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## DECLARATION OF COVENANTS, CONDITIONS, RECIPROCAL RIGHTS AND EASEMENTS

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CITY OF CHICAGO, COOK COUNTY, ILLINOIS

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## TABLE OF CONTENTS

	<u>Page</u>
<b>ARTICLE 1 DEFINITIONS</b> .....	1
1.1 Access Drive .....	1
1.2 Affiliate .....	2
1.3 Applicable Legal Requirements.....	2
1.4 Approving Party.....	2
1.5 Best Buy Parcel.....	2
1.6 Building.....	2
1.7 Building Area.....	2
1.8 Common Area.....	2
1.9 Constant Dollars.....	3
1.10 Construction Requirements.....	3
1.11 Co-Tenant(s) .....	3
1.12 Co-Tenant Parcel(s) .....	3
1.13 Defaulting Party.....	3
1.14 Environmental Laws .....	3
1.15 Floor Area .....	3
1.16 Floor Area .....	3
1.17 Hazardous Materials .....	4
1.18 Indemnitee.....	4
1.19 Indemnitor.....	4
1.20 Non-Defaulting Party.....	4
1.21 Occupant .....	4
1.22 Outside Sales Area.....	4
1.23 Parcel.....	4
1.24 Parking Areas.....	4
1.25 Party .....	4
1.26 Permittee .....	5
1.27 Person.....	5
1.28 Prime Rate.....	5
1.29 Pro Rata Share.....	6
1.30 Released Party.....	6
1.31 Releasing Party .....	6
1.32 Restaurant .....	6
1.33 Shopping Center.....	6
1.34 Site Plan .....	6
1.35 Tax Bill .....	6
1.36 Taxes.....	6
1.37 Utility Lines .....	6
<b>ARTICLE 2 EASEMENTS</b> .....	6
2.1 Ingress, Egress and Parking .....	6
2.2 Utility Lines .....	7

# UNOFFICIAL COPY

2.3	Rights of Declarant .....	9
2.4	Other Easements .....	9
<b>ARTICLE 3 CONSTRUCTION .....</b>		<b>9</b>
3.1	General Requirements.....	9
3.2	Common Area.....	10
3.3	Building Improvements .....	11
<b>ARTICLE 4 MAINTENANCE AND REPAIR.....</b>		<b>11</b>
4.1	Utility Lines .....	11
4.2	Common Area.....	11
4.3	Building Improvements and Outside Sales Areas .....	12
<b>ARTICLE 5 OPERATION OF THE SHOPPING CENTER.....</b>		<b>13</b>
5.1	Use .....	13
5.2	Lighting.....	15
5.3	Occupant Signs .....	16
5.4	Insurance.....	16
5.5	Taxes and Assessments.....	18
5.6	Liens.....	19
<b>ARTICLE 6 MISCELLANEOUS .....</b>		<b>19</b>
6.1	Default.....	19
6.2	Estoppel Certificate.....	21
6.3	Notices .....	21
6.4	Approval Rights .....	22
6.5	Condemnation.....	22
6.6	Binding Effect.....	22
6.7	Construction and Interpretation .....	22
6.8	Negation of Partnership .....	23
6.9	Not a Public Dedication.....	23
6.10	Excusable Delays.....	23
6.11	Severability .....	23
6.12	Amendments .....	23
6.13	Captions and Capitalized Terms .....	23
6.14	Mitigation of Damages .....	23
6.15	Declaration Shall Continue Notwithstanding Breach .....	24
6.16	Time.....	24
6.17	No Waiver.....	24
6.18	Interest.....	24
<b>ARTICLE 7 TERM.....</b>		<b>24</b>
7.1	Term of this Declaration.....	24

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## Exhibits

- A - Legal Description of Shopping Center
- B - Legal Description of Best Buy Parcel
- C - Legal Description of Co-Tenant Parcel(s)
- D - Site Plan
- E - Construction Requirements

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## **DECLARATION OF COVENANTS, CONDITIONS, RECIPROCAL RIGHTS AND EASEMENTS**

**THIS DECLARATION OF COVENANTS, CONDITIONS, RECIPROCAL RIGHTS AND EASEMENTS** (this “**Declaration**”) is made as of the 4th day of August, 2004, by **ELSTON DEVELOPMENT L.L.C.**, an Illinois limited liability company (“**Declarant**”).

### **RECITALS:**

**WHEREAS**, Declarant is the owner or ground leasehold tenant of that certain real property located in Chicago, Illinois, consisting of approximately 10 acres of land, as described in Exhibit A attached hereto and made a part hereof (the “**Land**”);

**WHEREAS**, a portion of the Land has been ground-leased by Declarant to Best Buy Stores, L.P., a Delaware limited partnership (“**Best Buy**”), pursuant to that certain Ground Lease dated August 15, 2002 between Declarant and Best Buy (as amended, the “**Best Buy Lease**”), which portion is described in Exhibit B attached hereto and made a part hereof (the “**Best Buy Parcel**”);

**WHEREAS**, the portion of the Shopping Center other than the Best Buy Parcel is described in Exhibit C (the “**Co-Tenant Parcel(s)**”);

**WHEREAS**, Declarant intends that the Land be developed as a retail shopping center (the “**Shopping Center**”); and

**WHEREAS**, Declarant desires to create certain easements and impose certain restrictive covenants and conditions upon the Shopping Center, upon the terms and conditions hereinafter set forth.

**NOW, THEREFORE**, in consideration of the premises and the covenants contained in this Declaration, Declarant hereby declares that the Shopping Center shall be owned, held, used, transferred, sold, conveyed, demised and occupied subject to the terms and conditions set forth in this Declaration, which shall run with the Shopping Center and shall be binding upon the Shopping Center and all Occupants, or other parties permitted within the Shopping Center, as follows:

### **ARTICLE 1**

#### **DEFINITIONS**

1.1 **Access Drive**. “**Access Drive**” shall mean any portion of the Common Area required for the passage of automobiles from the publicly dedicated streets surrounding the Shopping Center to and across the Parcels.

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1.2 **Affiliate.** “**Affiliate**” shall mean a corporate entity controlled by, controlling or under common control with a Party. “**Control**” shall mean the power to direct the day-to-day management and policies of the Party in question.

1.3 **Applicable Legal Requirements.** “**Applicable Legal Requirements**” shall have the meaning given in Section 3.1(A) herein.

1.4 **Approving Party.** “**Approving Party**” shall mean the Party designated from time to time pursuant to this Declaration, to make certain decisions and/or give certain approvals with respect to a Parcel pursuant to the terms of this Declaration. There shall be one Approving Party representing each Parcel. As of the date of the execution of this Declaration, the Declarant is the “Approving Party” with respect to each Parcel. As of the effective date of the Best Buy Lease, and until the Best Buy Lease is terminated or expires, or the right of Best Buy (or any assignee or Affiliate) to possession of the Best Buy Parcel is terminated, Declarant shall be the Approving Party with respect to matters under this Declaration affecting the Best Buy Parcel, but Best Buy must consent to matters concerning the Best Buy Parcel or Best Buy’s rights and/or obligations under the Best Buy Lease which consent may be given or withheld in Best Buy’s sole discretion if the same may adversely affect Best Buy’s rights and/or increase Best Buy’s obligations under the Best Buy Lease. Subject to the foregoing, each Approving Party shall make the decisions and/or give the approvals expressly designated to be made pursuant to this Declaration and/or given on behalf of the Parcel represented by such position regardless of whether the Approving Party then owns or leases all or less than all of such Parcel, which consents or approvals shall not be unreasonably withheld, conditioned or delayed. The holder of the Approving Party position shall have the right to assign such position to any other Party owning or leasing a Parcel, but if an assignment is not made, then such Approving Party position shall automatically be deemed assigned to the Party acquiring the last Parcel (or portion thereof) owned or leased by the transferring Approving Party. Notwithstanding anything contained herein to the contrary, at any time during which an Occupant is named as the Approving Party for a Parcel, Declarant shall also be deemed to be an Approving Party for such Parcel.

1.5 **Best Buy Parcel.** “**Best Buy Parcel**” shall mean the parcel of real estate described on Exhibit B attached hereto.

1.6 **Building.** “**Building**” shall mean any enclosed structure placed, constructed, or located on a Parcel, including any appurtenant canopies, supports, loading docks, truck ramps and other outward extensions, and all sidewalks immediately adjacent to any such structure.

1.7 **Building Area.** “**Building Area**” shall mean the areas of the Best Buy Parcel or the Co-Tenant Parcel(s) extending beyond the exterior walls of the Buildings located on the Best Buy Parcel or Co-Tenant Parcel(s), as the case may be, to the edge of the curbs surrounding said Buildings, which are delineated as Building Areas on the Site Plan.

1.8 **Common Area.** “**Common Area**” shall mean all areas within the exterior boundaries of the Shopping Center, exclusive of (i) Building Areas and (ii) any Outside Sales Area being used at any relevant time for such purpose.

