIONS

Section 1 01 Fundamental Lease Provisions Certain fundamental Lease provisions are presented in this Section in summary form only to facilitate convenient reference by the parties hereto

- | | | <u>Cross Reference</u> |
|-----|---|------------------------|
| (a) | LANDLORD/LESSOR HEARTLAND WEST VALLEY COMMERCIAL LIMITED PARTNERS | |
| (b) | TENANT/LESSEE Douglas W Martin, d b a , Fantastic Sams | |
| (c) | TENANT'S TRADE NAME FANTASTIC SAM'S | See Article VI |
| (d) | DESCRIPTION OF PREMISES 1,500 square feet on main level retail floor as shown in cross hatch marks on Exhibit "C" | See Article II |
| | GLA OF PREMISES 1,500 square feet | |
| (e) | LEASE TERM 10 years | See Article III |
| (f) | RENT COMMENCEMENT DATE June 1, 1998 | See Article IV |
| (g) | MINIMUM ANNUAL RENT \$1,687 50 per month during months 1-12,
\$1,750 00 per month during months 13-24,
\$1,812 50 per month during months 25-36,
\$1,875 00 per month during months 37-48,
\$1,937 50 per month during months 49-60,
\$2 000 00 per month during months 61-72,
\$2,062 50 per month during months 73-84,
\$2,125 00 per month during months 85-96,
\$2,187 50 per month during months 97-108, and
\$2,250 00 per month during months 109-120 | See Article IV |
| (h) | PERCENTAGE RENT <u>0</u> percent (<u>0</u> %) of Gross Receipts as defined in Section 4 05
BREAKPOINT <u>0</u> | See Article IV |
| (i) | DEPOSIT One Thousand Five Hundred Dollars (\$1,500 00) | See Article VIII |
| (j) | TENANT'S PRO RATA SHARE OF COMMON AREA EXPENSES <u>1 71</u> % | See Article IX |
| (k) | PERMITTED USE OF PREMISES Hair Salon including full service hair care services, such as cuts, perms, coloring and related hair maintenance products | |
| (l) | BUSINESS OPENING DATE June 1, 1998 | |
| (m) | RIGHT TO CANCEL | See Article XXIV |

SECTION 1 02 References and Conflicts

The provisions of this Article I are a summary only and reference should always be made to the full provisions relating to such matters set forth in other Articles of this Lease. The references to Articles in the foregoing summary are provided for convenience only and designate some, but not necessarily all, of the Articles where references to the particular Lease provision may appear. Each reference in this Lease to any of the summarized Lease provisions contained in this Article I shall be construed to incorporate all of the terms provided under each summarized Lease provision and such provisions shall be read in conjunction with all other provisions of this Lease applicable thereto. In the event of any conflict between the foregoing summary and the following provisions of the Lease the following provisions of the Lease shall control.

SECTION 1 03 Exhibits

The following drawings and special provisions are attached hereto as exhibits and are hereby made a part of this Lease

	Principal References
<u>Exhibit A</u> - Shopping Center Legal Description	Section 1 04
<u>Exhibit B</u> - Site Plan	Section 1 04
<u>Exhibit C</u> - Premises	Section 2 01
<u>Exhibit D</u> - Landlord's Work	Section 5 01
<u>Exhibit E</u> - Tenant's Work	Section 5 02
<u>Exhibit F</u> - Sign Regulations	Section 10 04
<u>Exhibit G</u> - Shopping Center Rules and Regulations	Section 11 04
<u>Exhibit H</u> - Hazardous Waste	
<u>Exhibit I</u> - Guarantee	

SECTION 1 04 The Shopping Center, Changes to the Shopping Center

As used in this Lease, the term "Shopping Center" shall mean the improvements constituting the retail shopping center (to be known initially as Market Street Center), as the same shall be changed and modified from time to time, which Landlord intends to construct or cause to be constructed at approximately the corner of 3500 South 2700 West, West Valley City, Utah, as more fully described on Exhibit A hereto. It is expressly understood and agreed that the site plan, as shown on Exhibit B attached hereto, sets forth only the general layout and proposed manner of development of the Shopping Center, is not and shall not be deemed to be a warranty, representation, agreement or undertaking on the part of Landlord that the Shopping Center will be exactly as shown thereon, or that the area thereof will be or remain the same, or be more or less. Landlord may, at any time, without Tenant's consent, and from time to time, increase, reduce or change the number, shape, size, height, dimensions or location of the walks, buildings, parking and all Common Areas and any other improvements contained in, attached to, and/or part of the Shopping Center, and may, at any time, eliminate or add any improvements to any portion of the Shopping Center, provided, however, that Landlord shall not materially change the size or location of the premises Leased to Tenant without Tenant's consent.

SECTION 1 05 Gross Leased Area ("GLA")

As used in this Lease, the term "Gross Leased Area" or "GLA" means and refers to, with respect to the premises and to all other Leased or leasable retail space in the Shopping Center, the actual number of square feet of floor area (hereinafter defined in Section 2 02) in the premises and in the Shopping Center for the exclusive use and occupancy (whether for, including, but without limitation, sales, display, storage, bathrooms, services, spas, fitness centers or offices) by occupants (including Tenant) engaged in retail sales or services to the public but excluding therefrom all mezzanine floor areas and balconies (both sales and storage). For purposes of this Lease, the term "retail sales" or "retail space" or any similar designation shall be deemed to include merchandise sales, restaurants, theaters, banks, savings and loans, fitness centers and other service agencies and the like.

ARTICLE II PREMISES

SECTION 2 01 Lease of Premises

Landlord, in consideration of the rent to be paid and the covenants to be performed by Tenant, does hereby demise and Lease unto Tenant, and Tenant hereby Leases and takes from Landlord, for the Lease Term, at the rental and upon the covenants and conditions hereinbefore and hereinafter set forth, that space located in the Shopping Center and described on Exhibit C attached hereto and made a part hereof (herein called the "premises")

SECTION 2 02 Premises Defined

For purposes hereof, the premises shall be deemed to extend to and include the exterior faces of all exterior walls, or to the building line where there is no wall, or to the center line of any walls separating the premises from other Tenant premises (whether Leased or not, and whether used for store purposes or not) in the Shopping Center, and shall consist of the space therein, including the structural floors and the bottom of the roof above, together with all permitted mezzanines, balconies and outside selling areas, if any (herein called the "floor area") and other appurtenances specifically granted herein, but excepting and reserving to Landlord and other Tenants the use of the exterior walls and roof.

~~SECTION 2 03 Delivery of Premises to Tenant~~

~~Landlord agrees to deliver to Tenant and Tenant agrees to accept from Landlord possession of the premises forthwith at such time as Landlord advises Tenant in writing that the work to be performed by Landlord therein in accordance with Exhibit D attached to this Lease and made a part hereof (herein called the "Landlord's Work") has been sufficiently completed to permit Tenant, without interfering with Landlord's Work, to commence the work to be performed at its expense in said premises in accordance with Exhibit E (hereinafter called the "Tenant's Work") Landlord's notice thereof shall constitute such delivery of the premises without any further act by either party~~

~~SECTION 2 04 Construction and Opening of Premises~~

~~On or before fifteen (15) days after delivery of possession of the premises to Tenant and provided Tenant's final working plans and specifications shall have been approved by Landlord as provided in Exhibit E, Tenant shall (i) commence the Tenant's Work, (ii) permit Landlord's contractor to perform any and all of the Tenant's Work which is specified in Exhibit E hereof to be performed by Landlord's contractor at Tenant's expense (iii) commence the installation of fixtures and equipment in the premises, and (iv) diligently and continuously proceed with all of the foregoing to completion in accordance with this Lease and Exhibit E Tenant shall not interfere with Landlord's construction work at the Shopping Center or with Landlord's contractor in the premises, nor shall Tenant permit its contractors or subcontractors to so interfere Tenant shall complete or cause to be completed, the Tenant's Work and the installation of fixtures equipment and merchandise prior to the Business Opening Date and open the premises for business to the public on or before such Business Opening Date As used in this Lease, the term "Business Opening Date" shall mean the initial opening date thirty (30) days after completion of Landlord's Work If for any reason Tenant is not able to take occupancy by November 1, 1990 due to contractor delays or other delays caused by Landlord, it is agreed that the Business Opening Date and Rent Commencement Date will not commence until Landlord gives Tenant a thirty (30) day written notice prior to said occupancy This refers to Section 1 01 (f) and (g)~~

ARTICLE III
TERM

SECTION 3 01 Term of the Lease

The term of this Lease (sometimes herein called the "Lease Term") shall mean the period starting on the Rent Commencement Date and, subject to earlier termination as hereinafter provided, ending on the date exactly that number of years specified in Section 1 01 (e) thereafter

ARTICLE IV
RENT

SECTION 4 01 Covenant to Pay Rent

Tenant hereby covenants and agrees to pay for the use and occupancy of the premises during the Lease Term, at the times and in the manner herein provided, the minimum annual rent and additional rent In this Lease, the term "rent" means, collectively, the minimum annual rent and additional rent With respect to the payment of minimum annual rent and additional rent and with respect to the performance by Tenant of all of its other covenants and obligations under this Lease, time is and shall be of the essence

SECTION 4 02 Rent Commencement Date

As used in this Lease, the term "Rent Commencement Date" shall be June 1, 1998

SECTION 4 03 Minimum Annual Rent

(a) Tenant shall pay to Landlord, in legal tender, at Landlord's office at 77 West 200 South, Salt Lake City, Utah 84101, or such other address as Landlord may designate in writing from time to time, the minimum annual rent amount specified in Section 1 01 (g) hereof The minimum annual rent shall be paid in equal monthly installments to be made, in advance, without set off or deduction, on the first day of each calendar month falling within the Lease Term

(b) If the Lease Term shall commence upon a day other than the first day of a calendar month, Tenant shall pay, on the Rent Commencement Date a portion of the fixed monthly rent provided for in the foregoing clause (a) prorated on a per diem basis with respect to the fractional calendar month preceding the commencement of the first full calendar month contained in the Lease Term

SECTION 4-04 Percentage Rent

~~(a) In addition to the minimum annual rent provided for in Section 4-03 above Tenant agrees to pay Landlord a sum equal to the amount if any by which the minimum annual rent provided for herein is exceeded by a percentage of gross receipts (as the term "gross receipts" is defined in Section 4-05 hereof) made from or upon the premises during each calendar year or part thereof falling within the Lease Term. Said percentage rent shall be computed each calendar month and, on or before the fifteenth (15th) day following the last day of each such calendar month, Tenant shall pay to Landlord the amount by which the sum so computed as a percentage of gross receipts during said month exceeds the installments of minimum annual rent which shall be payable by Tenant during such month pursuant to Section 4-03 (a) hereof. The percentage of gross receipts herein referred to shall be the percent specified as "Percentage Rent" in Section 4-01 (h) hereof.~~

~~(b) Within thirty (30) days after the close of each calendar year and in the event this Lease shall terminate on a day other than the last day of a calendar year, then within thirty (30) days after such termination, there shall be determined (i) the gross receipts during said calendar year or part thereof, and (ii) the amounts paid to Landlord as minimum annual rent and as percentage rent for said calendar year or part thereof, and thereupon an adjustment shall be made with respect to said percentage rent as follows. If Tenant shall have paid to Landlord an amount greater than Tenant is required to pay under the terms of this Lease, Tenant shall be entitled to a refund forthwith of said amount, or if Tenant shall have paid an amount less than the percentage rent required to be paid hereunder, then Tenant shall forthwith pay such difference.~~

~~(c) For the purpose of computing the percentage rent, gross receipts in any first fractional calendar month in which minimum annual rent commences shall be added to the gross receipts for the first full calendar month (provided the first fractional calendar month is within the same calendar year as the first full calendar month) falling within the Lease Term.~~

~~4-05 Gross Receipts~~

~~The term "gross receipts" as used herein is hereby defined to mean receipts from gross sales of Tenant and all of licensees, concessionaires and subtenants of Tenant, from all business conducted upon, from or through the premises by Tenant and all others, whether such sales be evidenced by check, credit, charge account, exchange or otherwise, and shall include, but not be limited to, the amounts received from the sale of goods, wares and merchandise and for services performed on, at, or through the premises, together with the amount of all orders taken or received at the premises whether such orders be filled from the premises or elsewhere, and whether such sales be made by means of merchandise or other vending devices in the premises. If any one or more departments or other divisions of Tenant's business shall be sublet by Tenant or conducted by an person, firm or corporation other than Tenant, then there shall be included in gross receipts, for the purpose of fixing the percentage rent payable hereunder, all the gross receipts of such departments or divisions, whether such sales be made at the premises or elsewhere, in the same manner and with the same effect as if the business or sales of such departments and divisions of Tenant's business had been conducted by Tenant itself. Gross receipts shall not include sales of merchandise for which cash has been refunded, or allowances made on merchandise claimed to be defective or unsatisfactory, and there shall be deducted from gross receipts the sales price of merchandise returned by customers for exchange provided that the price of the merchandise returned was originally included in gross receipts and provided also that the sales price of merchandise delivered to the customer in exchange shall be included in gross receipts. Gross receipts shall not include the amount of any sales, use or gross receipts tax imposed by any federal, state, municipal or governmental authority directly on sales and collected from customers, provided that the amount thereof is added to the selling price or absorbed therein, and paid by the Tenant to such governmental authority. No franchise or capital stock tax and no income or similar tax based upon income or profits as such shall be deducted from gross receipts in any event whatever. Each charge or sale upon installment or credit shall be treated as a sale for the full price in the month during which such charge or sale shall be made, irrespective of the time when Tenant shall receive payment (whether full or partial) therefor.~~

