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DECLARATION OF EASEMENTS AND COVENANTS

39
FIRST AMERICAN TITLE
No. 203700
This Declaration of Easements and Covenants (the "Declaration") is made and entered into as of this 1st day of November, 1994 by HEARTLAND WEST VALLEY COMMERCIAL LIMITED PARTNERS, a Minnesota limited partnership ("Heartland").

RECITALS

A. Heartland is the owner of certain real property and improvements known as the Market Street Center, situated in Salt Lake County, Utah and more particularly described on Exhibit "A" which is attached hereto and incorporated herein by this reference (the "Shopping Center").

B. The Shopping Center is comprised of six parcels of adjacent property, each of which is more particularly described on Exhibit "A". Each such parcel may be referred to herein as a "Parcel", or "Parcels" when reference is made to any two or more of the parcels of property comprising the Shopping Center. Although Heartland presently owns all of the Parcels, Heartland is, or will be, encumbering certain of the Parcels as security for one or more loans, and at some point in the future Heartland may elect to convey one or more Parcels, but less than the entire Shopping Center, to another person or entity.

C. In order to provide that the Owners, Occupants and Permittees (as hereinafter defined) of one or more Parcels will have and continue to have access and parking rights across and on those portions of the Shopping Center designated for such use, Heartland now desires to establish and grant easements for access and parking at the Shopping Center, as well as covenants, conditions and restrictions for the use and enjoyment of such easements, an enforceable covenant running with the land comprising the Shopping Center in accordance with the terms and conditions of this Declaration.

D. In order to assure that Owners of the Shopping Center shall have and continue to have the right to utilize, access, repair, replace and improve utility lines and facilities which are situated upon more than one Parcel, Heartland desires to establish and grant

easements for utility lines and facilities in the Shopping Center serving the improvements on the various Parcels, in accordance with the terms and conditions of this Declaration.

NOW, THEREFORE, in consideration of the premises Heartland hereby submits the Shopping Center to the following covenants, conditions and restrictions:

I. DEFINITIONS

As used herein, the terms set forth below shall have the stated meaning:

1.1 "Common Area". The term "Common Area" means those portions of the Shopping Center which are intended for, or are available for common use by any and all of the Owners, Occupants or Permittees of land and/or buildings within the Shopping Center, including, without limitation, the parking areas, lanes, drives and driveways, entrances, all means of ingress and egress, curb cuts, roadways, passageways, sidewalks, landscaped areas, common transformer pads, common utility lines and facilities, common drainage facilities, lighting facilities and equipment located in the Shopping Center.

1.2 "Major Tenant". The term "Major Tenant" means and refers to Toys "R" Us, Inc., a Delaware corporation, and its successors or assigns, so long as it or its successors or assigns have a leasehold interest in any portion of the Shopping Center.

1.3 "Occupant". The term "Occupant" as to each Parcel means the Owner and any person from time to time entitled to the use and occupancy of any part of such Parcel under any lease, license or concession agreement, or other instrument or arrangement under which each Occupant acquires its status as such.

1.4 "Owner". The term "Owner" as to each Parcel means and refers to the present Owner of such Parcel and the respective assigns, transferees, successors in interest, and others claiming by, through or under such present Owner.

1.5 "Permittee". The term "Permittee" as to each Parcel refers to all Occupants, and all customers, employees and other business invitees of Occupants.

1.6 "Person". The word "person" means and includes individuals, partnerships, firms, associations and corporations, or any other form of legal or business entity.

II. GRANT OF EASEMENTS

2.1 Ingress, Egress, and Parking. Heartland hereby creates and establishes, for the benefit of all Owners, Occupants and Permittees of the Shopping Center, or any Parcel thereof, and for the benefit of each Parcel, mutual nonexclusive easements for ingress and egress by vehicular and pedestrian traffic, and the right of vehicular parking upon, over, and

across that portion of the Common Area situated on each Parcel, except for those areas devoted to loading docks, trash enclosures and other service facilities.