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1.9 **Constant Dollars.** “Constant Dollars” shall mean the value of the U.S. dollar to which such phrase refers, as adjusted from time to time. An adjustment shall occur on the 1st day of June of the sixth (6th) full calendar year following the date of this Declaration, and thereafter at five (5) year intervals. Constant Dollars shall be determined by multiplying the dollar amount to be adjusted by a fraction, the numerator of which is the Current Index Number and the denominator of which is the Base Index Number. The “Base Index Number” shall be the level of the Index for the year this Declaration commences; the “Current Index Number” shall be the level of the Index for the year preceding the adjustment year; the “Index” shall be the Consumer Price Index for All Urban Consumers, published by the Bureau of Labor Statistics of the United States Department of Labor for U.S. City Average, All Items (1996=100), or any successor index thereto as hereinafter provided. If publication of the Index is discontinued, or if the basis of calculating the Index is materially changed, then the Approving Parties shall substitute for the Index comparable statistics as computed by an agency of the United States Government or, if none, by a substantial and responsible periodical or publication of recognized authority most closely approximating the result which would have been achieved by the Index.

1.10 **Construction Requirements.** “Construction Requirements” shall have the meaning given in Section 3.1(C) herein.

1.11 **Co-Tenant(s).** “Co-Tenants” shall mean the Occupants of the Co-Tenant Parcel(s).

1.12 **Co-Tenant Parcel(s).** “Co-Tenant Parcel(s)” shall mean the parcel of real estate described on Exhibit C attached hereto.

1.13 **Defaulting Party.** “Defaulting Party” shall have the meaning given in Section 6.1(A) herein.

1.14 **Environmental Laws.** “Environmental Laws” shall have the meaning given in Section 5.1(C) herein.

1.15 **Floor Area.** “Floor Area” shall mean the actual number of square feet of space contained on each floor within a building, including any mezzanine (but not including any mezzanine or portion thereof used for non-sales purposes) or basement space, as measured from the exterior faces of the exterior walls or storefront and/or the centerline of any common walls; provided, however, that the following areas shall not be included in such calculations: Outside Sales Areas; incidental office space used by the Occupant for administrative purposes and which is not open or accessible to the general public; the upper levels of any multi-deck/platform areas used for storage of merchandise; and any space used for building utilities or mechanical equipment. Notwithstanding the foregoing, any relatively permanent Outside Sales Areas must be included in overall Floor Area for purposes of calculating a party's proportionate share of costs for Common Area costs and expenses.

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1.17 **Hazardous Materials**. “**Hazardous Materials**” shall have the meaning given in Section 5.1(C) herein.

1.18 **Indemnitee**. “**Indemnitee**” shall have the meaning given in Section 5.4(C) herein.

1.19 **Indemnitor**. “**Indemnitor**” shall have the meaning given in Section 5.4(C) herein.

1.20 **Non-Defaulting Party**. “**Non-Defaulting Party**” shall have the meaning given in Section 6.1(A) herein.

1.21 **Occupant**. “**Occupant**” shall mean any Person from time to time entitled to the use and occupancy of any portion of any improvements on the Best Buy Parcel or the Co-Tenant Parcel(s) under an ownership right or any lease, sublease, license, concession or other similar agreement.

1.22 **Outside Sales Area**. “**Outside Sales Area**” shall mean those areas which from time to time may be used for sales, display and/or storage purposes. The Outside Sales Area for a particular Building shall be located immediately adjacent to the Building and shall not extend more than twenty-five (25) linear feet in any given direction beyond the exterior walls of such Building. All Outside Sales Areas shall be enclosed by a fence or other security barrier, but shall not be heated or air-conditioned.

1.23 **Parcel**. “**Parcel**” shall mean either the Best Buy Parcel or the Co-Tenant Parcel(s) and “**Parcels**” shall mean all of the Best Buy Parcel and the Co-Tenant Parcel(s).

1.24 **Parking Areas**. “**Parking Areas**” shall mean those portions of the Common Area intended and improved for the parking of automobiles, including, without limitation, the Parking Deck. The Parking Areas shall specifically exclude the Access Drive. “**Parking Deck**” shall mean that certain multi-level parking deck with subsurface parking, ground level surface parking and several levels of parking above grade, generally located as depicted on the Site Plan.

1.25 **Party**. “**Party**” shall mean each signatory hereto and, after compliance with the notice requirements set forth below, its successors and assigns who become owners of any portion of the Shopping Center or successors to the interest of such Party as a result of acquisition of such Party's rights hereunder (or possession of such Party's Parcel) by foreclosure or other remedy pursuant to any mortgage of such Parcel. Declarant shall also have the right to designate any Occupant as a “Party” with respect to the Parcel on which such Occupant's Building is located with respect to all or any of the rights permitted to be exercised by a Party under this Declaration with respect to such Parcel, and upon such designation, such Occupant shall be deemed the “Party” for all such designated purposes with respect to such Parcel, until Declarant shall deliver written notice to all other Parties specifying either Declarant, another Occupant, or another Person as the “Party” with respect to such Parcel; provided, however, that for all purposes under this Declaration other than the payment of sums due from the parties under this Declaration, following such designation, Declarant shall continue to be deemed a “Party”



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with respect to such Parcel. As of the effective date of the Best Buy Lease, Best Buy shall be a Party with respect to the Best Buy Parcel; provided, however, that Best Buy shall not be responsible for incurring any costs and/or expenses under this Declaration that are not expressly provided under the Best Buy Lease or for any obligation under this Declaration which materially and adversely affects Best Buy's rights under the Best Buy Lease. Each Party shall be liable for the performance of all covenants, obligations and undertakings herein set forth with respect to its Parcel which accrue during the period that such Party is the "Party" for its Parcel, and such liability shall continue with respect to any portion transferred until the notice of transfer set forth below is given, at which time the transferring Party's personal liability for unaccrued obligations shall terminate. A Party transferring all or any portion of its interest in the Shopping Center shall give notice to all other Parties of such transfer and shall include therein at least the following information:

- (i) the name and address of the new Party;
- (ii) a copy of the legal description of the portion of such Parcel transferred; and
- (iii) if the transferee is the Approving Party.

If the interest in a parcel is owned by more than one person, the person or persons owning at least fifty-one percent (51%) of the interest in the parcel shall designate one of their number to represent all owners of the interest in the parcel and such designated person shall be deemed the party for such parcel. Until the notice of transfer is given, the transferring Party shall (for the purposes of this Declaration only) be the transferee's agent.

1.26 **Permittee.** "Permittee" shall mean all Occupants and the officers, directors, employees, agents, contractors, customers, vendors, suppliers, visitors, invitees, licensees, subtenants and concessionaires of Occupants insofar as their activities relate to the intended use of the Shopping Center. Among others, Persons engaging in the following activities on the Common Area will not be considered to be Permittees:

- (a) Exhibiting any placard, sign or notice;
- (b) Distributing any circular, handbill, placard or booklet;
- (c) Soliciting memberships or contributions;
- (d) Parading, picketing or demonstrating; and
- (e) Failing to follow regulations relating to the use of the Shopping Center.

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

1.28 **Prime Rate.** "Prime Rate" shall mean the Prime Rate of interest published in the "Monthly Rates" section of *The Wall Street Journal*, as it fluctuates from time to time.

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1.29 **Pro Rata Share.** “Pro Rata Share” shall have the meaning given in Section 4.2(B) herein.

1.30 **Released Party.** “Released Party” shall have the meaning given in Section 5.4(C) herein.

1.31 **Releasing Party.** “Releasing Party” shall have the meaning given in Section 5.4(C) herein.

1.32 **Restaurant.** “Restaurant” shall mean any operation or business which requires a governmental permit, license and/or authorization to prepare and/or serve food for either on or off-site consumption; provided, however, notwithstanding anything contained herein to the contrary, a supermarket, grocery store or similar operation shall not be deemed a Restaurant.

1.33 **Shopping Center.** “Shopping Center” shall mean collectively, the Best Buy Parcel and the Co-Tenant Parcel(s).

1.34 **Site Plan.** “Site Plan” shall mean that certain site plan attached hereto as Exhibit D.

1.35 **Tax Bill.** “Tax Bill” shall have the meaning given in Section 5.5 herein.

1.36 **Taxes.** “Taxes” shall have the meaning given in Section 5.5 herein.

1.37 **Utility Lines.** “Utility Lines” shall mean those facilities and systems for the transmission of utility services, including drainage and storage of surface water.

## ARTICLE 2

### EASEMENTS

#### 2.1 **Ingress, Egress and Parking.**

(A) During the term of this Declaration, each Party shall have, for its use and for the use of its Permittees, in common with others entitled to use the same, a non-exclusive, perpetual easement for (i) the passage of vehicles over and across the Parking Areas and Access Drives of each Parcel, as the same may from time to time be constructed and maintained for such use, (ii) the passage and accommodation of pedestrians over and across the Access Drives and sidewalk areas of each Parcel, as the same may from time to time be constructed and maintained for such use, for ingress and egress, all as delineated on the Site Plan, and (iii) the parking of vehicles on the Parking Areas. Automobiles may not be parked on any Common Area in the Shopping Center other than a Parking Area.

(B) The foregoing easement rights shall be subject to the following reservations as well as other provisions contained in this Declaration:

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

(ii) Each Party reserves the right at any time and from time to time to exclude and restrain any Person who is not a Permittee from using any portion of the Common Area; and

(iii) No Party shall have the right to alter the location of such ingress and egress easements without having obtained the prior written consent of the Approving Party for the other Parcels.

## 2.2 Utility Lines.

(A) Each Party shall have non-exclusive, perpetual easements in, to, over, under, along and across those portions of the Common Area located on each Parcel necessary for the installation, operation, flow, passage, use, maintenance, connection, repair, relocation and removal of Utility Lines serving the benefited Party's Parcel, including, but not limited to, sanitary sewers, storm drains, and water (fire and domestic), gas, electrical, telephone and communication lines. All Utility Lines shall be underground except:

- (i) ground mounted electrical transformers;
- (ii) as may be necessary during periods of construction, reconstruction, repair or temporary service;
- (iii) as may be required by governmental agencies having jurisdiction;
- (iv) as may be required by the provider of such service; and
- (v) fire hydrants.