~~4-06 Reports, Records and Books of Account~~

~~(a) Tenant shall submit to Landlord on or before the fifteenth (15th) day following each calendar month during the Lease Term (including the fifteenth (15th) day of the month following the end of the Lease Term) at the place then fixed for the payment of rent, a written statement signed by Tenant, and certified by it to be true and correct, showing in reasonably accurate detail the amount of gross receipts for the preceding calendar month. Tenant shall submit to the Landlord on or before the thirtieth (30th) day following the end of each calendar year and following the end of the Lease Term, at the place then fixed for the payment of rent a written statement signed by Tenant, and certified to be true and correct showing, in reasonably accurate detail, satisfactory in scope to Landlord the amount of gross receipts during the preceding calendar year (or part thereof immediately preceding the end of the Lease Term). The statements referred to herein shall be in such form and style and contain such details and breakdown as the Landlord may reasonably request.~~

~~(b) For the purpose of ascertaining the amount payable as percentage rent, Tenant agrees to prepare and keep on the premises or make available to Landlord at Landlord's office upon request therefor for a period of not less than two (2) years following the end of each calendar year, or part~~

~~thereof falling within the Lease Term adequate records which shall show inventories and receipts of merchandise at the premises and daily receipts from all sales and other transactions conducted on, from, or through the premises by Tenant and any other persons conducting any business upon or from said premises~~

~~(c) The receipt by Landlord of any statement or any payment of percentage rent for any period shall not bind Landlord as to the correctness of said statement or payment~~

~~(d) Landlord shall within two (2) years following the receipt of Tenant's statement of gross receipts provided for herein be entitled to audit such statement. Such audit shall be limited to the determination of the gross receipts as defined in this Lease and shall be conducted during normal business hours at the principal place of business of Tenant. If it shall be determined as a result of such audit that there has been a deficiency in the payment of percentage rent, then such deficiency shall become immediately due and payable with interest at the rate of eighteen percent (18% per annum from the date when said payment should have been made. In addition if Tenant's statement for the pertinent calendar year shall be found to have understated gross receipts by more than three percent (3%) and Landlord is entitled to any additional percentage rent as a result of said understatement then the Tenant shall pay all of Landlord's reasonable costs and expenses connected with Landlord's audit. Landlord shall be permitted to divulge the contents of any such statements in connection with any financing arrangements or assignments of Landlord's interest in the premises or in connection with any administrative or judicial proceedings in which Landlord is involved and where Landlord may be required to divulge such information~~

SECTION 4 07 Taxes

Landlord shall, in the first instance, be obligated to pay all real property and other ad valorem taxes and assessments of every kind and nature (including, but not limited to, general and special assessments, whether foreseen or unforeseen or ordinary or extraordinary), or any other taxes levied as a substitute, in whole or in part, for any or all of the foregoing, which may be levied or assessed by any lawful authority against the land underlying the Shopping Center, and against the buildings and improvements located or built within the Shopping Center (herein collectively called "Shopping Center Taxes"). Tenant shall pay Landlord, as additional rent, all said Shopping Center Taxes which are apportioned to the premises in accordance with Section 4 07 (a) hereof

(a) Tenant's proportionate share of the Shopping Center Taxes shall be the amount obtained by multiplying the Shopping Center Taxes by a fraction, the numerator of which shall be the Gross Leased Area of the premises, and the denominator of which is the Gross Leased Area of the Shopping Center. Tenant shall pay one-twelfth (1/12th) of its proportionate share of the Shopping Center Taxes each month in advance on the first day of each month with its payment of the minimum monthly rent. The amount of the Shopping Center Taxes upon which such payment is based shall be the most current notice(s) of assessment of tax bill(s) concerning the entire Shopping Center or, if there are none, such amount as Landlord may reasonably estimate. Should the taxing authorities include in such Shopping Center Taxes the value of any improvements made by Tenant, or include machinery, equipment, fixtures, inventory, or other personal property of Tenant, then Tenant shall also pay the entire Shopping Center Taxes for such items. If the amount paid by Tenant toward Shopping Center Taxes exceeds the actual amount due (as determined from the notice(s) of assessments or tax bill (s) actually covering the period in question), the excess shall be credited on Tenant's next succeeding payment(s) pursuant to this subsection. If the amount paid by Tenant is less than said actual amount due, Tenant shall pay to Landlord the deficiency within ten (10) days after notice from Landlord. A tax bill submitted by Landlord to Tenant shall be conclusive evidence of the amount of taxes assessed or levied, as well as the items taxed. Tenant at all times shall be responsible for and shall pay, before delinquency, all municipal, county, state or federal taxes assessed against any Leasehold interest or any personal property of any kind owned, installed, or used by Tenant.

(b) Tenant shall also be solely responsible for and shall pay before delinquency all municipal, county, state, or federal taxes assessed during the term of this Lease against any personal property of any kind, owned by or placed in, upon, or around the premises by Tenant.

SECTION 4 08 Other Additional Rent

The Tenant shall pay as additional rent all sums of money or charges, other than minimum annual rent, which are required to be paid by Tenant under this Lease, whether or not the same be designated "additional rent". If such amounts or charges are not paid at the time provided in this Lease, they shall be collectible as additional rent with the next installment of rent thereafter falling due hereunder, but nothing herein contained shall be deemed to suspend or delay the payment of any amount of money or charge at the time the same becomes due and payable hereunder, or limit any other remedy of the Landlord.

SECTION 4 09 Past Due Rent and Additional Rent

If Tenant shall fail to pay, when the same is due and payable any rent or any additional rent, or amounts of charges of the character described in Section 4 08 hereof, such unpaid amounts shall bear interest from the due date thereof to the date of payment at the rate of eighteen percent (18%) per annum

SECTION 4 10 Late Charges

Tenant hereby acknowledges that late payment by Tenant to Landlord of Rent and other sums due hereunder will cause Landlord to incur costs not contemplated by this Lease, the exact amount of which are unknown and will be extremely difficult to ascertain other than such charges and late charges which may be imposed on Landlord by the terms of any mortgage or trust deed covering the Premises accordingly, if any installment of Rent or any other sum due from Tenant shall not be received by Landlord or Landlord's designee within ten (10) days after such amount shall be due, Tenant shall pay to Landlord in addition to the late charges incurred by Landlord under any mortgage or deed of trust covering the Premises, a late charge equal to ten percent (10%) of the amount(s) past due and additionally all such installments of Rent or other sums due shall bear interest at the rate provided for on Past Due Obligations as provided in Section 4 09 from the date the same became due and payable. The parties hereby agree that such late charge represents a fair and reasonable estimate of the costs Landlord will incur by reason of late payment by Tenant. Acceptance of such late charges by Landlord shall in no event constitute a waiver of Tenant's default with respect to such overdue amount, nor prevent Landlord from exercising any of the other rights and remedies granted hereunder

ARTICLE V

CONSTRUCTION, ALTERATION, RELOCATION AND FINANCING OF IMPROVEMENTS AND ADDITIONS THERETO

SECTION 5 01 Landlord's Obligation

(a) Landlord shall, at its sole cost and expense, construct the Shopping Center in accordance with the plans and specifications provided by Landlord, as such may from time to time be adopted and amended. Said plans and specifications shall be available for Tenant's inspection at Landlord's office during regular business hours at such time as such plans and specifications are finalized and approved by Landlord

(b) Landlord shall, at its cost and expense, construct the premises (building shell) for Tenant's use and occupancy in accordance with Exhibit D attached hereto and made a part hereof

SECTION 5 02 Tenant's Obligation

Tenant agrees, prior to the Rent Commencement Date, to perform or cause to be performed all Tenant's Work in the premises in accordance with Exhibit E hereto. In addition, Tenant agrees to make application and pay for all utilities from the date the Tenant's Work, as described in Exhibit E hereof, is commenced

SECTION 5 03 Parking

Parking shall be for the convenience and use (in accordance with the rules and regulations applying thereto) of Tenants (including Tenant) or other occupants of either the Shopping Center or such other parties as Landlord may from time to time grant access to and use of the parking and their respective agents, employees, customers, and invitees, as well as other members of the general public. All employees of Tenant shall be required to use parking areas at the Shopping Center which are located away from the premises and other Tenant spaces as such employee parking may be designated by Landlord from time to time

ARTICLE VI

CONDUCT OF BUSINESS BY TENANT

SECTION 6 01 Use of Premises

Tenant shall use the premises solely for the purpose of continually conducting the business set forth in Section 1 01 (k) hereof. Tenant shall not use or permit the premises to be used for any other purpose or purposes or under any other trade name, style or designation without the prior written consent of Landlord, which consent may be granted or withheld in Landlord's sole discretion. In no event shall the premises or any part thereof be used for the sale of alcoholic beverages without Landlord's prior written consent. Tenant shall, at its expense, procure any and all governmental licenses and permits required for the conduct of Tenant's business on the premises and shall, at all times, comply with the requirements of each such license and permit

SECTION 6 02 Continuous Operation of Business

(a) Tenant shall operate all of the premises during the entire Lease Term with due diligence and efficiency so as to produce the maximum volume of gross receipts, unless prevented from doing so by causes beyond Tenant's control. Tenant shall conduct its business continuously in the premises during the regular customary days and hours for such type of business in the City or trade areas in which the Shopping Center is located and, in addition, shall be open for business on such days no later than 10 00 a m and close no earlier on such days than 6 00 p m. Notwithstanding anything else contained herein, Tenant shall have the option to open or not open Tenant's premises for business on Sunday. Tenant shall keep the display windows and signs, if any, in the premises well lighted at all times during which Tenant is open for business. Tenant shall, at all times when premises are open for business, have sufficient personnel to service the usual and customary demands and requirements of its customers.

(b) Tenant agrees that it will not, during the entire Lease Term, directly or indirectly, operate, manage or own any business or interest in any business of the same or similar nature as that being operated by Tenant in the premises (not so operated or owned on the date of this Lease) within a radius of three (3) miles from the location of the premises. Without limiting Landlord's remedies, in the event Tenant should violate this covenant, Landlord may, at its option and in addition to any other available remedy, include the "gross receipts" of such other business in the "gross receipts" generated from the premises for the purpose of computing percentage rent due hereunder for so long as Tenant is operating said other business.

SECTION 6 03 Nuisance

Tenant shall not perform any acts or carry on any practices which may injure the building or be a nuisance or menace to other Tenants in the Shopping Center or their guests, customers, employees or invitees.

SECTION 6 04 Storage, Office Space

Tenant shall, at all times, keep and maintain within and upon the premises at all times sufficient stock of merchandise of such size, character and quality as shall be reasonably designed to produce the maximum volume of gross receipts. Tenant shall warehouse, store, and/or stock in the premises only such goods, wares and supplies as Tenant intends to use in the conduct of its business as herein defined. The premises shall not be used solely or primarily for warehouse, storage or stock purposes and such usage shall not meet the requirements of Section 6 02(a) for continuous operation of the business on the premises.

ARTICLE VII OPERATION OF CONCESSIONS

SECTION 7 01 Consent of Landlord

Tenant shall not permit any business to be operated in or from the premises by any concessionaire or licensee without the prior written consent of Landlord.

ARTICLE VIII SECURITY DEPOSIT

SECTION 8 01 Amount of Deposit

Tenant has already delivered to Landlord the amount specified in Section 1 01 (I) hereof, the receipt of which is hereby acknowledged by Landlord. Said deposit shall be held by Landlord, without liability for interest, as security for the faithful performance by Tenant of all of the terms, covenants, and conditions of this Lease by said Tenant to be kept and performed during the Lease Term hereof.

SECTION 8 02 Use and Return of Deposit

In the event of the failure of Tenant to keep and perform any of the terms, covenants and conditions of this Lease to be kept and performed by Tenant, then Landlord at its option may appropriate and apply said entire deposit, or so much thereof as may be necessary, to compensate Landlord for loss or damage sustained or suffered by Landlord due to such breach on the part of Tenant. Should the entire deposit, or any portion thereof, be appropriated and applied by Landlord for the payment of overdue rent or other sums due and payable to Landlord by Tenant hereunder, then Tenant shall, upon the written demand of Landlord, forthwith remit to Landlord a sufficient amount in cash to restore said security to the original sum deposited, and Tenant's failure to do so within five (5) days after receipt of such demand shall constitute a breach of this Lease. Should Tenant comply with all of said terms, covenants and conditions and promptly pay all of the rent herein provided for as it falls due, and all other sums payable by Tenant to Landlord hereunder, the said deposit shall be returned in full to Tenant at the end

of the Lease Term. If Tenant restores any deficiencies as noted by Landlord then the security deposit amount shall be reinstated to its original amount.