Prior to exercising the right granted herein, the grantee shall first provide the Approving Parties for such affected Parcels with a written statement describing the need for such easement, shall identify the proposed location of the Utility Line, and shall furnish a certificate of insurance showing that its contractor has obtained the minimum insurance coverage required by Section 5.4(B) hereof. Except as otherwise agreed to by the Approving Parties for such affected Parcels and the grantee, any Party installing Utility Lines pursuant to the provisions of this subparagraph shall pay all costs and expenses with respect thereto and shall cause all work in connection therewith (including general clean-up and proper surface and/or subsurface restoration) to be completed as quickly as possible and in a manner so as to minimize interference with the use of the Common Area.

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(B) The initial location of any Utility Line serving the Building and other improvements on the Best Buy Parcel (the “**Best Buy Building**”) shall be established by the Best Buy Lease. The initial location (and relocation) of any other Utility Lines shall be subject to the prior written approval of the Declarant, such approval not to be unreasonably withheld or delayed. During the term of the Best Buy Lease, Best Buy shall also have the right to approve the relocation of any Utility Lines serving the Best Buy Building, such approval not to be unreasonably withheld, conditioned or delayed. The easement area shall be no wider than necessary to reasonably satisfy the requirements of a private or public utility, or five feet (5') on each side of the centerline if the easement is granted to a Party. Upon request, the grantee shall provide to the grantor a copy of an as-built survey showing the location of such Utility Line. The grantor shall have the right at any time to relocate a Utility Line upon thirty (30) days prior written notice, provided that such relocation:

- (i) shall not unreasonably interfere with or diminish the utility service to the grantee during the grantee's business hours;
- (ii) shall not reduce or unreasonably impair the usefulness or function of such Utility Line;
- (iii) shall be performed without cost or expense to grantee;
- (iv) shall be completed using materials and design standards which equal or exceed those originally used;
- (v) shall have been approved by the provider of such service and the appropriate governmental or quasi-governmental agencies having jurisdiction thereover; and
- (vi) shall not unreasonably interfere with grantee's operations on its Parcel.

Documentation of the relocated easement area, including the furnishing of an “as-built” survey, shall be the grantor's expense and shall be accomplished as soon as possible.

(C) Each Party shall have the perpetual right and easement to discharge surface storm drainage and/or runoff from such Party's Parcel over, upon and across the Common Area located on an adjacent Party's Parcel, provided that no Party shall alter or permit to be altered the surface of the Common Area or the drainage/retention/detention system constructed on its Parcel if such alteration would materially increase the flow of surface water onto an adjacent Parcel either in the aggregate or by directing the flow of surface water to a limited area or adversely affects any drainage/retention/detention system on any other Parcel.

(D) No Party shall install Utility Lines or exercise any other rights pursuant to the provisions of this Section 2.2 during the period commencing on November 1 through January 10 of any calendar year except for (i) emergency repairs; (ii) routine maintenance or repairs which shall be reasonably necessary and shall not materially interfere with the normal business

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operations of the Occupants of the affected parcel or (iii) repairs which are necessary to avoid violations of, or to comply with, Applicable Legal Requirements.

2.3 **Rights of Declarant.** Notwithstanding the grant of easements set forth in Sections 2.1 - 2.2 above but subject to the Best Buy Lease, Declarant have the right to expand, contract, alter, reconfigure, modify, and/or make such other changes in and to the Shopping Center and Common Area as Declarant, in its sole discretion, may determine, provided that Declarant shall not materially interfere with the operation of a Party's business upon its Parcel.

2.4 **Other Easements.** Declarant shall have the right to grant any easements for any purpose set forth in this Article to any Person (including, without limitation, adjacent property owners, governmental authorities or agencies, and/or public utility companies) as Declarant in its reasonable discretion may determine, provided that in no event shall the grant of any such easements materially and adversely affect the easement rights permitted to be exercised by a Party under this Article and/or otherwise violate the terms and conditions of this Declaration or the terms and provisions of any lease with any Occupant, which, at the time of exercise is in full force and effect.

## ARTICLE 3

### CONSTRUCTION

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

(A) Each Party agrees that all construction activities performed by it within their respective Parcels shall be performed in compliance with all applicable laws, rules, regulations, orders and ordinances of the city, county, state and federal government, or any department or agency thereof (collectively, the "**Applicable Legal Requirements**").

(B) Each Party further agrees that its construction activities shall not:

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

(ii) unreasonably interfere with construction work being performed on the other Party's Parcel;

(iii) unreasonably interfere with the use, occupancy or enjoyment of any part of the Common Areas by the other Party or its Permittees; and

(iv) cause any Building located on the other Parcel to be in violation of Applicable Legal Requirements.

(C) Each Party (and/or Permittee) performing construction activities in the Shopping Center shall perform such construction activity in accordance with, and shall incorporate in its construction contracts with its general contractor and its subcontractors, the requirements of Exhibit E attached hereto and made a part hereof (collectively, the "**Construction**

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**Requirements**”), in order to coordinate all construction activities in the Shopping Center; provided that nothing contained in the Construction Requirements shall be deemed to modify or limit other terms and conditions of this Declaration which are applicable to the performance of such construction activities, including without limitation the requirements of Section 3.1(B)(i)-(iv) above. Upon request by any Party, the Party (and/or its Permittee) performing such construction activity shall deliver to the requesting Party reasonably satisfactory evidence of compliance with the requirements of this Declaration, including without limitation, the requirements of this Section 3.1.

(D) All storage of materials and the parking of construction vehicles, including vehicles of workers, shall occur only on the constructing Party's Parcel, and all laborers, suppliers, contractors and others connected with such construction activities shall use only the access points located upon the constructing Party's Parcel. Upon completion of such work, the constructing Party shall restore the affected Common Area to a condition equal to or better than that existing prior to commencement of such work.

(E) Each Party and its respective Permittees, contractors, materialmen and laborers shall have a temporary license for access and passage over and across the Common Area of each Parcel as shall be reasonably necessary for such Party to construct or maintain improvements upon the Party's Parcel; provided, however, that such license shall be in effect only during periods when actual construction or maintenance is being performed and provided further that the use of such license shall not unreasonably interfere with the use and operation of the Common Area by others. Prior to exercising the rights granted herein, a Party (and/or its respective Permittees) shall first provide all other affected Parties with a written statement describing the need for such license, and shall furnish a certificate of insurance showing that its contractor has obtained the minimum insurance coverage required by Section 5.4(B) hereof. Any Party (and/or its respective Permittees) availing itself of the temporary license shall promptly pay all costs and expenses associated with such work, shall diligently complete such work as quickly as possible, and shall promptly clean the area and restore the affected portion of the Common Area to a condition which is equal to or better than the condition which existed prior to the commencement of such work. Notwithstanding the foregoing, in the event a dispute exists between the contractors, laborers, suppliers or others connected with construction activities, each Party shall have the right to prohibit the contractors, laborers, suppliers or others working for another Party from using the Common Area on its Parcel.

## 3.2 Common Area.

(A) The Common Area shall initially be constructed as set forth in the Site Plan. Subject to Declarant's rights under Section 2.1(B)(i) above, no fence or other barrier which would prevent or unreasonably obstruct the passage of pedestrian or vehicular travel shall be erected or permitted within or across the Common Area, exclusive of the curbing and other forms of traffic control, or permitted staging and/or storage areas. No Party shall make any change to the improved Common Area on its Parcel without the prior written approval of the Declarant which may be withheld in Declarant's sole discretion.

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(B) All sidewalks and pedestrian isles shall be concrete or other materials approved by Declarant in its sole discretion.

3.3 **Building Improvements.** Once construction of each Party's Building has been commenced on their respective Parcels, such Building shall be completed in accordance with Applicable Legal Requirements and the provisions of this Declaration.

## ARTICLE 4

### MAINTENANCE AND REPAIR

4.1 **Utility Lines.** Each Party shall maintain and repair, or cause to be maintained and repaired, in a good state of repair and safe condition, all Utility Lines exclusively utilized by it, regardless of whether located on its Parcel or upon the other Party's Parcel. Any maintenance and repair of nondedicated Utility Lines located on the other Party's Parcel shall be performed after two (2) weeks' notice to the other Party (except in an emergency the work may be initiated with reasonable notice), after normal business hours whenever possible and in such a manner as to cause as little disturbance in the use of such other Party's Parcel as is practicable under the circumstances. Any Party performing or causing to be performed maintenance or repair work shall promptly pay all costs and expenses associated therewith; shall diligently complete such work as quickly as possible and to promptly clean the area and restore the affected portion of the other Party's Parcel to a condition equal to or better than the condition which existed prior to the commencement of such work. If a mechanic's lien is filed against any portion of the Shopping Center as a result of any Party performing or causing to be performed such maintenance or repair, then the Party performing or causing to be performed such maintenance or repair shall promptly cause such mechanic's lien to be removed or promptly and diligently contest same in good faith (provided such Party furnishes Declarant security in the form of title insurance or a surety bond to ensure payment and to prevent any sale, foreclosure or forfeiture of such Parcel by reason of such nonpayment) and hereby agrees to indemnify, defend and hold harmless Declarant from any loss, cost, damage, liability or expense (including reasonable attorneys' fees and litigation expenses) arising out of such mechanic's lien.