SECTION 8 03 Transfer of Deposit

Landlord shall deliver the funds deposited hereunder by Tenant to the purchaser or other Successors of Landlord's interest in the premises, in the event that such interest be sold and thereupon the selling Landlord shall be discharged from any further liability with respect to such deposit and Tenant shall look solely to the new Landlord for the return of Tenant's security deposit. Further, in no event shall the holder of a mortgage, deed of trust, or security instrument (as referred to in Section 14 03 hereof) or any successor in interest to such holder in the event such holder or successor becomes the Landlord under this Lease, be liable to Tenant for reimbursement of said security deposit or any part thereof, unless said security deposit was actually transferred to and is actually held by the holder or successor concerned.

ARTICLE IX COMMON AREAS

SECTION 9 01 Use by Tenant Maintenance

Tenant and its agents, employees, customers and invitees are, except as otherwise specifically provided in this Lease, authorized, empowered and privileged during the Lease Term to use the Common Areas for their respective intended purposes in common with other persons and on a non exclusive basis. Landlord agrees to maintain and operate, or cause to be maintained and operated the Common Area. In no event shall Tenant use the Common Area for display or sales of merchandise, advertising or marketing, without the prior written consent of Landlord.

SECTION 9 02 Common Areas Defined

In this Lease, the term "Common Areas" means all areas, space, equipment, special services, facilities and improvements provided, from time to time, in the Shopping Center (except those within any store premises) for the mutual convenience and use of Tenants or other occupants of the Shopping Center, their respective agents, employees, customers and invitees, and may include without limitation, parking areas, driveways, sidewalks, stairways, service corridors, truck ways, ramps, loading docks, pedestrian malls, courts, delivery areas, landscaped areas, package pickup stations, public restrooms and comfort stations, access and interior roads, retaining walls, bus stops, and lighting facilities.

SECTION 9 03 Changes by Landlord

Tenant agrees that Landlord shall at all times have the right to determine the nature and extent of the Common Areas, whether the same shall be surface, underground, or deck, and to make such changes, rearrangements, additions or reductions which, in Landlord's opinion, are deemed desirable and in the best interests of all persons using the Common Areas, or which are required by any federal, state or municipal law, rule, regulation, guideline or order, including, but not limited to, changes, rearrangements, additions or reductions involving location, relocation, or enlargement, reduction or addition of accommodations for access to the Shopping Center by public transportation, driveways, entrances, exits, automobile parking spaces, employee and/or customer parking areas, the direction and flow of traffic, installation of prohibited areas, landscaped areas, and any and all other facilities of the Common Areas.

SECTION 9 04 Service Area and Delivery Vehicles

Tenant shall require all trucks and other vehicles serving Tenant to use such service areas as may be provided by Landlord. Tenant shall cause all such vehicles serving Tenant to be promptly loaded or unloaded and removed, and shall use its efforts to see that all such trucks or other vehicles owned or operated by, or on behalf of, or serving Tenant shall comply in all respects with any applicable rules and regulations governing use of truck or vehicle access, parking, loading and unloading facilities, and permissible hours and places therefor, as the same may, from time to time, be established, modified or amended by Landlord.

SECTION 9 05 Landlord's Control

Landlord shall have the sole and exclusive control, management and direction of the Common Areas, and may, at any time, exclude and restrain any person from use or occupancy thereof, excepting, however, Tenants of the Shopping Center and bona fide invitees of Landlord or Tenants of the Shopping Center who make use of said Common Areas in accordance with the rules and regulations established by Landlord. The rights of Tenant in and to the common Areas shall at all times be subject to the rights of others to use the same in common with Tenant and it shall be the duty of Tenant to keep all of said Common Areas free and clear of any obstructions created or permitted by Tenant or resulting from Tenant's

operation Landlord may, at any time, close any or all portions of the Common Areas to make repairs, to construction additions or improvements to discourage non-customer parking to prevent a dedication of said Common Areas or parts thereof or the accrual of any rights to any person or to the public therein, and to do and perform such other acts in and to the Common Areas as the Landlord shall determine to be advisable to improve and maintain said Common Areas for the convenience and use thereof by Tenants, their employees, agents, customers and invitees Landlord hereby reserves exclusive control of advertising in the Common Areas

SECTION 9 06 License

All Common Areas and facilities not within the premises which Tenant may be permitted to use and occupy, are to be used and occupied under a revocable license, and, if the amount of such areas are diminished for purposes of Section 9 07 hereof or for any other reasonable and necessary purpose, Landlord shall not be subject to any liability nor shall Tenant be entitled to any compensation or diminution or abatement of rent, nor shall such diminution of such areas be deemed constructive or actual eviction so long as such diminution of the Common Areas and facilities does not materially and adversely affect accessibility to Tenant's premises

SECTION 9 07 Landlord's Use of Common Areas

Landlord reserves the right at any time to utilize the Common Areas for promotions, exhibits, carnival type shows, rides, outdoor shows, displays, automobiles and other product shows, the leasing of kiosks and food facilities, the placement of decorative items, landscaping, and any other use which, in Landlord's sole judgment, tends to attract customers and thereby benefit the Shopping Center All income derived from promotions, exhibits, carnival type shows, displays, automobile and other product shows (but not from leasing of kiosks and/or food facilities) less all expenses incurred by Landlord therefor shall either be given to the Merchants' Association for its use in performing its defined functions or be applied to reduce Common Area Costs provided for in Secuon 9 08 hereof, whichever Landlord shall, from time to time, elect

SECTION 9 08 Common Area Costs and Expenses

(a) All costs and expenses incurred by Landlord, or others on Landlord's behalf, in operating, maintaining, repairing, carrying, and replacing the Common Areas (herein the "Common Area Costs") shall be charged and prorated among the Tenants in the manner hereinafter set forth Such Common Area Costs shall include all costs and expenses of every kind and nature as may be paid or incurred by Landlord, (including appropriate reserves for depreciation and replacement of machinery and equipment serving the Common Areas) in operating, policing, protecting, managing, equipping, lighting, repairing, replacing and maintaining the Common Areas, including, but not limited to, the cost and expenses of

(I) operating, maintaining, repairing, replacing, lighung, cleaning, sweeping, painting, resurfacing, and striping of, and removing snow, ice and debris from the Common Areas, removing garbage and trash from the Shopping Center, maintaining, repairing and replacing Common Area ducts, conduits and similar items, fire protection systems, sprinkler systems, utility sprinkler and security alarm systems, storm and sanitary drainage systems and other utility systems, Shopping Center signs on and off the Shopping Center site, directional signs and markers, and traffic regulation and control signs and devices,

(ii) premiums for all insurance, if any, maintained by Landlord, including, without limitation liability insurance for bodily injury, death and property damage, insurance on the Shopping Center (as provided for in Section 12 02 hereof) against fire, extended coverage, theft or other casualties, workmens compensation, and business interruption insurance for up to a twelve (12) month period,

(iii) planting, replanting and replacing flowers, shrubbery, plants, trees, and other landscaping and all water and irrigation systems used to irrigate flowers, shrubbery, plants, trees, and other landscaping,

(iv) repair and maintenance of the Shopping Center structure, including, without limitation, floors, ceilings, roof, skylights and windows to the extent not covered by insurance provided for herein,

(v) maintenance, repair, depreciation, replacement, and inspection of all machinery and equipment used in the operation and maintenance of the Common Areas and the Shopping Center heating, ventulating and air conditioning system and all personal property taxes and other charges incurred in connecution with such equipment,

(vi) all license and permit fees that may result from any environmental or other laws, rules regulations, guidelines or orders,

(vii) the cost of all electricity and other utilities used with respect to the Common Areas including, but not limited to, electricity for lighting all Common Areas,

(viii) personnel, including without limitation, security and maintenance people to implement the operation, maintenance, repair and replacement of the Common Areas and the Shopping Center heating, ventilating and air conditioning system (including without limitation the payroll, payroll taxes and employee benefits of such implementing personnel), and

(ix) Landlord's administrative costs and overhead in an amount equal to ten percent (10%) of the total aggregate costs and expenses of operating, maintaining, repairing and replacing the Common Areas and the Shopping Center heating ventilating and air conditioning system including, but not limited to, those items listed in subsections 9 08 (a) (i) through (viii) above (but specifically excluding therefrom depreciation)

(b) Landlord may cause any or all maintenance services for the Common Areas and the Shopping Center heating, ventilating and air conditioning system to be provided by an independent contractor or contractors or other parties

(c) Landlord's determination of the cost of all electricity and other utilities used with respect to the Common Areas and the Shopping Center heating, ventilating and air conditioning system, as more particularly set forth in Subsection 9 08 (a) (vii) above, shall be based upon meter or sub-meter readings, except that if such metering shall be infeasible, impractical or otherwise incapable of being performed without substantial expense to Landlord, then Landlord's determination of the cost of such electricity and other utilities shall be based upon the reasonable estimate of Landlord's property manager as hereinafter provided. Landlord shall retain and employ a property manager who, after conducting whatever tests are deemed necessary and appropriate, shall issue a certificate which, to the best of his knowledge and ability, shall estimate the cost of all electricity and/or other utilities use with respect to the Common Areas and the Shopping Center heating, ventilating and air conditioning system, or portions thereof for which meter readings were not made, for the period in question. Such determination shall be conclusive.

(d) Tenant, at its own cost and expense, shall have the right upon written request to Landlord to have a Certified Public Accountant (chosen by said Tenant) review and verify the Common Area Costs once each calendar year.

(e) If Landlord acquires or makes available additional land not presently part of the Shopping Center, part of which is used for Common Area purposes, then the Common Area Costs shall also include all expenses incurred by Landlord in connection with the operating, maintenance and repair of the Common Areas on said additional land, but shall not include acquisition costs of said additional land, the leasing or rental payments therefor, or original construction costs thereon.

SECTION 9 09 Tenant's Pro Rata Share

Tenant shall pay to Landlord, Tenant's pro rata share of Common Area Costs in the following manner:

(a) In each calendar year or part thereof during which this Lease is in force, Tenant shall pay to Landlord, as additional rent, subject to the limitations hereinafter set forth, Tenant's pro rata share of the Common Area Costs which shall equal in amount the total Common Area Costs for said calendar year or part thereof multiplied by a fraction, the numerator of which shall equal the total number of square feet of GLA contained in the premises and the denominator of which shall equal the average total square feet of GLA contained in the Shopping Center which are from time to time during said calendar year or part thereof actually Leased and occupied by Tenants. Said fraction is hereinafter sometimes referred to as "Tenant's Pro Rata Percentage of Common Area Costs". In determining Common Area Costs hereunder for any calendar year or part thereof, amounts (such as taxes and insurance premiums) which by their nature are fairly or logically allocable to the period in question shall be reasonably allocated thereto through the use of the accrual method of accounting, and the amounts thus allocated shall for all of the purposes of this Lease be treated as Common Area Costs for the full or partial calendar year in question, irrespective of whether the amounts concerned are or were actually paid or payable during said period.

(b) Subject to adjustment as hereinafter provided, Tenant shall pay Landlord on the Rent Commencement Date and on the first day of each month of the Lease Term thereafter an amount estimated by Landlord to be Tenant's monthly Pro Rata Percentage of Common Area Costs. Landlord may adjust said amount at the end of any calendar month on the basis of Landlord's experience and reasonably anticipated costs.

(c) Within ninety (90) days following the end of each calendar year, and in the event this Lease shall terminate on a day other than the last day of a calendar year, within ninety (90) days after such termination, Landlord shall furnish Tenant a statement covering such calendar year or part thereof.

just expired in reasonable detail, showing the Common Area Costs and the amount of Tenants Pro Rata Percentage of such Costs for such year or part thereof and the payments made by Tenant with respect to such year or part thereof as provided for in Section 9 08 and 9 09 contained herein. In the event this Lease shall terminate on a day other than the last day of a calendar year, and in the further event accurate information regarding the amount of any item included in Common Area Costs (e.g. real property taxes, etc.) is not available as of the date Landlord issues its statement of Common Area Costs to Tenant, then Landlord shall make, for purposes of this Section 9 09 (c) a reasonable estimate of the amount of each such item based upon relevant information then Tenants obligations hereunder. If Tenant's Pro Rata Percentage of Common Area Costs for the year or part thereof in question is less than Tenants payments made therefor, Landlord shall have the option of refunding the difference to Tenant, or of crediting the difference against future payments required to be made by Tenant toward Common Area Costs, or if Tenants Pro Rata Percentage is greater than Tenants said payments, Tenant shall pay Landlord the difference. Tenant and Landlord shall adjust and Tenant shall pay the deficiency, or (in the event Landlord elects to refund any difference) Landlord shall make a refund, as the case may be, within thirty (30) days after receipt of such statement.