#### 4.2 **Common Area.**

(A) Subject to Section 4.2(B) below, Declarant shall maintain, repair, replace and restore or cause to be maintained, repaired and restored the Common Area in a tight, safe condition and good state of repair, in a manner comparable to other first-class shopping centers in the trade area.

(B) Each Party shall pay to Declarant such Party's Pro Rata Share (as defined below) of all costs and expenses incurred by Declarant in maintaining and repairing all of the site improvements serving the Shopping Center and the Common Areas, including, without limitation, operating, insuring, and/or replacing (i) the Access Drive (including all light standards, Utility Lines related thereto, landscaping, appurtenant sidewalks, and other related improvements), (ii) all common Utility Lines providing service to more than one Parcel, (iii) the Parking Areas and the Parking Deck and (iv) all retention and/or detention facilities serving the

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Shopping Center, together with an administrative fee to Declarant of five percent (5%) of all such costs. For purposes of this Section 4.2(B) and Section 5.5 below, each Party's "Pro Rata Share" shall be a fraction, the numerator of which shall be the Floor Area of such Party's Building, and the denominator of which shall be the aggregate Floor Area for the entire Shopping Center. Within ninety (90) days before the beginning of each calendar year, Declarant shall deliver written notice to each Party of the estimated costs to be paid by such Party pursuant to this Section 4.2(B). Each Party shall pay its pro rata share of such cost to Declarant on a monthly basis, in an amount equal to 1/12th of Declarant's estimate of such Party's annual pro rata share, which monthly sum shall be paid on the first day of each month during each calendar year. Such estimated annual and monthly amounts shall be subject to adjustment by Declarant from time to time. Within one hundred twenty (120) days after the expiration of each calendar year, Declarant shall deliver written notice to each Party advising such Party of its actual Pro Rata Share of such costs and expenses for such previous year, and if the aggregate total of the monthly installments paid by such Party shall have exceeded its Pro Rata Share, Declarant shall, at its election, either refund such excess to such Party or credit such amount against future sums due from such Party. If the amount owed by such Party for such calendar year shall exceed the aggregate total of such Party's monthly payments, such Party shall pay the balance due to Declarant within thirty (30) days after receipt of such statement.

Within three (3) years after the expiration of any calendar year during the term of this Declaration, and upon at least five (5) business days' notice, each Party shall have the right to audit Declarant's books and records pertaining to the costs and expenses payable by such Party pursuant to this Section 4.2(B). Each Party shall have the right to audit Declarant's books and records with respect to such expenses for any calendar year only once. If any such audit shall disclose any error in the determination of the amount payable by such Party, an appropriate adjustment shall be made immediately unless Declarant disputes the results of such audit, in which event Declarant and such Party shall in good faith attempt to resolve such dispute. If it is determined that any such reviewing Party is entitled to a refund in excess of five (5%) of the amount charged by Declarant to such Party as its annual pro rata share for such calendar year, then Declarant shall reimburse Party for its reasonable out-of-pocket costs with respect to such audit. A Party may not engage an auditor whose fees are calculated on a contingency basis.

Notwithstanding anything contained herein to the contrary, as between an Occupant of a Party's Parcel, and the Party, the terms and conditions for determining the Occupant's Pro-Rata Share and reimbursement for Common Area costs and expenses set forth in any lease or occupancy agreement between a Party and such Occupant shall supercede and govern and control the terms and provisions of this Declaration. Further, with respect to determining Pro-Rata Share and amount and timing of payment of Common Area costs and expenses by Best Buy to the Owner of the Best Buy Parcel, the Best Buy Lease shall control and Best Buy shall not be responsible for paying any additional amounts to Declarant for Common Area costs and expenses under this Article 4 or otherwise.

#### 4.3 Building Improvements and Outside Sales Areas.

(A) After completion of construction, each Party covenants and agrees to maintain and keep all Buildings and Outside Sales Areas located on its Parcel in first-class condition and



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state of repair, in compliance with all Applicable Legal Requirements and the provisions of this Declaration and in a manner consistent with that of other first-class retail buildings occupied by national retailers in the Lincoln Park/Bucktown, Chicago, Illinois area. Each Party further agrees to store all trash and garbage in adequate containers, to locate such containers so that they are not readily visible from the Parking Area, and to arrange for regular removal of such trash or garbage.

(B) In the event any Building or Outside Sales Areas are damaged by fire or other casualty (whether insured or not), the Party upon whose Parcel such Building or Outside Sales Areas are located shall, subject to Applicable Legal Requirements and/or insurance adjustment delays, immediately remove the debris resulting from such event and provide a sightly barrier, and within a reasonable time thereafter shall demolish the damaged portion and/or the balance of such Building or Outside Sales Areas and restore the cleared area to either a hard surface condition or a landscaped condition in which event the area shall be Common Area until a replacement Building is erected. Notwithstanding anything contained herein to the contrary, Best Buy's repair and/or restoration obligations hereunder shall not exceed Best Buy's repair and/or restoration obligations applicable under the Best Buy Lease.

## ARTICLE 5

### OPERATION OF THE SHOPPING CENTER

#### 5.1 Use.

(A) The following uses shall not be permitted in the Shopping Center:

- (i) Any use which emits an obnoxious odor, noise or sound which can be heard or smelled outside of any Building in the Shopping Center.
- (ii) An operation primarily used as a storage warehouse operation and any assembling, manufacturing, distilling, refining, smelting, agricultural or mining operation.
- (iii) Any "second hand" store, "surplus" store, or pawn shop.
- (iv) Any mobile home park, trailer court, labor camp, junkyard, or stockyard; provided, however, this prohibition shall not be applicable to the temporary use of construction trailers during periods of construction, reconstruction or maintenance.
- (v) Any dumping, disposing, incineration or reduction of garbage; provided, however, this prohibition shall not be applicable to garbage compactors located near the rear of any Building.
- (vi) Any fire sale, bankruptcy sale (unless pursuant to a court order) or auction house operation.

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(vii) Any central laundry, dry cleaning plant or laundromat; provided, however, this prohibition shall not be applicable to nominal supportive facilities for on-site service oriented to pickup and delivery by the ultimate consumer as the same may be found in retail shopping centers in the metropolitan area where the Shopping Center is located.

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

(ix) Any bowling alley or skating rink.

(x) Any hotel, motel, short or long term residential use, including but not limited to: single family dwellings, townhouses, condominiums, other multi-family units, and other forms of living quarters, sleeping apartments or lodging rooms.

(xi) Any veterinary hospital or animal raising or boarding facility; provided, however, this prohibition shall not be applicable to pet shops. Notwithstanding the forgoing exception, any veterinary or boarding services provided in connection with the operation of a pet shop shall only be incidental to such operation; the boarding of pets as a separate customer service shall be prohibited; all kennels, runs and pens shall be located inside the Building; and the combined incidental veterinary and boarding facilities shall occupy no more than fifteen percent (15%) of the Floor Area of the pet shop.

(xii) Any mortuary or funeral home.

(xiii) Any establishment selling or exhibiting pornographic materials or which sells drug-related paraphernalia or which exhibits either live or by other means to any degree, nude or partially clothed dancers or wait staff and/or any massage parlors or similar establishments; provided, however, Declarant acknowledges that materials for sale in a majority of "Best Buy" Stores shall not be deemed pornographic).

(xiv) Any bar, tavern, Restaurant or other establishment whose reasonably projected annual gross revenues from the sale of alcoholic beverages for on-premises consumption exceeds fifty percent (50%) of the gross revenues of such business.

(xv) Any flea market, amusement or video arcade, pool or billiard hall, car wash or dance hall.

(xvi) Any gambling facility or operation, including but not limited to: off-track or sports betting parlor; table games such as blackjack or poker; slot machines, video poker/blackjack/keno machines or similar devices; or bingo hall. Notwithstanding the foregoing, this prohibition shall not be applicable to government sponsored gambling activities or charitable gambling activities, so

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long as such activities are incidental to the business operation being conducted by the occupant.

(xvii) Any residential uses, without the prior written consent of E.I. duPont de Nemours & Company.

(xviii) Health Club or Gymnasium in excess of 50,000 square feet.

(B) No Party shall knowingly use or permit the use of Hazardous Materials (as hereinafter defined) on, about, under or in its Parcel, except in the ordinary course of its usual business operations conducted thereon, and any such use shall at all times be in compliance with all Environmental Laws (as hereinafter defined).

For the purpose of this section, the term (i) "**Hazardous Materials**" shall mean petroleum products, asbestos, polychlorinated biphenyls, radioactive materials and all other dangerous, toxic or hazardous pollutants, contaminants, chemicals, materials or substances listed or identified in, or regulated by, any Environmental Law, and (ii) "**Environmental Laws**" shall mean all federal, state, county, municipal, local and other statutes, laws, ordinances and regulations which relate to or deal with human health or the environment, all as may be amended from time to time.

(C) No merchandise, equipment or services, including, but not limited to, vending machines, promotional devices and similar items, shall be displayed, offered for sale or lease, or stored within the Common Areas. Notwithstanding the foregoing or anything contained in this Declaration to the contrary, the foregoing prohibition shall not be applicable to (i) the storage of shopping carts on a Parcel; (ii) the seasonal display and sale of merchandise on the sidewalk in front of any building located on a Parcel, (iii) Outside Sales Areas permitted by this Declaration as designated by a Party, or (iv) temporary Parcel promotions not occurring within portions of the Common Area devoted to access. In addition, if a recycling center or equipment is required by law to be located in the Common Areas of a Parcel, the location shall be subject to the approval of the Approving Parties.

(D) This Declaration is not intended to, and does not, create or impose any obligation on a Party to open, operate, continuously operate or cause to be operated, a business or any particular business on the Best Buy Parcel or the Co-Tenant Parcel(s).

5.2 **Lighting.** After completion of the Common Area lighting system by Declarant, each Party hereby covenants and agrees to keep its Parcel fully illuminated each day from dusk for at least one-half hour after the store on its Parcel closes, unless the Approving Parties agree upon a different time. Each Party further agrees to keep any exterior building security lights on from dusk until dawn. During the term of this Declaration, each Party grants an irrevocable license to each other Party for the purpose of permitting the lighting from one Parcel to incidentally shine on the adjoining Parcel.

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## 5.3 Occupant Signs.

(A) No freestanding sign shall be permitted within the Shopping Center except as approved by Declarant at its sole discretion. Declarant shall have the right, in its sole discretion, to approve the design, size and material of all freestanding signs, including the panel inserts.

(B) All Building signs erected within the Shopping Center shall be subject to all Applicable Legal Requirements and the prior written approval of Declarant, which may be withheld by Declarant in its sole discretion.

## 5.4 Insurance.

(A) Each Party or the Affiliate of a Party operating a business on its Parcel shall maintain or cause to be maintained in full force and effect policies commonly known as Commercial General Liability Insurance with a combined single limit of liability of not less than One Million Dollars (\$1,000,000.00) in Constant Dollars for bodily or personal injury or death, and for property damage, arising out of any one occurrence and with an excess/umbrella liability policy of not less than Three Million Dollars (\$3,000,000); the other Parties shall be "additional insureds" under such policy.

Each Party hereby indemnifies, holds harmless and agrees to defend the other Party and that Party's Affiliates from and against all claims, damages, expenses (including, without limitation, attorneys' fees and reasonable investigative and discovery costs), liabilities and judgments on account of injury to persons, loss of life, or damage to property occurring in their respective Parcel and on the ways immediately adjoining such parcels, caused by the active or passive negligence of the indemnifying Party, its Affiliates, its or their agents, servants or employees; provided, no Party shall be required to indemnify the other against any injury, loss of life, or damage which is caused by the active or passive negligence of such other Party or its Affiliates, its or their other tenants on its Parcel, their agents, servants or employees.

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

- (i) Workers' Compensation - statutory limits; and
- (ii) Employers' Liability - \$500,000; and
- (iii) Comprehensive General/Commercial General Liability and Business Auto Liability as follows:
  - 1) Bodily Injury - \$3,000,000 per occurrence;
  - 2) Property Damage - \$3,000,000 per occurrence;
  - 3) Independent Contractors Liability; same coverage as set forth in (a) and (b) above;

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- 4) Products/Completed Operations Coverage which shall be kept in effect for two (2) years after completion of work;
- 5) "XCU" Hazard Endorsement, if applicable;
- 6) "Broad Form" Property Damage Endorsement;
- 7) "Personal Injury" Endorsements; and
- 8) "Blanket Contractual Liability" Endorsement.

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

(C) Effective upon the commencement of construction of any Building on its Parcel and so long as such Building exists, each Party shall carry, or cause to be carried, casualty insurance with "extended" or "all-risk" coverage, in the amount of ninety-five percent (95%) of full replacement cost thereof (excluding footings, foundations or excavations).

Each Party and the Affiliate of a Party operating a business on a Parcel (the "**Releasing Party**") hereby releases and waives for itself, and each Person claiming by, through or under it, each other Party (the "**Released Party**") from any liability for any loss or damage to all property of such Releasing Party located upon any portion of the Shopping Center, which loss or damage is of the type generally covered by the insurance required to be maintained under this Section 5.4(C), irrespective either of any negligence on the part of the Released Party which may have contributed to or caused such loss, or of the amount of such insurance required to be carried or actually carried. Each Party agrees to use its best efforts to obtain, if needed, appropriate endorsements to its policies of insurance with respect to the foregoing release; provided, however, that failure to obtain such endorsements shall not affect the release hereinabove given. To the full extent permitted by law, each Party and the Affiliate of a Party operating a business on a Parcel ("**Indemnitor**") covenants and agrees to indemnify, defend and hold harmless each other Party ("**Indemnitee**") from and against all claims asserted by or through any Permittees of the Indemnitor's Parcel for any loss or damage to the property of such Permittee located upon the respective Indemnitor's Parcel, which loss or damage is of the type generally covered by the insurance required to be maintained under this Section 5.4, irrespective of any negligence on the part of the Indemnitee which may have contributed to or caused such loss.

(D) All insurance required by this Section 5.4 shall be written on an occurrence basis, procured from companies authorized to do business in the State of Illinois, with a Best's Rating of A-/XI according to *Best's Insurance Reports* or a substantially equivalent rating from a nationally recognized insurance rating service. All insurance may be provided under (i) an

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individual policy covering this location, (ii) a blanket policy or policies which includes other liabilities, properties and locations of such Party; provided, however, that if such blanket commercial general liability insurance policy or policies contain a general policy aggregate of less than Twenty Million Dollars (\$20,000,000) in Constant Dollars, then such insuring Party shall also maintain excess liability coverage necessary to establish a total liability insurance limit of Twenty Million Dollars (\$20,000,000) in Constant Dollars, (iii) a plan of self-insurance which may be maintained by a Party or an Affiliate of a Party, provided that any Party or an Affiliate of a Party so self-insuring confirms in writing to a Party requesting confirmation of the existence of such self-insurance plan and compliance of such plan within the terms of this Section and agrees that, upon the request of another party, it shall deliver to such other Party each calendar year a copy of its annual report that is audited by an independent certified public accountant which discloses that such Party or its Affiliate has One Hundred Million Dollars (\$100,000,000) or more in Constant Dollars of net worth determined in accordance with generally accepted accounting principles and is liable for claims intended to be insured by this Declaration to the same extent that a Party would be liable if the Party was maintaining the self-insurance plan, or (iv) a combination of any of the foregoing insurance programs. To the extent any deductible is permitted or allowed as a part of any insurance policy carried by a Party in compliance with Section 5.4, such Party shall be deemed to be covering the amount thereof under an informal plan of self-insurance; provided, however, that in no event shall any deductible exceed Fifty Thousand Dollars (\$50,000.00) in Constant Dollars unless such Party complies with the requirements regarding self-insurance pursuant to (iii) above. Each Party agrees to furnish to any Party requesting the same, a certificate(s) of insurance evidencing that the insurance required to be carried by such Person is in full force and effect.

The insurance required pursuant to this Section 5.4 shall include the following provisions:

- (i) shall provide that the policy may not be canceled or materially reduced in amount or coverage without at least thirty (30) days' prior written notice by the insurer to each insured and to each additional insured;
- (ii) shall provide for severability of interests, as they appear;
- (iii) shall provide that an act or omission of one of the named insureds or additional insureds which would void or otherwise reduce coverage, shall not reduce or void the coverage as to the other named insureds; and
- (iv) shall provide for contractual liability coverage with respect to the indemnity obligations set forth herein.

(E) With respect to Best Buy, the Best Buy Lease shall govern and control the terms and conditions of the coverages and policies required to be provided by Best Buy as an Occupant of the Best Buy Parcel.

## 5.5 Taxes and Assessments.

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(A) If the Parcels are separately assessed, each Party shall pay all real estate taxes and all installments of assessments (collectively, the "Taxes") for its respective Parcel promptly as the same shall become due and before interest or penalty accrues thereon. If the Parcels are not separately assessed, each Party shall pay to Declarant such Party's Pro Rata Share of the Taxes payable with respect to the Shopping Center. In such case, Declarant shall submit a bill to each Party together with photostatic copies of all notices regarding the Taxes, including but not limited to any assessments, changes of assessments, tax rates, changes of taxes, and tax bills (the collectively, "**Tax Bill**"). Each Party shall pay its Pro Rata Share of the Tax Bill to Declarant on or before the earlier of (i) ten (10) days prior to the due date of the Taxes and (ii) thirty (30) days after billing therefor from Declarant. Declarant shall furnish each Party with proof of payment of the Taxes within sixty (60) days of such Party's payment.

(B) Each Party shall at all times be solely responsible for and shall pay before delinquency all municipal, county, state or federal taxes assessed or levied against any leasehold interest held by or any personal property of any kind owned, installed or used by Tenant.

(C) No Party shall contest any real estate taxes or assessments for any portion of the Shopping Center without the prior written consent of the Declarant, which may be withheld by Declarant in its sole and absolute discretion.

(D) As between Declarant and Best Buy, the terms and conditions of the Best Buy Lease shall govern and control the obligation of Best Buy to reimburse such Owner for any Tax Bill levied against the Best Buy Parcel or the Shopping Center.

5.6 **Liens.** In the event any mechanic's lien is filed against a Parcel as a result of services performed or materials furnished for the use of another Party, the Party permitting or causing such lien to be so filed agrees to cause such lien to be removed or promptly and diligently contest same in good faith (provided such Party furnishes Declarant security in the form of title insurance or a surety bond to ensure payment and to prevent sale, foreclosure or forfeiture of such Parcel by reason of such nonpayment) and further agrees to indemnify, defend, and hold harmless Declarant against liability, loss, damage, costs or expenses (including reasonable attorneys' fees and litigation expenses) on account of such claim of lien. In the event such contest is determined adversely (allowing for appeal to the highest appellate court), such Party shall promptly pay in full the required amount, together with any interest, penalties, costs or other charges necessary to release such lien.