ARTICLE X FIXTURES, ALTERATIONS, SIGNS, CANOPIES

SECTION 10 01 Installation by Tenant

All fixtures installed by Tenant shall be new or completely reconditioned to the approval and satisfaction of Landlord. Landlord agrees that Tenant may, at its own expense and after giving Landlord notice in writing of its intention to do so, from time to time during the Lease Term, make alterations, additions and changes in and to the interior of the premises (except those of a structural nature) as it may find necessary or convenient for its purposes, provided that the value of the premises is not thereby diminished, and provided, however, that no alterations, additions or changes costing in excess of TEN THOUSAND DOLLARS (\$10,000.00) may be made without first procuring the approval in writing of the Landlord. In addition, no alterations, additions or changes shall be made to any store front, the exterior walls or roof of the premises, nor shall Tenant erect any mezzanine or increase the size of same, if one be initially constructed, unless and until the written consent and approval of the Landlord shall first have been obtained. In the event Landlord's written approval is required under this Section 10 01, Tenant shall present to Landlord plans and specifications for all work requiring approval at the time approval is sought.

SECTION 10 02 Removal and Restoration by Tenant

(a) Tenant shall have the right, provided Tenant is not in default under the terms of this Lease, at any time and from time to time during the Lease Term to remove any and all of its trade fixtures and other personal property which it may have stored or installed in the premises, including but not limited to, counters, shelving, inventory, showcases, mirrors and other movable personal property, provided, however, that nothing herein shall permit or allow Tenant to so remove said fixtures or other personal property, other than merchandise for sale to the public in the ordinary course of Tenants business, prior to the end of the Lease Term without the immediate replacement thereof with similar personal property of comparable or better quality the effect thereof would be to render the premises less suitable for conducting the type of business specified in Section 6 01. At the end of the Lease Term, provided Tenant shall not then be in default under this Lease, Tenant shall promptly remove its personal property from the premises and repair any damage resulting therefrom. Any such property not promptly removed shall be deemed abandoned as provided in Section 11 03 hereof.

(b) All improvements contained in and/or comprising the premises, including but not limited to light fixtures, floor coverings, and partitions, but excluding Tenants trade fixtures and other personal property referred to in paragraph (a) immediately above, shall become the property of Landlord upon expiration or earlier termination of this Lease.

SECTION 10 03 Tenant Shall Discharge All Liens

Tenant shall promptly pay all contractors and materialmen employed by Tenant so as to minimize the possibility of a lien attaching to the premises, and should any such lien be made or filed, Tenant shall and does hereby indemnify Landlord completely against said lien, and shall bond against or discharge the same within ten (10) days after written request by Landlord.

SECTION 10 04 Signs and Canopies

Tenant will not place or suffer to be placed or maintained on any exterior door, wall or window of the premises or elsewhere in the Shopping Center any sign, awning or canopy, or advertising matter or other thing of any kind, and will not place or maintain any decoration, lettering or advertising matter on the glass of any window or door of the premises without first obtaining Landlord's written approval. Awnings, banners and/or "going out of business" signs shall not be permitted on the premises in any event. Tenant agrees to maintain any sign, canopy, decoration, lettering, advertising matter

or other thing (as may be approved) in good condition and repair at all times. Landlord may, at Tenant's cost and with or without notice to Tenant, remove any item in violation of this Section. See Exhibit F titled "Sign Regulations" attached hereto and made a part hereof.

ARTICLE XI MAINTENANCE OF PREMISES

SECTION 11.01 Maintenance by Tenant

(a) Tenant shall, at all times and at its own cost and expense, keep the premises in good order, condition and repair (including painting as reasonably required), damage by unavoidable casualty excepted. For these purposes, the premises shall include, but not be limited to, all partitions, doors, floor coverings, fixtures, equipment and appurtenances (including lighting, heating and plumbing fixtures, and air conditioning and fire control systems, if any) contained in said premises. In addition, Tenant shall maintain exterior entrances and all glass and show window moldings of the premises. Notwithstanding the above, Landlord shall be responsible for the maintenance and repair of structural portions of the premises which, for these purposes, shall include, and be limited to the roof, exterior walls, and the structural concrete floor of the premises, as well as sprinkler mains, utility pipes, conduits, meters and lines, located outside of the premises (unless originally installed by Tenant or at Tenant's expense). If, however, Landlord is required to make repairs to said structural portions of the premises by reason of Tenant's negligent acts or omission to act, Landlord may add the cost of such repairs to the rent thereafter becoming due under the provisions of this Lease.

(b) Tenant agrees that it will keep the premises in a neat, clean and orderly condition. Tenant agrees that all trash and rubbish of Tenant shall only be deposited into acceptable trash receptacles as may be provided by Landlord for such purposes. Tenant agrees to cause such Tenant's receptacles to be emptied and trash removed.

SECTION 11.02 Maintenance by Landlord

If Tenant refuses or neglects to repair property as required hereunder and to the reasonable satisfaction of Landlord as soon as reasonably possible after written demand, Landlord may make such repairs without liability to Tenant for any loss or damage that may accrue to Tenant's merchandise, fixtures, or other property or to Tenant's business by reason thereof, and upon completion thereof, Tenant shall pay, as additional rent, Landlord's costs for making such repairs plus twenty percent (20%) for overhead upon presentation of a bill therefor.

SECTION 11.03 Surrender of Premises

Tenant shall deliver up and surrender to Landlord possession of the premises upon the expiration or earlier termination of the Lease Term, broom clean, free of debris and Tenant's personal property, in good order, condition and state of repair (excepting any ordinary wear and tear) and shall deliver all keys to the Landlord. Any personal property of Tenant not promptly removed in accordance with Section 10.02 hereof shall be deemed to have been abandoned by Tenant and shall become the property of Landlord and may, at Landlord's option, be retained by Landlord or disposed of at Tenant's expense (Tenant hereby agreeing to remain liable for the cost thereof even though this Lease shall have terminated). If not sooner terminated as herein provided, this Lease shall terminate in accordance with Section 3.01 without the necessity of notice from either Landlord or Tenant to terminate the same. Tenant hereby waiving notice to vacate the premises and agreeing that Landlord shall be entitled to the benefit of all provisions of law respecting the summary recovery of possession of premises from a Tenant holding over to the same extent as if statutory notice had been given.

SECTION 11.04 Rules and Regulations

The rules and regulations appended to this Lease as Exhibit C are hereby made a part of this Lease, and Tenant agrees to comply with and observe the same. Tenant's failure to keep and observe said rules and regulations shall constitute a breach of the terms of this Lease as if the same were contained herein as covenants. Landlord reserves the right from time to time to amend or supplement said rules and regulations and to adopt and promulgate additional rules and regulations applicable to the premises and the Shopping Center. Notice of such additional rules and regulations, and amendments and supplements, if any, shall be given to Tenant, and Tenant agrees thereupon to comply with and observe all such rules and regulations and amendments thereto and supplements thereof, provided the same shall apply uniformly to all retail Tenants of the Shopping Center.

ARTICLE XII
INSURANCE AND INDEMNITY

SECTION 12.01 Tenant's Insurance

(a) Tenant covenants and agrees that from and after the date of delivery of the premises to Tenant, Tenant will carry and maintain, at its sole cost and expenses, the following types of insurance in the amounts specified and in the form hereinafter provided

(I) Public Liability and Property Damage General Public Liability Insurance covering the premises and Tenant's use thereof against claims for personal injury or death and property damage occurring upon, in or about the premises such insurance to afford protection to the limit of not less than \$1,000,000.00 in respect of injury or death to any number of persons arising out of any one occurrence and such insurance against property damage to afford protection to the limit of not less than \$250,000.00 in respect of any instance of property damage The insurance coverage required under this Section (I) shall, in addition, extend to any liability of Tenant arising out of Tenant's indemnities hereinafter provided,

(ii) Tenant Improvements and Property Insurance covering all of the items included in Tenant's Work, Tenant's Leasehold improvements, trade fixtures and personal property from time to time in or upon the premises, and any alterations, improvements, additions or changes made by Tenant thereto in an amount not less than eighty percent (80%) of their full replacement cost during the Lease Term, providing protection against perils included within the standard Utah form of fire and extended coverage insurance policy, together with insurance against sprinkler leakage or other sprinkler damage, vandalism and malicious mischief Any policy proceeds from such insurance, so long as this Lease shall remain in effect, shall be held in trust by Tenant's insurance company for the repair, reconstruction, restoration or replacement of the property damaged or destroyed

(iii) Plate Glass Plate glass insurance covering all plate glass in the premises Tenant shall be and remain liable for the repair and restoration of all such plate glass, except if such damage is due to Landlord's negligence

(b) All policies of insurance to be provided by Tenant shall be issued in form acceptable to Landlord by insurance companies with general policyholders rating of not less than A and a financial rating of AAA as rated in the most current available "Best's" Insurance Reports, and qualified to do business in the State of Utah The policy shall name Landlord, any person, firms or corporations designated by Landlord, and Tenant as insured Said policies shall be for the mutual and joint benefit and protection of each of said parties and any such other parties in interest, and executed copies of each such policy of insurance or a certificate thereof shall be delivered to Landlord within ten (10) days after delivery of possession of the premises to Tenant and, thereafter, at least fifteen (15) days prior to the expiration of each such policy As often as any such policy shall expire or terminate, renewal or notice of additional policies shall be procured and maintained by Tenant in like manner and to like extent All such policies of insurance and any Certificates concerning same shall contain a provision that the company writing said policy will give to Landlord and such other parties in interest at least thirty (30) days prior written notice of any cancellations, or lapse, or the effective date of any reduction in the amounts of insurance In the event Tenant shall fail to promptly furnish any insurance herein required, Landlord may effect the same for a period not exceeding one year and Tenant shall promptly reimburse Landlord upon demand, as additional rent, the premium paid by Landlord If upon Tenant's failure, Landlord, rather than purchasing separate insurance coverage, chooses to include Tenant's coverage under Landlord's insurance policies, then Tenant shall promptly reimburse Landlord upon demand, as additional rent, the greater of the increase in Landlord's premium resulting therefrom or \$1,000.00 All such public liability, property damage and other casualty policies shall be written as primary policies which do not contribute to and are not in excess of coverage which Landlord may carry All such public liability and property damage policies shall contain a provision that Landlord and any such other parties in interest, although named as assured, shall nevertheless be entitled to recover under said policies for any loss occasioned to them, their servants, agents and employees by reason of the negligence of Tenant or any other named assured Any insurance provided for may be effected by a policy or policies of blanket insurance, covering additional items or locations, provided, however, that

(I) Landlord and any other parties in interest from time to time designated by Landlord to Tenant shall be named as an additional assureds thereunder as their interests may appear, and

(ii) the coverage afforded Landlord and any such other parties in interest will not be reduced or diminished by reason of the use of such blanket policy or insurance, and

(iii) any such policy or policies (except any covering the risks referred to in Section 12.01(a)(I)) shall specify therein (or Tenant shall furnish Landlord with a written statement from the insurers under such policy specifying) the amount of the total insurance allocated to the "Tenant

Improvements and Property" more specifically detailed in Section 12 01(a)(ii) and (iii), and all insurance requirements set forth herein are otherwise satisfied. Any insurance policies herein required to be procured by Tenant shall contain a provision waiving subrogation against Landlord, any other parties in interest and all other Tenants or occupants of space in the Shopping Center.

SECTION 12 02 Landlord's Insurance

(a) Landlord shall at all times during the Lease Term maintain in effect a policy or policies of insurance covering the improvements constituting the Shopping Center (including Common Areas but excluding Tenants Work and other improvements and property required to be insured by Tenant pursuant to Sections 12 01(a)(ii) and (iii)) in the amount not less than eighty percent (80%) of the full replacement cost (exclusive of the cost of excavations, foundations and footings), from time to time, providing protection against perils included within the standard Utah form of fire and extended coverage insurance policy, together with insurance against sprinkler damage, vandalism and malicious mischief, and such other risks as Landlord may from time to time determine and with any such deductibles as Landlord may from time to time determine.

SECTION 12 03 Indemnity

(a) Tenant shall indemnify Landlord and save it harmless from and against any and all suits, actions, damages, claims, liability, and expense in connection with loss of life, bodily or personal injury, or property damage arising from or out of any occurrence in, upon, at or from the Premises, or of the occupancy or use by Tenant of the Premises or any part thereof, or occasioned wholly or in part by any act or omission of Tenant, its agents, contractors, employees, servants, invitees, licensees, or concessionaires including acts or omissions relating to the sidewalks and Common Areas within the Shopping Center.

(b) Landlord shall not be responsible or liable at any time for any loss or damage to Tenant's merchandise, equipment, fixtures, or other personal property or to Tenant's business, including any loss or damage to either the person or property of Tenant that may be occasioned by or through the acts or omissions of persons occupying adjacent, connecting, or adjoining space. Tenant shall store its property in and shall use and occupy the Premises and all other portions of the Shopping Center at its own risk, and hereby releases Landlord, to the full extent permitted by law, from all claims of every kind resulting in loss of life, personal or bodily injury, or property damage.

(c) Tenant shall give prompt notice to Landlord in case of fire or accidents in the Premises or in the building of which the Premises are a part or of defects therein or in any fixtures or equipment.

(d) In case Landlord shall, without fault on its part, be made a party to any litigation commenced by or against Tenant, then Tenant shall protect and hold Landlord harmless and shall pay all costs, expenses, and reasonable attorneys' fees.

ARTICLE XIII UTILITIES

SECTION 13 01 Utility Lines

(a) Utility lines serving the premises shall be constructed to and within the premises in accordance with Exhibit D and Exhibit E. Landlord's and Tenant's respective obligations with regard thereto are set forth therein. In this regard, Tenant shall, at its sole cost and expense, arrange for the furnishings of all utility service facilities which are necessary for the operation of Tenant's business at the premise (or the business of any permitted licensees or concessionaires therein) but which are not provided by Landlord under Exhibit D attached hereto, and such utility service facilities shall become the property of Landlord upon the expiration or earlier termination of this Lease. Tenant covenants and agrees that at all times during the Lease Term its use of any utility service shall never exceed the capacity of the mains, feeders, ducts, conduits and lines bringing the same to the premises, provided, however, that Tenant may increase the capacity of the aforesaid, with Landlord's prior written approval, if Tenant pays for and performs all necessary work therefor (including maintenance and repair of the same) and, provided further, that no work performed by Tenant will result in any increased expense to Landlord in any manner whatsoever.

(b) In addition to the costs provided to be paid by Tenant under paragraph (a) above, Tenant shall, except as otherwise provided, pay all charges for and costs of actual usage of utility services in the premises. Tenant shall pay such charges and costs directly to the public utility or governmental authority furnishing the particular service unless Landlord requests Tenant to pay such charges and costs to Landlord, in which event Tenant shall pay Landlord within ten (10) days after receiving written request therefor from Landlord. For these purposes, Tenant's actual usage shall be recorded on appropriate recording instruments to be installed by Tenant. In the event that such recording equipment is inoperable or such recording is incapable of being performed or used, actual usage will be determined

in accordance with the manner described in Section 9.08 (d) Actual usage cost will be based upon current applicable rate schedules as published by the local utility

ARTICLE XIV OFFSET STATEMENT, ATTORNMEN, SUBORDINATION

SECTION 14.01 Estoppel Certificate by Tenant

Tenant agrees that from time to time upon not less than ten (10) days prior request by Landlord, Tenant will deliver to Landlord a statement in writing certifying (a) that this Lease is unmodified and in full force and effect (or if there have been modifications that the same is in full force and effect as modified and identifying the modifications), (b) the dates to which the minimum annual rent, additional rents, and other charges provided herein have been paid, and (c) that, so far as Tenant knows, Landlord is not in default under any provision of this Lease, and, if Landlord is in default, specifying each such default of which Tenant may have knowledge, it being understood that any such statement so delivered may be relied upon by any prospective purchaser, mortgagee, or any assignee of any mortgagee of the Shopping Center

SECTION 14.02 Attornment

Tenant shall, in the event any proceedings are brought for the foreclosure of, or in the event of exercise of the power of sale under any mortgage or Deed of Trust made by Landlord covering the premises, or in the event of any deed or transfer in lieu of foreclosure, attorn to the new owner of Landlord's interest in the premises and recognize such new owner as Landlord under this Lease

SECTION 14.03 Subordination

This Lease is, and shall be and remain, subject and subordinate to any present or future lien of any or all first position mortgages, Deeds of Trust or security instruments, and to any or all utility easement, regardless of whether such mortgage, Deed of Trust, security instrument, or utility easement now exists or hereafter may be created, and to any and all advances to be made pursuant to any such mortgage, Deed of Trust or security instrument and to any interest thereunder, and to all modifications, consolidations, renewals, replacements and extensions of any of the aforementioned instruments, provided, however, that so long as Tenant continues to perform all of its obligations under this Lease, this Lease shall remain in full force and effect notwithstanding such subordination or Landlord's default in connection with the mortgage, Deed of Trust, security instrument concerned or any resulting foreclosure, or sale, or transfer in lieu of such proceedings. Tenant shall not subordinate its interests hereunder or in the premises to any lien or encumbrance (except the foregoing) without the prior written consent of Landlord and of the holder of any first position mortgage or Deed of Trust against Landlord's interest in the Shopping Center. Any such unauthorized subordination by Tenant shall be void and of no force or effect whatsoever. Further, Tenant agrees that any lessor, mortgagee or trustee may elect to have this Lease superior to any Lease or lien of its mortgage, Deed of Trust or security instrument, and in the event of such election and upon notification by such lessor, mortgagee or trustee to Tenant to that effect, this Lease shall be deemed prior in lien to the said Lease, mortgage, Deed of Trust or security instrument, as the case may be, whether this Lease is dated prior to or subsequent to the date of said Lease, mortgage, Deed of Trust or security instrument

ARTICLE XV ASSIGNMENT AND SUBLETTING

SECTION 15.01

(a) Tenant shall not assign any interest herein nor further sublet the Premises or any part thereof without the prior written consent of Landlord

(b) Should Tenant assign or further sublet the Premises pursuant to written consent of Landlord, Tenant shall nevertheless remain liable to Landlord for full payment of the Rent and for the performance of all of Tenant's other obligations under this Lease. Any subletting shall be subject and subordinate to this Lease

ARTICLE XVI WASTE, GOVERNMENTAL REGULATIONS

SECTION 16.01 Waste or Nuisance

Tenant shall not commit or suffer to be committed any waste upon the premises or any nuisance or other act or thing which may disturb the quiet enjoyment of any other Tenant in the building in which the premises may be located, or in the Shopping Center

SECTION 16 02 Governmental Regulations

Tenant shall, at Tenant's sole cost and expense, comply with all of the requirements of all county, municipal, state, federal and other applicable governmental authorities, now in force, or which may hereafter be in force, pertaining to the premises, and shall faithfully observe in the use of the premises all municipal and county ordinances and state and federal statutes now in force or which may hereafter be in force. Tenant shall reimburse Landlord for any and all damages by Landlord as a result of Tenant's noncompliance with any such regulations or requirements.

ARTICLE XVII ADVERTISING, MERCHANTS' ASSOCIATION

SECTION 17 01 Solicitation of Business

Tenant and Tenant's employees and agents shall not solicit business nor distribute any handbills or other advertising matter in the parking area, in the common Areas, or on adjoining or adjacent property.

SECTION 17 02 Merchants' Association

In the event Tenant elects to be part of the Merchants Association, the following shall apply. Landlord elects to form a Merchants Association for the purpose of furthering the business interests of the Shopping Center as a whole. Tenant agrees to (a) become a member of said Association not later than thirty (30) days prior to the date on which the minimum annual rent commences to accrue hereunder, (b) to participate actively in and remain in good standing in said Association throughout the term of this lease, (c) cooperate with said Association and comply with its Articles and By-Laws, (d) pay to the Association within twenty (20) days after being billed therefor by the Association, an initial assessment in an amount equal to the product of the number of square feet of floor area within the premises times ten cents (10¢) to be used by the Association for the purpose of defraying the promotional and public relations expenses incurred and to be incurred by the Association in connection with the opening of stores in the Shopping Center, (e) pay dues to the Association, in addition to said initial assessment, in the amounts fixed from time to time by the Board of Directors of the Association on a budgetary basis in order to carry out the purposes and defray the expenses of the Association, but in no event shall Tenant pay into the Association, as minimum annual dues, less than an amount equal to the product of the number of square feet of floor area in the premises times fifteen cents (15¢), or one hundred and twenty dollars (\$120) per year, whichever is greater. Said annual dues shall be payable in equal monthly installments, in advance, on the first day of each calendar month during the term of this Lease and shall be prorated for any fractional month. The provisions of this Section 17 shall be deemed to be covenants for the benefit of Landlord and the Association and shall be enforceable by each of them. The minimum annual dues as defined in (e) above will be adjusted by a percentage equal to the percentage increase or decrease from the base period of the United States Department of Labor, Bureau of Labor Statistics, Revised Consumer Price Index for Urban Wage Earners and Clerical Workers (1967 = 100). The Index published for the calendar year 1990 shall be considered the "base period". Such adjustment shall be made at any time there exists an increase or decrease of ten percent (10%) or more from the base period, and shall be effective for the fiscal year of the Merchants Association immediately following such adjustment. If at any time there shall not exist the Consumer Price Index, the Landlord may substitute any official index published by the Bureau of Labor Statistics, or successor, or similar governmental agency, as may then be in existence and shall be most nearly equivalent thereto.

The provisions of this Lease shall prevail over any conflicting provisions which may be contained in the Articles, By-Laws, or Regulations of the Merchants Association.

ARTICLE XVIII DESTRUCTION OF PREMISES

SECTION 18 01 Total or Partial Destruction

(a) If any portion of the premises constituting Landlord's Work shall be damaged by causes insured against under Section 12 02 hereof, but the premises are not thereby rendered untenable in whole or in part, Landlord shall, at its own expense, cause such damage to be repaired, and the rent shall not be abated. If by any reason of such occurrence, the premises shall be rendered untenable only in part, Landlord shall, at its own expense, cause the damage to be repaired, and the minimum annual rent meanwhile shall be abated proportionately as to the portion of the premises rendered untenable. If the premises shall be rendered wholly untenable by reason of such occurrence, or in the event of any portion of the premises constituting Landlord's Work shall be damaged by causes not insured against under Section 12 02 hereof, Landlord shall, at its own expense, cause such damage to be repaired, and the minimum annual rent meanwhile shall abate until the premises have been restored and rendered Tenable, or Landlord may, at its election, terminate this Lease and the tenancy hereby created by giving to Tenant, within the sixty (60) days following the date of said occurrence, written notice of Landlord's election so to do, and, in event of such termination, rent shall be adjusted as of such date.

Notwithstanding the above, if damages to the premises rendering either part or all of the premises untenable are caused by the fault or neglect of Tenant, Tenant's servants, agents or employees, there shall be no abatement of rent during the period said premises or part thereof are being restored and rendered Tenatable

(b) In the event of termination of this Lease under this Article XVIII, all proceeds from Tenant's fire and extended coverage insurance provided for in Section 12.01(a)(ii) hereof, but excluding proceeds for Tenant's trade fixtures, merchandise signs, and other personal property, shall be disbursed and paid to Landlord

SECTION 18.02 Partial Destruction of Shopping Center

In the event that thirty percent (30%) or more of the GLA of the Shopping Center shall be damaged or destroyed by fire or other cause, notwithstanding that the premises may be unaffected by such fire or other cause, Landlord may terminate this Lease and the tenancy hereby created by giving to Tenant give (5) days written notice of Landlord's election so to do which notice shall be given, if at all, within the ninety (90) days following the date of said occurrence. Rent shall be adjusted as of the date of such termination

SECTION 18.03 Tenant's Duty to Rebuild

If any item of Tenant's Work or any other portion of the premises which is not deemed Landlord's Work shall be damaged or destroyed, Tenant shall, unless Landlord terminates this Lease pursuant to Section 18.01 or 18.02 hereof, commence to repair, reconstruct and restore or replace said item or portion (including fixtures, furnishings and merchandise) no later than fifteen (15) days after construction work, if any, is completed which is Landlord's responsibility and which, by its nature, must be accomplished before Tenant may pursue its own work, and thereafter prosecute the same diligently to completion. The cost of all such repair, reconstruction, restoration and replacement shall be the sole responsibility of Tenant

SECTION 18.04 Waiver

Tenant hereby waives any right to terminate this Lease which may arise under any present or future law by reason of any partial or total destruction of the premises or of the Shopping Center

ARTICLE XIX EMINENT DOMAIN

SECTION 19.01 Total Condemnation of Premises

If the whole of the premises shall be acquired or condemned by eminent domain for any public or quasi-public use or purpose, then the Lease Term shall cease and terminate as of the day possession of the premises is taken by the condemning authority and all rentals shall be paid up to that date and Tenant shall have no claim against Landlord nor the condemning authority for the value of any unexpired Lease Term of this Lease

SECTION 19.02 Partial Condemnation of Premises

If less than all but more than fifty percent (50%) of the GLA contained in the premises is taken by condemnation, then Landlord and Tenant shall each have the right to terminate this Lease upon notice in writing to the other party within ninety (90) days after possession is taken by the condemning authority. If this Lease is so terminated, it shall terminate as of the day such notice is given or the day possession shall be taken by said authority, whichever is later, and Tenant shall pay rent and perform all of its other obligations under this Lease up to that date with a proportionate refund by Landlord of any rent as may have been paid in advance for a period subsequent to the date of termination. If this Lease is not so terminated, or if less than fifty percent (50%) of the GLA contained in the premises shall be taken by condemnation, then this Lease shall terminate only with respect to the parts of the premises so taken as of the day possession shall be taken by the condemning authority, and Tenant shall pay rent up to that day with a proportionate refund by Landlord of any rent as may have been paid for a period subsequent to the date of the taking, and thereafter, the minimum annual rent shall be reduced in direct proportion to the amount of GLA contained in the premises taken and Landlord agrees at Landlord's cost and expense, to restore the premises on the land remaining, as soon as reasonably possible, to a complete unit of like quality and character as existed prior to such condemnation (except that Tenant shall be solely responsible for fixturing and merchandising of the premises), provided that Landlord shall not be required to expend more on such restoration than an amount equal to that portion of the condemnation award received by Landlord (less all expenses, costs, legal fees and court costs incurred by Landlord in connection with such award) attributable to the premises. In the event that condemning authority shall not specify such attributable portion, and should Landlord and Tenant be unable to reach agreement between themselves as to the amount of said portion, the matter shall be determined by the Landlord, whose determination shall be conclusive. If the premises shall be rendered

wholly or partially untenable by any condemnation foresaid then the rent payable by Tenant under this Lease during the period in which the premises are so untenable shall be equitably abated. In the event the parties shall be unable to determine an equitable abatement of rent, the same shall be determined by the Landlord, whose determination shall be conclusive.