## ARTICLE 6

### MISCELLANEOUS

#### 6.1 Default.

(A) The occurrence of any one or more of the following events shall constitute a material default and breach of this Declaration by the nonperforming Party (the "**Defaulting Party**"):

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(i) The failure to make any payments required to be made hereunder within ten (10) days after written notice that such payments are due; or

(ii) The failure to observe or perform any of the covenants, conditions or obligations of this Declaration, other than as described in (i) above, within thirty (30) days after the issuance of a notice by another Party (the "**Non-Defaulting Party**") specifying the nature of the default claimed; provided, however that if such failure cannot be cured within such thirty (30) day period, then such thirty (30) day period shall be extended for so long as the Party is diligently proceeding to cure such failure.

(B) With respect to any default under Section 6.1(A)(ii) above, any Non-Defaulting Party shall have the right, but not the obligation, to cure such default by the payment of money, if appropriate, or the performance of some other action for the account of and at the expense of the Defaulting Party, provided, however, that in the event the default shall constitute an emergency condition, the Non-Defaulting Party, acting in good faith, shall have the right to cure such default upon such advance notice as is reasonably possible under the circumstances or, if necessary, without advance notice, so long as notice is given as soon as possible thereafter. To effectuate any such cure, the Non-Defaulting Party shall have the right to enter upon the Parcel of the Defaulting Party (but not into any Buildings thereupon) to perform any necessary work or furnish any necessary materials or services to cure the default of the Defaulting Party. Each Party shall be responsible for the default of its Occupants. In the event that any Non-Defaulting Party shall cure a default, the Defaulting Party shall reimburse the Non-Defaulting Party for all costs and expenses incurred in connection with such curative action, plus interest as provided herein, within ten (10) days of receipt of demand, together with reasonable documentation supporting the expenditures made.

(C) No waiver by any Party of any default under this Declaration shall be effective or binding on such Party unless made in writing by such Party and no such waiver shall be implied from any omission by a Party to take action in respect to such default. No express written waiver of any default shall affect any other default or cover any other period of time other than any default and/or period of time specified in such express waiver. One or more written waivers or any default under any provision of this Declaration shall not be deemed to be a waiver of any subsequent default in the performance of the same provision or any other term or provision contained in this Declaration.

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



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shall not constitute a waiver or election of remedies with respect to any other permitted or available right or remedy.

## 6.2 Estoppel Certificate.

Each Party agrees that upon the written request (which shall not be more frequent than three (3) times during any calendar year) of another Party, such requested Party will issue to the requesting Party or its prospective mortgagee or successor, an estoppel certificate stating, to the best of the requested Party's knowledge, that as of such date:

- (i) whether it knows of any default under this Declaration by the requesting Party, and if there are known defaults, specifying the nature thereof;
- (ii) whether this Declaration has been assigned, modified or amended in any way by it and if so, then stating the nature thereof; and
- (iii) whether this Declaration is in full force and effect.

Such statement shall act as a waiver of any claim by the Party furnishing it to the extent such claim is based upon facts contrary to those asserted in the statement and to the extent the claim is asserted against a bona fide encumbrancer or purchaser for value without knowledge of facts to the contrary of those contained in the statement, and who has acted in reasonable reliance upon the statement. Notwithstanding anything to the contrary, the issuance of an estoppel certificate shall in no event subject the Party furnishing it to any liability whatsoever, notwithstanding the negligent or otherwise inadvertent failure of such Party to disclose correct and/or relevant information, nor shall such issuance be construed to waive any rights of the issuer to challenge acts committed by the other Party for which approval by the Approving Parties was required but not sought or obtained.

## 6.3 Notices.

All notices, demands and requests (collectively the "notice") required or permitted to be given under this Declaration must be in writing and shall be deemed to have been given as of the date such notice is (i) delivered to the Party intended, (ii) delivered to the then current address of the Party intended, or (iii) rejected at the then current address of the Party intended, provided such notice was sent prepaid. The initial addresses of the Parties shall be:

Declarant: Elston Development, L.L.C.  
 c/o Baker Development Corporation  
 1156 West Armitage Avenue  
 Chicago, Illinois 60614  
 Attn: Warren Baker

with a copy to: Piper Rudnick  
 203 North LaSalle Street  
 Suite 1800  
 Chicago, Illinois 60601

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Attn: Jeffrey N. Owen, Esq.

And to: Best Buy Stores, L.P.  
7601 Penn Avenue South  
Richfield, Minnesota 55423  
Attn: Legal Department – Real Estate

Upon at least ten (10) days' prior written notice, each Party shall have the right to change its address to any other address within the United States of America.

## 6.4 Approval Rights.

(A) Unless otherwise herein provided, whenever a consent or approval (the “approval”) is required, such approval shall not be unreasonably withheld or delayed. Unless provision is made for a specific time period, each response to a request for an approval shall be given by the Person to whom directed within thirty (30) days of receipt. If a response is not given within the required time period, the requested Person shall be deemed to have not given its approval. Each disapproval shall be in writing and the reasons shall be clearly stated. If approval is requested from more than one Approving Party, unanimous approval must be given.

(B) Nothing contained in this Declaration shall limit the right of a party to exercise its business judgment, or act, in a subjective manner, with respect to any matter as to which it has specifically been granted such right, or the right to act in its sole discretion or sole judgment, whether “objectively” reasonable under the circumstances, and any such exercise shall not be deemed inconsistent with any covenant of good faith and fair dealing otherwise implied by law to be part of this Declaration; and the Parties intend by this Declaration to set forth their entire understanding with respect to the terms, covenants, conditions and standards pursuant to which their obligations are to be judged and their performance measured.

6.5 Condemnation. In the event any portion of the Shopping Center shall be condemned, the award shall be paid to the Party owning the land, except that if the taking includes improvements belonging to more than one Party, such as Utility Lines, the portion of the award allocable thereto shall be used to relocate, replace or restore such jointly owned improvements to a useful condition. Except as provided above, each Party waives the right to an award given with respect to the other Party's Parcel.

6.6 Binding Effect. The terms of this Declaration and all easements granted hereunder shall constitute covenants running with the land and shall inure to the benefit of and be binding upon the signatories hereto and their respective successors and assigns who become Parties hereunder.

6.7 Construction and Interpretation. Whenever required by the context of this Declaration, (i) the singular shall include the plural and vice versa, and the masculine shall include the feminine and neuter genders and vice versa; and (ii) use of the words “including”, “such as”, or words of similar import, when following any general term, statement or matter shall not be construed to limit such statement, term or matter to specific items, whether or not

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language of non-limitation, such as “without limitation”, or “but not limited to”, are used with reference thereto, but rather shall be deemed to refer to all other items or matters that could reasonably fall within the broadest scope of such statement, terms or matter.

6.8 **Negation of Partnership.** None of the terms or provisions of this Declaration shall be deemed to create a partnership between or among the Parties in their respective businesses or otherwise, nor shall it cause them to be considered joint venturers or members of any joint enterprise. Each Party shall be considered a separate owner, and no Party shall have the right to act as an agent for another Party, unless expressly authorized to do so herein or by separate written instrument signed by the Party to be charged.

6.9 **Not a Public Dedication.** Nothing herein contained shall be deemed to be a gift or dedication of any portion of the Shopping Center to the general public, or for any public use or purpose whatsoever. Except as herein specifically provided, no right, privileges or immunities of any Party hereto shall inure to the benefit of any third-party Person, nor shall any third-party Person be deemed to be a beneficiary of any of the provisions contained herein.

6.10 **Excusable Delay.** Whenever performance is required of any Party hereunder, such Party shall use all due diligence to perform and take all necessary measures in good faith to perform; provided, however, that if completion of performance shall be delayed at any time by reason of acts of God, war, civil commotion, riots, strikes, picketing or other labor disputes, unavailability of labor or materials, damage to work in progress by reason of fire or other casualty, or any cause beyond the reasonable control of such Party, then the time for performance as herein specified shall be appropriately extended by the amount of the delay actually so caused. The provisions of this section shall not operate to excuse any Party from the prompt payment of any monies required by this Declaration.

6.11 **Severability.** Invalidation of any of the provisions contained in this Declaration, or of the application thereof to any Person by judgment or court order shall in no way affect any of the other provisions hereof or the application thereof to any other Person and the same shall remain in full force and effect.

6.12 **Amendments.** This Declaration may be amended by, and only by, a written agreement signed by all of the then current Parties and shall be effective only when recorded in the County of Cook, State of Illinois. No Occupant or Person other than the Parties have any right to enforce any of the provisions hereof.

6.13 **Captions and Capitalized Terms.** The captions preceding the text of each article and section are included only for convenience of reference. Captions shall be disregarded in the construction and interpretation of this Declaration. Capitalized terms are also selected only for convenience of reference and do not necessarily have any connection to the meaning that might otherwise be attached to such term in a context outside of this Declaration.

6.14 **Mitigation of Damages.** In all situations arising out of this Declaration, each Party shall attempt to avoid and mitigate the damages resulting from the conduct of any other

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Party. Each Party hereto shall take all reasonable measures to effectuate the provisions of this Declaration.