SECTION 19 03 Shopping Center Taken

If any part of the Shopping Center (including, without limitation, the Common Areas) is taken by condemnation so as to render, in Landlord's judgment, the Shopping Center or remaining part thereof unsuitable for use as retail shopping center, Landlord shall have the right to terminate this Lease upon notice in writing to Tenant within one hundred twenty (120) days after possession is taken by the condemning authority. If Landlord terminates this Lease upon a condemnation of the Shopping Center as herein provided, it shall terminate as of the day Landlord gives the aforesaid notice or the day possession is taken by the condemning authority, whichever is later, and Tenant shall pay rent and perform all of its other obligations under this Lease up to that date with a proportionate refund by Landlord of any rent as may have been paid in advance for a period subsequent to the date of termination.

SECTION 19 04 Landlord's Damages

In the event of any condemnation or taking as aforesaid, whether in whole or in part, Tenant shall not be entitled to any part of the award paid for such condemnation, and Landlord shall be entitled to receive the full amount of such award, Tenant hereby expressly waiving any right or claim to any part thereof.

SECTION 19 05 Tenant's Damages

Although all damages in the event of any condemnation are to belong to Landlord, whether such damages are awarded as compensation for diminution in value of the Leasehold or to the fee or the fee estate in this premises, Tenant shall have the right to claim and recover from the condemning authority, but not from Landlord, such compensation as may be separately awarded or recoverable by Tenant in Tenant's own right on account of any and all damage to Tenant's business by reason of the condemnation and for, or on account of, any cost or loss to which Tenant might be put in removing Tenant's merchandise, furniture, fixtures, Leasehold improvements and equipment.

ARTICLE XX DEFAULT OF THE TENANT

SECTION 20 01 Default Prior to Rent Commencement Date.

In the event, as the result of Tenant's default at any time prior to the Rent Commencement Date, Tenant shall be judicially evicted from the premises and/or this Lease shall be terminated, Landlord and Tenant hereby agree that, at Landlord's option, Tenant shall pay to Landlord on account of such default, as liquidated and agreed damages (and not as a penalty), a sum equal to Tenant's security deposit provided for under Section 8 01 hereof. It is agreed between Landlord and Tenant that the liquidated and agreed damages stipulated herein represent the difference between rent reserved under this Lease and the reasonable rental value of the premises, it being impossible to measure such actual damages at this time. In addition to the foregoing liquidated damages, in the event this Lease shall be terminated and/or Tenant shall be evicted as aforesaid, all Leasehold improvements constructed in the premises, whether as a part of Tenant's Work or otherwise, shall be and remain the property of Landlord. The option available to Landlord under this Section 20 01 is not intended to preclude the property of Landlord. The option available to Landlord under this Section 20 01 is not intended to preclude Landlord from not exercising said option and instead pursuing any other rights or remedies available to it.

SECTION 20 02 Right to Re-Enter

In the event of any failure of Tenant to pay any rental due hereunder within fifteen (15) days after the due date thereof, whether or not and after written notice has been given of non-payment thereof has been given, or any failure to perform any other terms, conditions or covenants of this Lease to be observed or performed by Tenant for more than thirty (30) days after receipt by Tenant of written notice of such default, or if Tenant or any guarantor of this Lease shall become bankrupt or insolvent, file any debtor proceedings, or take or have taken against Tenant or any guarantor of this Lease in any court, pursuant to any statute either of the United States or of any State, a petition in bankruptcy or insolvency or for reorganization or for the appointment of a receiver or trustee of all or a portion of Tenant's or any such guarantor's property, or if Tenant or any such guarantor shall abandon said premises, or suffer this Lease to be taken under any writ of execution, then Landlord in addition to all other rights or remedies it may have at law or in equity, shall have the immediate right to re-enter and may remove all persons and property from the premises and place and store such property in a public warehouse or elsewhere at the cost of, and for the account of, Tenant, all without service of notice or

resort to legal process and without being deemed guilty of trespass, or becoming liable for any loss or damage which may be occasioned thereby

SECTION 20 03 Right to Relet

Should Landlord elect to re-enter as herein provided, or should it take possession pursuant to legal proceedings or pursuant to any notice provided for by law, it may either terminate this Lease or it may, from time to time without terminating this Lease, make such alterations and repairs as may be necessary in order to relet the premises, and relet said premises or any part thereof for such term or terms (which may be for a term extending beyond the Lease Term) and at such rental or rentals and upon such other terms and conditions as Landlord, in its sole discretion, may deem advisable. Upon each such reletting, all rentals received by Landlord from such reletting shall be applied, first to the payment of any indebtedness other than rent due hereunder from Tenant to Landlord, second, to the payment of any costs and expenses of such reletting, including brokerage fees and attorneys fees and of costs of alterations and repairs in the premises, third, to the payment of rent due and unpaid hereunder, and the residue, if any, shall be held by Landlord and applied in payment of future rent as the same may become due and payable hereunder. If such rentals received from such reletting during any month be less than that to be paid during that month by Tenant hereunder, Tenant shall pay any such deficiency to Landlord. Such deficiency shall be calculated and paid monthly. No such re-entry or retaking possession of the premises by Landlord shall be construed as an election on its part to terminate this Lease unless a written notice of such intention be given to Tenant or unless the termination thereof be decreed by a court of competent jurisdiction. Notwithstanding any such reletting without termination, Landlord may at any time thereafter elect to terminate this Lease for such previous breach. Should Landlord at any time terminate this Lease for any breach, in addition to any other remedies Landlord may have, Landlord may recover from Tenant all damages it may incur by reason of such breach, including the cost of recovering the premises, reasonable attorneys fees, and the present value (calculated using a 12% interest factor) at the time of such termination of the excess, if any, of the amount of rent and charges equivalent to rent reserved in this Lease for the remainder of the Lease Term over the then reasonable rental value of the premises for the remainder of the Lease Term, all of which amounts shall be immediately due and payable from Tenant to Landlord.

SECTION 20 04 Legal Expenses

In the event either Landlord or Tenant shall bring suit against the other for breach of a covenant contained herein, or default hereunder, or for any legal remedy flowing therefrom, and in the event a breach, default, or right of remedy is established, the defaulting party shall pay all expenses incurred by the other in bringing said suit or action, including reasonable attorneys' fees.

SECTION 20 05 Waiver of Rights of Redemption

If Tenant is not able to redeem his position in the premises within 30 days after written notice by Landlord then Tenant hereby expressly waives any and all rights of redemption granted by or under any present or future laws in the event of Tenant's being evicted or dispossessed for any cause, or in the event of Landlord's obtaining possession of the premises by reason of the violation, by Tenant, of any of the covenants or conditions of this Lease, or otherwise.

SECTION 20 06 Bankruptcy

If Tenant shall be adjudicated or declared bankrupt, or if any proceedings are filed by or against Tenant, under the Bankruptcy Code or any similar provisions of any future federal bankruptcy law, or any state insolvency law, then and in any such event the Landlord may, at its option, terminate this Lease and all rights of Tenant hereunder by giving to Tenant written notice of Landlord's election to so terminate, in which event this Lease shall cease and terminate with the same force and effect as though the date set forth in said notice were the date originally set forth herein and fixed for the expiration of the term and Tenant shall vacate and surrender the Premises but shall remain liable to the full extent permitted by law.

If as a matter of law Landlord has no right on Tenant's bankruptcy to terminate this Lease, then if Tenant, as debtor, or its trustee, wishes to assume or assign the Lease, in addition to curing or adequately assuring the cure of all defaults existing under this Lease on Tenant's part on the date of filing of the proceedings (such assurances being defined below), Tenant, as debtor or its trustee, must also furnish adequate assurance of future performance under this Lease (as defined below). Adequate assurance of curing defaults means the posting with Landlord of a sum in cash sufficient to defray the costs of curing all existing defaults. Adequate assurance of future performance under this Lease means posting a deposit equal to three (3) months' rent including all other charges payable by Tenant hereunder, and in the case of an assignee, assuring Landlord that the assignee is financially capable of assuming this Lease and that its use of the Premises will be as provided elsewhere in this Lease and for no other use. In a reorganization under the Bankruptcy Code, the debtor or trustee must assume this Lease or assign it within sixty (60) days from the filing of the proceeding or it shall be deemed to have rejected and terminated this Lease.

If this Lease is assumed by a bankruptcy trustee appointed for Tenant or by Tenant as Debtor-in-Possession and thereafter Tenant is liquidated or files a subsequent petition for reorganization under the Bankruptcy Code, then Landlord may, at its option, terminate this Lease and all rights of Tenant hereunder, by giving Tenant written notice of its election to so terminate no later than 30 days after the occurrence of either of such events

When, pursuant to the Bankruptcy Code, a trustee or Debtor-in-Possession shall be obligated to pay reasonable use and occupancy charges for the use of the Premises or any portion thereof, such charges shall not be less than all rent and other monetary obligations of Tenant hereunder

ARTICLE XXI ACCESS BY Landlord

SECTION 21 01 Right of Entry

Landlord or Landlord's agents shall have the right to enter the premises during usual business hours to examine the same, and to show them to prospective purchasers or lessees of the Shopping Center or the premises, and to make such repairs, alterations, improvements or additions as Landlord may deem necessary or desirable, and Landlord shall be allowed to take all material into and upon said premises that may be required therefor without the same constituting an eviction of Tenant in whole or in part and the rent reserved shall in no wise abate while said repairs, alterations, improvements, or additions are being made, by reason of loss or interruption of business of Tenant, or otherwise. During the six (6) months prior to the expiration of the Lease Term, Landlord may exhibit the premises to prospective Tenants or purchasers and place upon the premises the usual notices "To Let" or "For Sale" which notices Tenant shall permit to remain thereon without interference. In the event of an emergency, and if Tenant shall not be personally present to open and permit an entry into the premises, Landlord or Landlord's agents may enter the same by a master key, or may forcibly enter the same, without rendering Landlord or such agents liable therefor, and without in any manner affecting the obligations and covenants of this Lease. Nothing herein contained, however, shall be deemed or construed to impose upon Landlord any obligation, responsibility or liability whatsoever, for the care, maintenance or repair of the Shopping Center or any part thereof, except as otherwise herein specifically provided

SECTION 21 02 Excavation

If an excavation shall be made upon land adjacent to the premises, or shall be authorized to be made, Tenant shall afford to the person causing or authorized to cause such excavation, license to enter upon the premises for the purpose of doing such work as Landlord shall deem necessary to preserve the wall or the building of which the premises form a part from injury or damage and to support the same by proper foundation, without any claim for damages or indemnification against Landlord or diminution or abatement of rent

ARTICLE XXII Tenant'S PROPERTY

SECTION 22 01 Taxes on Leasehold

Tenant shall be responsible for and shall pay before delinquency all municipal, county or state taxes assessed during the Lease Term against any Leasehold interest or personal property of any kind owned by or placed in, upon or about the premises by Tenant

SECTION 22 02 Loss and Damage

Landlord shall not be liable for any damage to property of Tenant or of others located on the premises or entrusted to Tenant or Tenant's employees or for the loss of any property by theft or otherwise, unless caused by the negligent act or omission of Landlord, its agents, contractors, servants or employees. Landlord shall not be liable for any injury or damage to persons or property resulting from fire, explosion, falling plaster, steam, gas, electricity, wind snow, rain or water which may lead from any part of the Shopping Center or from the pipes, appliances or plumbing works of the same or from any other place, or from dampness, or from any other cause whatsoever unless caused by or due to the negligent act or omission of Landlord, Landlord's agents, contractors, servants or employees, nor shall Landlord be liable for any such damage in construction of any public or quasi-public works. Landlord shall not be liable for any latent defect in the premises or in the building of which they form a part. Except as provided above, all property of Tenant kept or stored on the premises shall be so kept or stored at the risk of Tenant only, and Tenant shall hold Landlord harmless from any claims arising out of damage to the same, including subrogation claims by Tenant's insurance carrier

SECTION 22 03 Notice by Tenant

Tenant shall give immediate notice to Landlord in case of fire accidents or defects in the premises or in the building of which the premises form a part or in any fixtures or equipment contained therein or constituting part thereof

ARTICLE XXIII
HOLDING OVER, SUCCESSORS

SECTION 23 01 Holding Over

Any holding over after the expiration of the Lease Term shall be construed to be a Tenant from month to month at double the minimum rent herein specified and shall otherwise be on the terms and conditions herein specified, so far as applicable

SECTION 23 02 Successors

All rights and liabilities herein given to, or imposed upon, the respective parties hereto shall extend to and bind the several respective heirs, executors, administrators, successors, and assigns of the said parties, and if there shall be more than one Tenant, they shall all be bound jointly and severally by the terms, covenants and agreements herein. No rights, however, shall inure to the benefit of any assignee of Tenant unless the assignment to such assignee has been approved by Landlord in writing as provided in Section 15 01 hereof

ARTICLE XXIV
QUIET ENJOYMENT

SECTION 24 01 Landlord's Covenant

Upon payment by Tenant of the rents provided for herein, and upon the observance and performance of all the covenants, terms, and conditions on Tenant's part to be observed and performed, Tenant shall peaceably and quietly hold and enjoy the premises for the Lease Term without hindrance or interruption by Landlord or any other person or persons lawfully or equitably claiming by, through or under Landlord, subject, nevertheless, to the terms and conditions of this Lease

SECTION 24 01 Notice of Intent to Cancel

Tenant shall have the right to cancel this Lease at any time after the end of the fifth year of the Lease term by giving Landlord a one hundred and twenty day (120) written notice and paying concurrently with said notice a penalty of \$43.13 for each month that remains on the Lease term. If, by way of example, Tenant decides to terminate the Lease, and there are fourteen months remaining on the Lease, then the penalty would be fourteen times \$43.13, or, a total of \$603.75 as the penalty

ARTICLE XXV
MISCELLANEOUS

SECTION 25 01 Waiver

The waiver by Landlord of any breach of any term, covenant or condition herein contained shall not be deemed to be a waiver of such term, covenant or condition or any subsequent breach of the same or any other term, covenant or condition herein contained. The subsequent acceptance of rent hereunder by Landlord shall not be deemed to be a waiver of any preceding breach by Tenant of any term, covenant or condition of this Lease, other than the failure of Tenant to pay the particular rental so accepted, regardless of Landlord's knowledge of such preceding breach at the time of acceptance of such rent. No covenant, term or condition of this Lease shall be deemed to have been waived by Landlord unless such waiver be in writing signed by Landlord

SECTION 25 02 Accord and Satisfaction

No payment by Tenant or receipt by Landlord of a lesser amount than the rent herein stipulated shall be deemed to be other than on account of the earliest stipulated rent, nor shall any endorsement or statement on any check or any letter accompanying any check or payment as rent be deemed an accord and satisfaction, and Landlord may accept such check or payment without prejudice to Landlord's right to recover the balance of such rent or pursue any other remedy in this Lease provided

SECTION 25 03 Entire Agreement

This Lease and the Exhibits, and riders, if any, attached hereto and forming a part hereof, set forth all the covenants, promises, agreements, conditions or understandings, either oral or written, between Landlord and Tenant with regard to the premises. Except as herein otherwise provided, no

subsequent alteration, amendment change or addition to this Lease shall be binding upon Landlord or Tenant unless reduced to writing and signed by all parties hereto

SECTION 25 04 No Partnership

Landlord does not in any way or for any purpose by this Lease become a partner of Tenant in the conduct of its business, or otherwise or become a joint venturer or a member of any enterprise with Tenant

SECTION 25 05 Force Majeure

In the event that either party hereto shall be delayed or hindered in or prevented from the performance of any act required hereunder (except the obligations imposed with regard to rent and other charges to be paid by Tenant pursuant to this Lease) by reason of strikes, lock-outs, labor troubles, inability to procure materials, failure of power, restrictive governmental laws or regulations, the actions or inactions of the Redevelopment Agency of West Valley City, riots, insurrection, war or other reason of a like nature not the fault of the party delayed in performing work or doing acts required under the terms of this Lease, then performance of such act shall be excused for the period of the delay and the period for the performance of any such act shall be extended for a period of the delay and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay

SECTION 25 06 Notices

Except as otherwise provided herein, any notice, demand, request or other instrument which may be or is required to be given under this Lease shall be personally delivered or sent by United States certified mail - "Return Receipt Requested" and, if mailed, shall be addressed (a) if to Landlord, to the office of Landlord at 77 West 200 South, Suite 200, Salt Lake City, Utah 84101 or at such other place as Landlord may from time to time designate by written notice to Tenant and (b) if to Tenant, at the address specified at the outset of this Lease (with a copy to the premises if sent after the Rent Commencement Date) or at such other address as Tenant shall designate by written notice Any mailed notice shall be effective two (2) business days after said notice is deposited, postage prepaid, in the United States mails

SECTION 25 07 Captions and Section Numbers

The captions, section numbers, article numbers, and index appearing in this Lease are inserted only as a matter of convenience and in no way define, limit, construe, or describe the scope or intent of such sections or articles of this Lease nor in any way affect this Lease

SECTION 25 08 Tenant Defined, Use of Pronoun

The term "Tenant" shall be deemed and taken to mean each and every person or party mentioned as a Tenant herein, be the same one or more, and if there shall be more than one Tenant, any notice required or permitted by the terms of this Lease may be given by or to any one thereof, and shall have the same force and effect as if given by or to all thereof The use of the neuter or masculine singular pronoun to refer to Landlord or Tenant shall be deemed a proper reference even though Landlord or Tenant may be an individual, partnership, a corporation, other form of legal entity, or a group of two or more persons or legal entities The necessary grammatical changes required to make the provisions of this Lease apply in the plural sense where there is more than one Landlord or Tenant and to either corporations, associations, partnerships, individuals, other legal entities, males or females, shall in all instances be assumed as though in each case fully expressed

SECTION 25 09 Partial Invalidity

If any term, covenant or condition of this Lease or the application thereof to any person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Lease, or the application of such term, covenant or condition to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby and each term, covenant or condition of this Lease shall be valid and be enforced to the fullest extent permitted by law

SECTION 25 10 Recording

Tenant shall not record this Lease or any memorandum hereof without the written consent of Landlord Upon the request of Landlord, Tenant shall join in the execution of a memorandum or so-called "short form" of this Lease for the purposes of recordation Said memorandum or short form of this Lease shall describe the parties, the premises and the Lease Term and shall incorporate this Lease by reference, and shall contain such other provisions consistent with this Lease as Landlord may require

SECTION 25.11 Landlord Defined, Transfer of Landlord's Interests

The term "Landlord" as used in this Lease, so far as covenants or agreements on the part of Landlord are concerned, shall be limited to and include only the owner or owner's of Landlord's interest in this Lease at the time in question, and in the event of any transfer or transfers of such interest, Landlord herein named (and in case of any subsequent transfer, the then transferor) shall be automatically freed and relieved from and after the date of such transfer of all personal liability as respects the performance of any covenants or agreements on the part of Landlord contained in this Lease thereafter to be performed


SECTION 25.12 Governing Law

This Lease shall be governed by, enforced and construed pursuant to, the laws of the State of Utah

IN WITNESS WHEREOF, Landlord and Tenant have signed and sealed this Lease as of the day and year first above written.

Landlord:

HEARTLAND WEST VALLEY
COMMERCIAL LIMITED PARTNERS

By: 
Title: President

Tenant

DOUGLAS W MARTIN, D.B.A.,
FANTASTIC SAMS

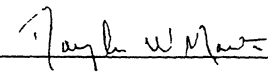
By: 
Title: An Individual

EXHIBIT "A"

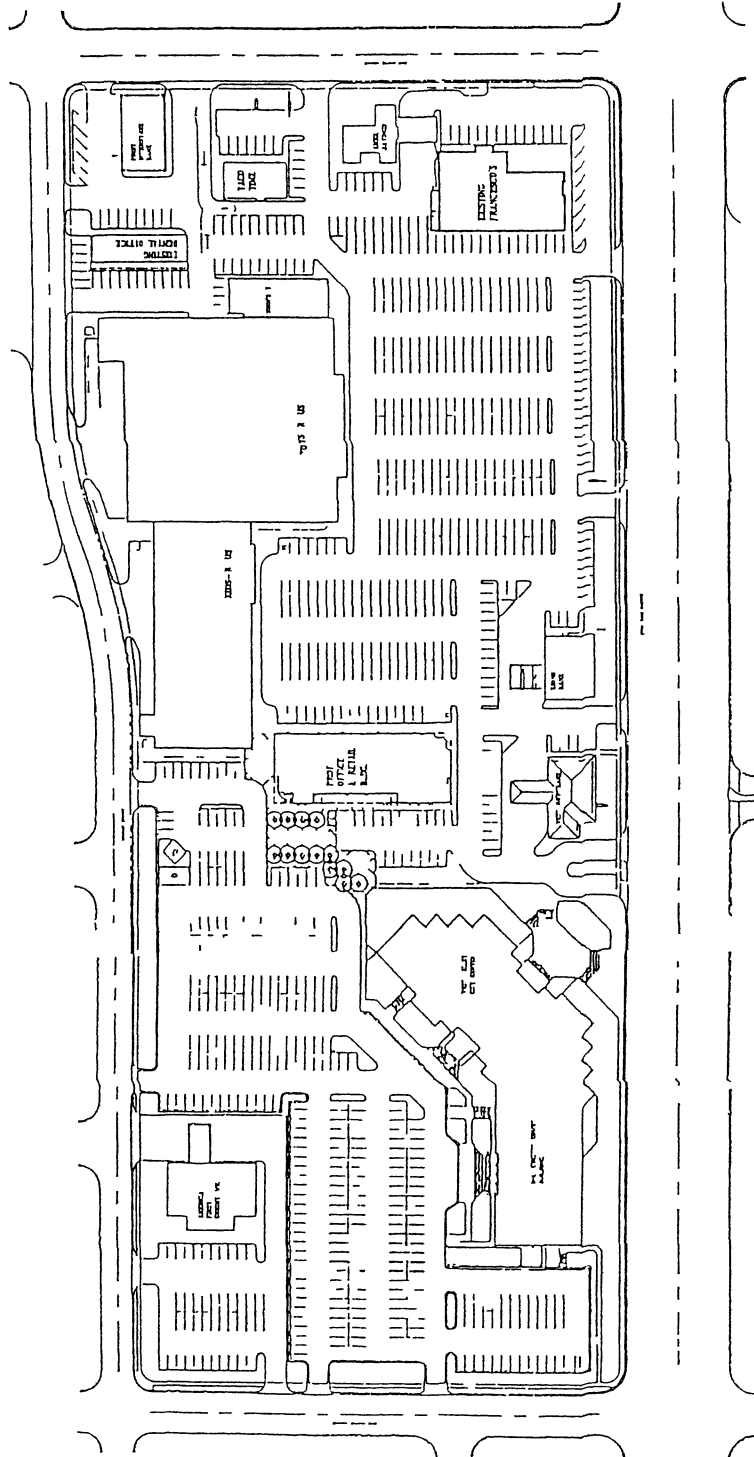
LEGAL DESCRIPTION

A part of the Northwest Quarter of Section 33, Township 1 South, Range 1 West, Salt Lake Base and Meridian, U.S. Survey:

Beginning at a point South 89°53'20" West 330.00 feet along the North line of said Northwest Quarter, and South 0°00'44" West 48.00 feet from the Northeast corner of said Northwest Quarter of Section 33; running thence South 0°00'44" West 272.00 feet; thence North 89°53'20" East 297.00 feet to a point 33 feet perpendicularly distant West of the Centerline of 2700 West Street; said Centerline being the East line of said Northwest Quarter of Section 33; thence South 0°00'44" West 495.095 feet parallel to said centerline; thence South 89°56'30" West 498.901 feet to the East line of Market Street; thence along said Easterly line North 0°00'20" East 142.384 feet to a point of tangency of a 526.66 foot radius curve to the left; thence along the arc of said curve 183.992 feet through a central angle of 20°01'00" to a point of tangency of a 466.66 foot radius curve to the right; thence along the arc of said curve 163.031 feet through a central angle of 20°01'00"; thence North 0°00'20" East 58.17 feet; thence North 89°53'20" East 199.968 feet; thence North 0°00'44" East 225.952 feet; thence North 89°53'20" East 142.00 feet to the point of beginning.