6.15 **Declaration Shall Continue Notwithstanding Breach.** It is expressly agreed that no breach of this Declaration shall (i) entitle any Party to cancel, rescind or otherwise terminate this Declaration, or (ii) defeat or render invalid the lien of any mortgage or deed of trust made in good faith and for value as to any part of the Shopping Center; provided, however, such limitation shall not affect in any manner any other rights or remedies which a Party may have hereunder by reason of any such breach.

6.16 **Time.** Time is of the essence of this Declaration.

6.17 **No Waiver.** The failure of any Party to insist upon strict performance of any of the terms, covenants or conditions hereof shall not be deemed a waiver of any rights or remedies which that Party may have hereunder, at law or in equity and shall not be deemed a waiver of any subsequent breach or default in any of such terms, covenants or conditions.

6.18 **Interest.** Any time a Party shall not pay any sum payable hereunder to another within five (5) days of the due date, such delinquent Party shall pay interest on such amount from the due date to and including the date such payment is received by the Person entitled thereto, at the lesser of:

- (i) The highest rate permitted by law to be paid on such type of obligation by the Person obligated to make such payment or the Person to whom such payment is due, whichever is less; or
- (ii) Three percent (3%) per annum in excess of the Prime Rate.

## **ARTICLE 7**

### **TERM**

7.1 **Term of this Declaration.** This Declaration shall be effective as of the date first above written and shall continue in full force and effect until 11:59 p.m. on January 31, 2055; provided, however, that the easements referred to in Article 2 hereof which are specified as being perpetual or as continuing beyond the term of this Declaration shall continue in force and effect as provided therein, together with the obligations specified in Section 5.4. Upon termination of this Declaration, all rights and privileges derived from and all duties and obligations created and imposed by the provisions of this Declaration, except as relates to the easements mentioned above, shall terminate and have no further force or effect; provided, however, that the termination of this Declaration shall not limit or affect any remedy at law or in equity that a Party may have against any other Party with respect to any liability or obligation arising or to be performed under this Declaration prior to the date of such termination.

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IN WITNESS WHEREOF, the Declarant has caused this Declaration to be executed by its duly authorized representatives effective as of the day and year first above written.

**ELSTON DEVELOPMENT, L.L.C.**, an Illinois limited liability company

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its \_\_\_\_\_

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STATE OF ILLINOIS )  
 ) SS:  
COUNTY OF Cook )

I HEREBY CERTIFY that on this 30<sup>th</sup> day of July, 2004, before me, the undersigned officer, personally appeared Warren Bulker, who acknowledged himself to be the president ~~Warren Bulker~~ of Baker Development Corporation, an Illinois corporation, which is the manager of Elston Development L.L.C., an Illinois limited liability company, and that he, in such capacity, being authorized to do so, executed the foregoing instrument for the purposes therein contained, by signing the name of Elston Development L.L.C., as president of Baker Development Corporation, which is the manager of Elston Development L.L.C.

IN WITNESS WHEREOF, I hereunto set my hand and Notarial Seal.

Michelle Madrigal  
Notary Public

My Commission expires: 9/19/05



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PERM TAX#		2003 1ST INST	STATUS
14-31-211-028	(affects part & other ppty)	\$1,335.81	PAID
14-31-211-029	(affects part & other ppty)	\$1,118.66	PAID
14-31-219-001	(affects part)	\$338.13	PAID
14-31-219-002	(affects part)	\$19,127.71	PAID
14-31-219-003	(affects part)	\$486.18	PAID
14-31-219-004	(affects part)	\$211.00	PAID
14-31-219-005	(affects part)	\$161.77	PAID
14-31-219-012	(affects part)	\$221.33	PAID
14-31-219-013	(affects part)	\$221.33	PAID
14-31-219-014	(affects part)	\$221.33	PAID
14-31-219-015	(affects part)	\$221.33	PAID
14-31-219-016	(affects part)	\$464.17	PAID
14-31-219-017	(affects part)	\$558.22	PAID
14-31-219-018	(affects part)	\$600.36	PAID
14-31-219-019	(affects part)	\$533.70	PAID
14-31-219-020	(affects part and other ppty)	\$548.43	PAID
14-31-219-029	(affects part)	\$474.39	PAID
14-31-219-031	(affects part)	\$461.29	PAID
14-31-219-032	(affects part)	\$461.29	PAID
14-31-219-034	(affects part)	\$844.43	PAID
14-31-219-035	(affects part)	\$849.01	PAID
14-31-219-039	(affects part)	\$1,738.59	PAID
14-31-219-040	(affects part)	\$312.08	PAID
14-31-219-041	(affects part)	\$302.73	PAID

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## EXHIBIT A

### LEGAL DESCRIPTION OF SHOPPING CENTER

That part of various lots: vacated streets and alleys; in various subdivisions in the East Half of the Northeast Quarter of Section 31, Township 40 North, Range 14, East of the Third Principal Meridian, described as follows: Commencing at the intersection of the South line of West Webster Avenue with the Southwesterly line of North Elston Avenue; Thence South 44° 59' 59" East along said Southwesterly line 919.25 feet to the point of beginning; Thence continue South 44° 59' 59" East along said Southwesterly line 280.89 feet to the Westerly line of the Chicago and Northwestern Railway Company right of way; Thence South 16° 30' 34" East along said Westerly line of said right of way 439.44 feet to the North line of West Armitage Avenue; Thence North 89° 20' 44" West along said North line 144.37 feet to the Northeasterly line of Chicago and Northwestern Railway Company right of way; Thence Northwesterly along said Northeasterly right of way line being an arc of a circle convex Northeasterly and having a radius of 3538.26 feet for a distance of 339.30 feet (the chord of said arc having a bearing of North 43° 17' 15" West and a distance of 339.17 feet) Thence North 48° 38' 53" West along said right of way line 183.40 feet; Thence North 50° 35' 39" West along said right of way line 42.30 feet to a point on said Northeasterly line 695.54 feet (as measured on said Northeasterly line) Southeasterly of the East line of North Wood Street; Thence North 45° 03' 01" East 316.20 feet to the point of beginning (except therefrom Lots 14 and 34 in Hurford's Subdivision of Original Lot 1 in Block 21 in Sheffield's Addition to Chicago in said Section 31) in Cook County, Illinois.

PLUS:

That part of various lots: vacated streets and alleys; in various subdivisions in the East Half of the Northeast Quarter of Section 31, Township 40 North, Range 14, East of the Third Principal Meridian, described as follows: Commencing at the intersection of the South line of West Webster Avenue with the Southwesterly line of North Elston Avenue; Thence South 44°59'59" East along said Southwesterly line 204.88 feet to the point of beginning; Thence continue South 44°59'59" East along said Southwesterly line 714.37 feet; Thence South 45°03'01" West 316.20 feet to the Northeasterly line of the Chicago & Northwestern Railroad right of way; Thence North 50°35'39" West along said Northeasterly line 695.54 feet to the East line of North Wood Street; Thence North 00°54'22" East along said East line 75.0 feet to a point 358.29 feet (as measured on said East line) South of the South line of West Webster Avenue; Thence South 89°05'38" East 42.21 feet; Thence North 45°0'01" East 300.76 feet to the point of beginning, in Cook County, Illinois.



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## EXHIBIT B

### LEGAL DESCRIPTION OF BEST BUY PARCEL

That part of various lots: vacated streets and alleys; in various subdivisions in the East Half of the Northeast Quarter of Section 31, Township 40 North, Range 14, East of the Third Principal Meridian, described as follows: Commencing at the intersection of the South line of West Webster Avenue with the Southwesterly line of North Elston Avenue; Thence South  $44^{\circ} 59' 59''$  East along said Southwesterly line 919.25 feet to the point of beginning; Thence continue South  $44^{\circ} 59' 59''$  East along said Southwesterly line 280.89 feet to the Westerly line of the Chicago and Northwestern Railway Company right of way; Thence South  $16^{\circ} 30' 34''$  East along said Westerly line of said right of way 439.44 feet to the North line of West Armitage Avenue; Thence North  $89^{\circ} 20' 44''$  West along said North line 144.37 feet to the Northeasterly line of Chicago and Northwestern Railway Company right of way; Thence Northwesterly along said Northeasterly right of way line being an arc of a circle convex Northeasterly and having a radius of 3538.26 feet for a distance of 339.36 feet (the chord of said arc having a bearing of North  $43^{\circ} 17' 15''$  West and a distance of 339.17 feet); Thence North  $48^{\circ} 38' 53''$  West along said right of way line 183.40 feet; Thence North  $50^{\circ} 35' 39''$  West along said right of way line 42.30 feet to a point on said Northeasterly line 695.54 feet (as measured on said Northeasterly line) Southeasterly of the East line of North Wood Street; Thence North  $45^{\circ} 03' 01''$  East 316.20 feet to the point of beginning (except therefrom Lots 14 and 34 in Hurford's Subdivision of Original Lot 1 in Block 21 in Sheffield's Addition to Chicago in said Section 31) in Cook County, Illinois.

Excepting therefrom:

That part of Lot "A" in the consolidation of parts of Original Block 21 in Sheffield's Addition to Chicago in Section 31, Township 40 North, Range 14, East of the Third Principal Meridian, described as follows: Commencing at the intersection of the South line of West Webster Avenue with the Southwesterly line of North Elston Avenue; thence South  $44^{\circ} 59' 59''$  East, along the Southwesterly line of North Elston Avenue 941.33 feet to the point of beginning; thence South  $44^{\circ} 59' 59''$  East, along the Southwesterly line of North Elston Avenue, 20.02 feet to the Northwesterly line of vacated North Hobson Avenue; thence South  $45^{\circ} 03' 01''$  West, along the Northwesterly line of vacated North Hobson Avenue, 20.00 feet; thence North  $44^{\circ} 59' 59''$  West 20.00 feet; thence North  $45^{\circ} 00' 01''$  East 20.00 feet to the point of beginning, in Cook County, Illinois.