Contains 6.928 Acres

SITE PLAN



MARKET STREET CENTER

BARLOW-VIELSEN
2500 SOUTH 200 EAST
SALT LAKE CITY, UTAH



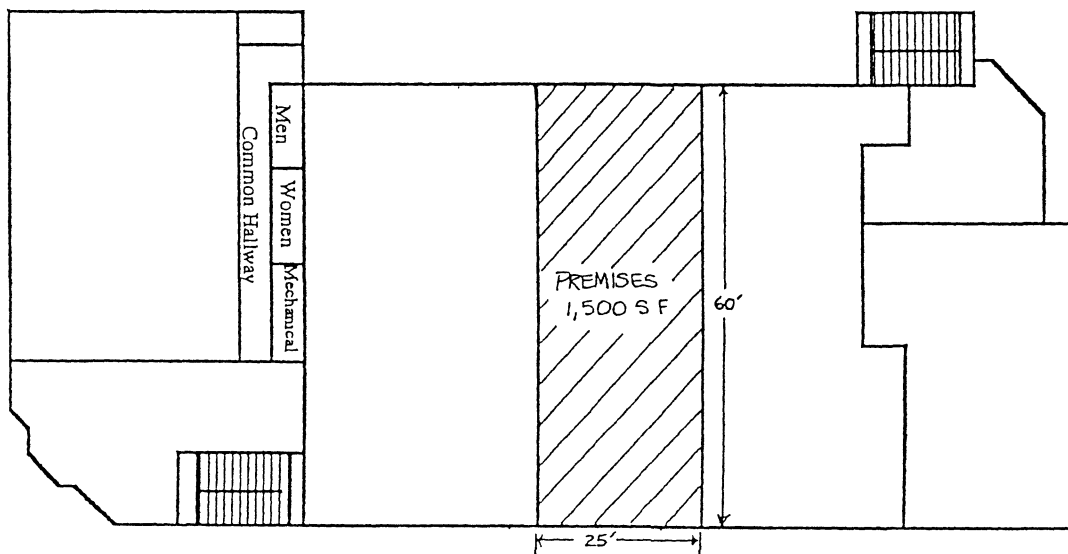
SP SITE PLAN

EXHIBIT "C"

PREMISES

MARKET STREET CENTER

First Floor



Ground Floor Retail

EXHIBIT "D"

LANDLORD'S WORK

None, Tenant accepts premises in "as is" condition.

EXHIBIT "E"

TENANT'S WORK

Tenant is responsible for all construction and renovations

EXHIBIT "F"

SIGNS

These criteria have been established for the purpose of assuring an outstanding shopping complex and for the mutual benefit of all Tenants

I GENERAL REQUIREMENTS

- A Tenant shall submit or cause to be submitted to the Landlord's architect for approval before fabrication at least three copies of detailed drawings indicating the location, site layout, design and color of the proposed signs, including all lettering and/or graphics
- B All permits for Tenant's signs and their installation shall be obtained by the Tenant or his representative and shall conform to all local building and electrical codes
- C All signs shall be constructed and installed at Tenant's expense
- D Tenant shall be responsible for the fulfillment of all requirements of these criteria

II LOCATION OF SIGNS

- A Only one exterior sign shall be permitted at the sign area, if any, designated by Landlord or Landlord's architect and shall not be permitted without the prior written consent of Landlord
 - 1 Tenant shall provide on one facade of the Premises a suitable exterior signboard, sign or signs of such size, design and character and in such location only as Landlord shall approve in writing at its sole discretion. Size specification shall be provided by Landlord's architect
 - 2 No sign perpendicular to the face of the building or storefront will be permitted

III DESIGN REQUIREMENTS

- A Tenant's storefront entrance/store name identification designs shall be subject to the approval of Landlord's architect. Wording of signs shall not include the product(s) sold except as part of the Tenant's trade name or insignia
- B The design of all signs, including style, placement and height of letterings, size, color and materials, method and amount of illumination shall be subject to the approval of Landlord's architect
- C No exposed lamps, tubing, animated, flashing, audible signs, exposed raceways, crossovers, conduit or brackets will be permitted. All cabinets, conductors, transformers and other equipment shall be concealed
- D Exterior signs shall be individual letters with plexiglas faces with contrasting copy. Copy shall be formed or flat cut out plexiglas compatible with cap edges. Letters shall have sheet metal or anodized aluminum returns no more than five inches deep using neon lighting with 30 or 60 mililamp systems

IV CONSTRUCTION REQUIREMENTS

- A Exterior facade signs, bolts, fastenings, and clips, if such exterior signs and appurtenances are permitted by Landlord, shall be enameled iron with enamel finish, stainless steel, aluminum, brass or bronze or other rust free metal. No black iron materials of any type will be permitted
- B Exterior facade signs, if such exterior signs are permitted by Landlord, exposed to the weather, shall be mounted to permit proper dirt and water drainage away from the building unless otherwise directed by Landlord's architect
- C Location of all openings for conduit in sign panels on building walls shall be indicated by the sign contractor on drawings submitted to Landlord's architect. All penetrations of the building structure required for sign installation shall be neatly sealed in a watertight condition. No labels will be permitted on the exposed surface of signs except those required by local ordinance which shall be applied in an inconspicuous location

V MISCELLANEOUS REQUIREMENTS

- A Tenant will be permitted to place upon each entrance of its premises not more than 144 square inches of gold leaf or decal application lettering not to exceed two inches (2) in height indicating hours of business, emergency telephone number, etc. Tenant may install on the store front, if required by the U S Post Office, the numbers only for the street address in exact location stipulated by Landlord's architect. Size, type and color of numbers shall be stipulated by Landlord's architect.
- B In the event Tenant has a non-customer door for receiving merchandise only, Tenant's name shall be uniformly applied on said door in a location, as directed by Landlord's architect, in 2' high block letters. Where more than one tenant uses the same door, each name shall be applied.
- C Tenant shall be fully responsible for the operations of Tenant's sign contractors and Tenant shall indemnify and hold Landlord harmless from any acts or omissions of Tenant's sign contractor.
- D Tenant, his representative, or his sign contractor shall, during the term of this Lease, repair and maintain in a clean and orderly fashion, all tenant's signs and immediately repair any damage caused by their work. If Tenant fails to repair or maintain said sign(s), Landlord may undertake such repairs or maintenance at its option and the cost thereof shall be payable by Tenant to Landlord upon demand as additional rent.
- E Tenant, his representative, or his sign contractor, shall at the termination of this Lease, remove Tenant's sign and repair any damaged area to its original condition when Tenant's sign was created.
- F The exterior facade sign shall be operated by a central time clock and shall be illuminated during such hours as prescribed by Landlord.
- G Tenant's cost for service and the maintenance, repair and replacement of such facilities, including time clocks to Tenant's sign, may be on a pro-rata basis which shall be the proportion of such cost which Tenant's sign bears to the total number of signs contributing towards said service bill with necessary and equitable modification where special or comparatively excessive use of such facilities occurs with respect to or is afforded an individual Tenant and will be billed by the Landlord to the Tenant on a regular basis and shall be due and payable upon demand. Tenant shall pay to Landlord Tenant's share of said cost within ten (10) days after receipt of billing from Landlord. Tenant's share may be adjusted with the common area expenses.

EXHIBIT "G"

SHOPPING CENTER RULES & REGULATIONS

As per the date of the Tenant's signing of this Lease, the rules and regulations for Market Street Center have not changed from the specifics outlined in the Lease.

EXHIBIT "H"

HAZARDOUS WASTE

Unless Tenant obtains prior written consent of Landlord, Tenant shall not create, generate, use, bring, allow, emit dispose or permit on the Premises any toxic or hazardous gaseous, liquid or solid material or waste ("Toxic Material") including, without limitation, any material or substance (I) having characteristics of ignitability, corrosivity, reactivity, or extraction procedure toxicity, or (ii) which is defined as "Hazardous Substances", "Hazardous Materials", or 'Toxic Substances' in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 USC Section 9601, et seq, the Hazardous Materials Transportation Act, 49 USC Section 1801, et seq, the Resource conservation and Recovery Act, 42 USC Section 6901, et seq, and in the regulations adopted and publications promulgated pursuant to said laws, or (iii) which has been determined by any state, federal, or local governmental or public authority or agency to be capable of posing a risk of injury to health, safety, or property. Tenant, at its sole cost, shall immediately take all steps necessary to effect a clean up of any contamination of the Premises, or any part thereof, caused or permitted by Tenant in violation of the preceding sentence, and to obtain appropriate governmental agency certification of such cleanup. Tenant shall indemnify and hold Landlord harmless from any claims, liabilities, costs or expenses incurred or suffered by landlord arising from such bringing, allowing, using, permitting, generating, creating, emitting, or disposing of Toxic materials, whether or not consent to same has been granted by Landlord. Tenant's indemnification and hold harmless obligations shall include, without limitation (I) claims, liability, costs or expenses resulting from or based upon administrative, judicial (civil or criminal), or other action, legal or equitable, brought by any private or public person under common law or any Federal, State, County or Municipal law, ordinance or regulation, including, without limitation, any subsequent tenant or owner of the premises or adjacent property, (ii) claims, liabilities, costs, or expenses pertaining to the cleanup or containment of Toxic Materials, the identification of the pollutants in the Toxic Materials, the identification of the scope of any environmental contamination, the removal of pollutants from soils, riverbeds, or aquifers, and obtaining customary certification from the appropriate governmental agency of such removal, the provision of any alternative public drinking water source, or the long term monitoring of ground water and surface waters, (iii) all costs and fees incurred in defending such claims, and (iv) all costs or losses to Landlord arising from any delay or inability in selling or leasing the premises after the expiration of the Lease, including, without limitation, reduction in the market value of the Premises. Tenant shall comply, at its sole cost, with all laws pertaining to such Toxic Materials. Tenant's hold harmless and indemnity obligations hereunder shall survive the expiration or termination of this Lease.

EXHIBIT "I"

LEASE GUARANTY

THIS LEASE GUARANTY, made and given this ____ day of June, 1998, by Douglas W Martin

WITNESSETH

WHEREAS, HEARTLAND WEST VALLEY COMMERCIAL LIMITED PARTNERS (hereinafter referred to as "Landlord") has entered or is about to enter into that certain Lease Agreement with DOUGLAS W MARTIN, D B A, FANTASTIC SAMS (therein and herein referred to as "Tenant"), with respect to those certain premises covering approximately 1,500 square feet at 3588 Constitution Boulevard, City of West Valley City, County of Salt Lake, State of Utah, and

WHEREAS, the undersigned will be benefitted by the business, and

WHEREAS, Landlord requires as a condition to its execution of said Lease Agreement that the undersigned guarantee performance of certain of the obligations of Tenant under said Lease and Assignment Agreement, and

WHEREAS, the undersigned is desirous that Landlord enter into said Lease and Assignment Agreement with Tenant

NOW, THEREFORE, in consideration of the execution of said Lease and Assignment Agreement by Landlord, the undersigned hereby unconditionally agrees as follows

1 The undersigned guarantees performance of each and all of the terms, covenants and conditions of said Lease and Assignment Agreement to be kept and performed by said Tenant, including the payment of all rentals and other charges to accrue thereunder during the Lease and Assignment Agreement Term

2 The covenants and agreements contained herein shall continue in favor of Landlord, notwithstanding any extension, modification or alteration of said Lease and Assignment Agreement entered into by and between the parties thereto or their successors or assigns, or notwithstanding any assignment of said Lease and Assignment Agreement, with or without the consent of Landlord, and no extension, modification, alteration or assignment of the above referenced Lease and Assignment Agreement shall in any manner release or discharge the undersigned, and it does hereby consent thereto

3 This Lease Guaranty will continue unchanged by any bankruptcy, reorganization or insolvency of any Tenant or any successor assignee thereof or by any disaffirmance or abandonment by a trustee of Tenant

4 Landlord may, without notice, assign this Lease Guaranty in whole or in part, and no assignment or transfer of the Lease and Assignment Agreement shall operate to extinguish or diminish the liability of the undersigned hereunder

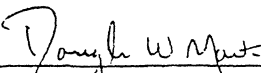
5 The liability of the undersigned under this Lease Guaranty shall be primary and with respect to any right of action which shall accrue to Landlord under the Lease and Assignment Agreement, Landlord may, at its option, proceed against the undersigned without having commenced any action or having obtained any judgment against Tenant

6 To pay Landlord's reasonable attorney's fees and all costs and other expenses incurred, whether on appeal or otherwise, in any collection or attempted collection or in any negotiations relative to the obligations hereby guaranteed, or enforcing this Lease Guaranty against the undersigned

7 That it does hereby waive notice of any demand by Landlord as well as any notice of default in time payment of rent or any other amounts contained or reserved in the Lease and Assignment Agreement

8 The use of the singular herein shall include the plural The obligation of two or more parties shall be joint and several The terms and provisions of this Lease Guaranty shall be binding upon and insure to the benefit of the respective successors and assigns of the parties herein named


IN WITNESS WHEREOF, the undersigned has caused this Lease Guaranty to be executed as of the date set forth above



Douglas W. Martin

Address 1595 South State Street
Orem, UT 84097

Subscribed and Sworn to before me this 12th day of June, 1998



Notary Public

My Commission Expires 1 November 2001

Residing at Orem, Utah