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## EXHIBIT C

### LEGAL DESCRIPTION OF CO-TENANT PARCEL(S)

That part of various lots: vacated streets and alleys; in various subdivisions in the East Half of the Northeast Quarter of Section 31, Township 40 North, Range 14, East of the Third Principal Meridian, described as follows: Commencing at the intersection of the South line of West Webster Avenue with the Southwesterly line of North Elston Avenue; Thence South 44°59'59" East along said Southwesterly line 204.88 feet to the point of beginning; Thence continue South 44°59'59" East along said Southwesterly line 714.37 feet; Thence South 45°03'01" West 316.20 feet to the Northeasterly line of the Chicago & Northwestern Railroad right of way; Thence North 50°35'30" West along said Northeasterly line 695.54 feet to the East line of North Wood Street; Thence North 00°54'22" East along said East line 75.0 feet to a point 358.29 feet (as measured on said East line) South of the South line of West Webster Avenue; Thence South 89°05'38" East 42.21 feet; Thence North 45°00'01" East 300.76 feet to the point of beginning, in Cook County, Illinois.

PLUS:

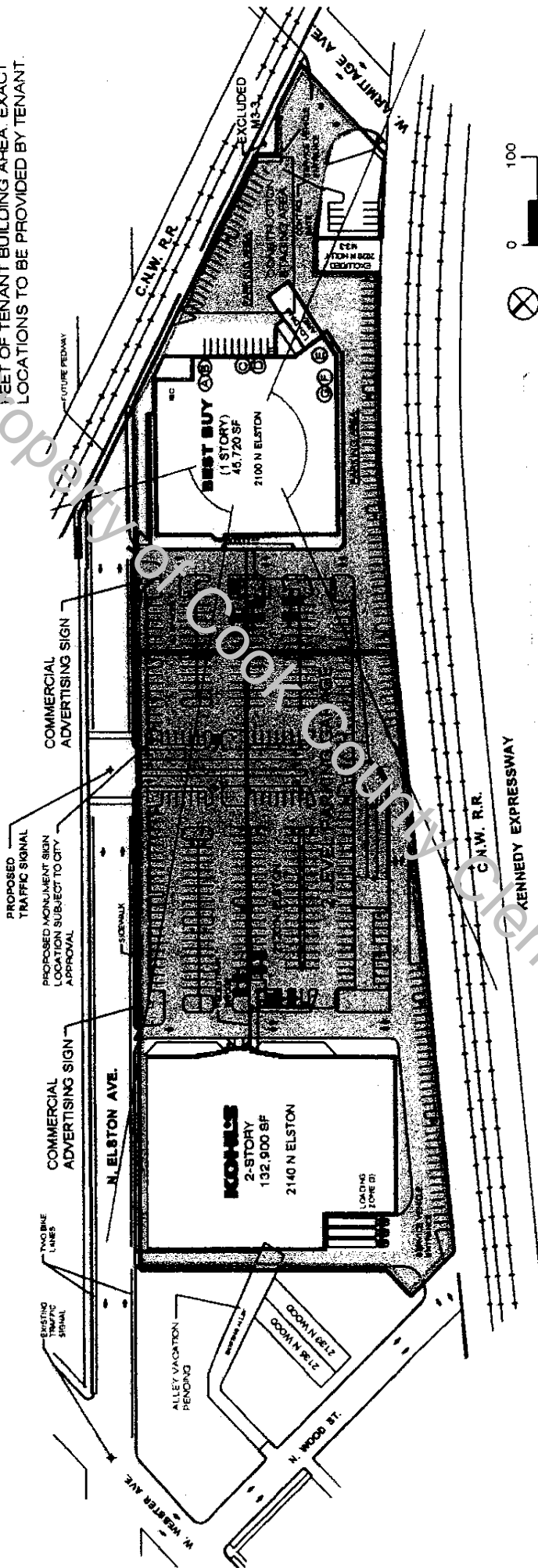
That part of Lot "A" in the consolidation of parts of Original Block 21 in Sheffield's Addition to Chicago in Section 31, Township 40 North, Range 14, East of the Third Principal Meridian, described as follows: Commencing at the intersection of the South line of West Webster Avenue with the Southwesterly line of North Elston Avenue; thence South 44° 59' 59" East, along the Southwesterly line of North Elston Avenue 941.63 feet to the point of beginning; thence South 44° 59' 59" East, along the Southwesterly line of North Elston Avenue, 20.02 feet to the Northwesterly line of vacated North Hobson Avenue; thence South 45°03'01" West, along the Northwesterly line of vacated North Hobson Avenue, 20.00 feet; thence North 44° 59' 59" West 20.00 feet; thence North 45° 00' 01" East 20.00 feet to the point of beginning, in Cook County, Illinois.

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**UTILITIES LEGEND**

- (A) - SANITARY SEWER
- (B) - DOMESTIC WATER
- (C) - STORM SEWER
- (D) - GAS SERVICE
- (E) - SPRINKLER WATER
- (F) - TELEPHONE
- (G) - ELECTRICAL SERVICE

**NOTE:**  
UTILITIES TO BE PROVIDED WITHIN FIVE FEET OF TENANT BUILDING AREA. EXACT LOCATIONS TO BE PROVIDED BY TENANT.



**EXHIBIT 'D'**  
**2100 - 2140 NORTH ELSTON AVENUE SITE PLAN**

JULY 27, 2004

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## EXHIBIT E

### CONSTRUCTION REQUIREMENTS

It is understood by each Party (and its Permittees) that its contractor will be working on site with a variety of other contractors. It is the responsibility and obligation of the contractor of each Party (and/or its Permittees) to coordinate all necessary work with the other contractors in order that interferences and delays are to be minimized. To effect a clear division of responsibility the following conditions shall be noted in all contracts:

1. To the extent that a contractor damages or materially changes the completed work of another contractor, the contractor causing such damage or alteration shall repair at its own cost and expense, any and all damage caused by such work and shall restore the affected work. Such repairs shall be completed so that the condition of the work is equal to or better than the condition which existed prior to the beginning of such work.
2. Each contractor shall be responsible for keeping the site clean and free of any loose debris. All stored materials and equipment shall be neatly arranged.
3. Any and all required pumping and bailing within each building site shall be the responsibility of the Occupant's contractor. Such pumping shall be discharged at a point determined by the Declarant's contractor.
4. Mud and other debris may not be tracked onto public roads. It is the responsibility of each contractor to clean truck tires prior to leaving the Shopping Center site and entering the paved area.
5. Each individual contractor shall be responsible for security of their equipment, materials and finished work within their work area.
6. Inasmuch as there will be several building contractors on the site throughout the course of this project, the Declarant's contractors and the Occupant's contractors shall coordinate their work with the work of the other contractor. In the event that coordination of such work directly between contractors is not obtainable, the Declarant's representative will make a determination as to how said work will be coordinated. In no case will this determination by the Declarant result in any additional cost to the Declarant or schedule delays.
7. All construction shall be accomplished in an expeditious manner in compliance with all requirements. The party undertaking such work shall take all necessary measures to minimize inconvenience caused by such work. Such work shall be accomplished in such a manner as to minimize inconvenience caused by such work. Such work shall be accomplished in such a manner as to minimize any damage or adverse effect on any completed work of any other party or to the Parcel in which the work is being done or any other Parcel in the Shopping Center.

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8. To the extent that the work of any contractor follows or covers up the work of another contractor, it is the responsibility of the second contractor to satisfy himself as to the acceptability of all preceding work. It is also the second contractor's responsibility to inform the preceding contractor that said work is to be covered.

9. It is the responsibility of each contractor to provide necessary field office storage sheds, sanitary facilities, drinking water, appropriate fire protection for their employees and work in progress.

10. Each contractor is responsible for all safety issues arising out of the execution of their contract responsibilities. Each contractor shall comply with all standards and code requirements for erection of barricades and other similar requirements needed to protect and inform personnel and the public of hazards on the property.

11. Each contractor is responsible for delivering the completed work in a clean condition. This includes employing experienced workers for final cleaning and cleaning each surface to the condition expected in a commercial building cleaning and maintenance program.

12. Bollards shall be installed for the protection of all appropriate improvements including gas meters, electrical transformers, compactors, condensers, generators, or other similar exterior equipment, fire protection equipment including valves and siamese connections, as well as doors exiting onto a paved area. These bollards shall be installed and painted traffic yellow by the contractor installing the improvements to be protected.

13. Siamese connections for fire suppression systems shall be mounted on the building and shall be the responsibility of the Occupant's contractor.

14. All the layout and survey work required to complete their contract work is the responsibility of each individual contractor.

15. The maintenance of all staging areas is the responsibility of the Occupant's contractor utilizing such areas.

Notwithstanding anything to the contrary contained herein, subsequent to the Possession Date (as defined in the Best Buy Lease), Declarant agrees to use commercially reasonable efforts to minimize any interference with the construction of Best Buy's improvements on the Best Buy Parcel, the fixturing and merchandising thereof, or the operation of Best Buy's business therefrom and Declarant shall not authorize any construction activity in contravention of the foregoing.