2.2 Utility Lines. Heartland hereby creates and establishes, for the benefit of each other Owner and its Parcel, nonexclusive easements under, through, and across the Common Area for water drainage systems or structures, water mains, sewers, water sprinkler lines, telephone and electrical conduits or systems, gas mains, cable television lines, communications facilities, public utilities and service easements. All such systems, structures, mains, sewers, conduits, lines and other utilities shall be installed and maintained below the ground level or surface of such easements.

2.3 Signs. Heartland hereby creates and establishes, for the benefit of each other Owner and its Parcel, easements under, through, and across the Common Area for the purpose of installing, maintaining, repairing and replacing the signs presently existing on the Shopping Center.

2.4 Building Encroachments. Heartland hereby creates and establishes, for the benefit of each other Owner and its Parcel, an easement for any portion of any buildings or structures on any Parcel which may encroach into or over an adjoining Parcel, provided the easement for footings, piers, piles, grade beams, and building encroachments does not exceed two (2) feet and the easement for canopies, eaves, and roof overhangs does not exceed four (4) feet.

2.5 Covenant of Access. There shall at all times be free access for vehicles and pedestrians between the Parcels. In furtherance of the foregoing provision, and not by way of limitation, no hedge, fence, wall, retaining wall or other barrier may be constructed which would totally separate the Parcels or materially impair or prevent access from one Parcel to another.

2.6 Easements Nonexclusive. Subject to any rules and regulations adopted for the use of such areas as provided in this Declaration, the use of all easements provided for in this Declaration will, in each instance, be nonexclusive, and for the use and benefit of the Owners, Occupants and Permittees of each Parcel. The construction, repair, or replacement and use of such easement facilities shall not unreasonably interfere with the normal operation of any business in the Shopping Center. At any time, and from time to time, the Owner of any Parcel shall have the right to relocate on its Parcel any utility line or facility which is then located on the Parcel of such Owner, provided that any such relocation: (a) shall be performed only after sixty (60) days notice of such Owner's intention to undertake the relocation shall have been given to the Owner(s) of each Parcel served by the utility line or facility, and the Major Tenant if its improvements are served by such utility or facility; (b) shall not unreasonably interfere with or diminish utility service to the Parcels served by the line or facility; (c) shall not reduce or unreasonably impair the usefulness or function of the line or facility; and (d) shall be performed without cost or expense to the Owner or Occupant of any Parcel served by the line or facility other than Owner requesting or performing

relocation; and (e) the original and relocated area shall be promptly restored to their original conditions and specifications following such relocation.

III. OPERATION OF COMMON AREA

3.1 Parking. There shall be no charge for parking in the Common Area without the prior written consent of all Owners and the Major Tenant.

3.2 Employee Parking. Owners and Major Tenant may adopt such regulations, and Owners will impose such requirements within leases, as appropriate to cause employees of businesses located within the Shopping Center to utilize designated employee parking areas for parking.

3.3 Protection of Common Area. Each Owner shall have the right to take such steps as it deems necessary to prevent those persons who are not Owners, Occupants or Permittees from using the Common Area. Such steps may include, without limitation, the construction of fences, walks, or barricades along the boundary lines of any portion of the Shopping Center held by such Owner (provided no driveway shall be obstructed unless required on a temporary basis to prevent the implied dedication of a right-of-way to the public), except along the common boundary of any Parcels.

3.4 Common Area Maintenance.

a. Each Owner shall be responsible for maintaining the Common Area on their respective Parcel. The Common Area shall, at all times, be maintained in good and clean condition and repair, including, without limitation, the following:

(i) Maintaining the asphalt surfaces in a level, smooth, and evenly covered condition with the type of surfacing material originally installed or such substitute as shall in all respects be equal or superior in quality, use and durability;

(ii) Removing all snow, ice, papers, debris, filth, refuse, and thoroughly sweeping the area to the extent reasonably necessary to keep the area in a clean and orderly condition;

(iii) Placing, keeping in repair, and replacing any necessary or appropriate directional signs, markers, and lines;

(iv) Operating, keeping in repair, and replacing, where necessary, such artificial lighting facilities as shall be reasonably required; and

(v) Maintaining all landscaped areas and repairing sprinkler systems and water lines, and making replacements of shrubs and other landscaping as is necessary.

b. Owners shall share expenses of maintaining and repairing any and all utility lines or sewer lines which serve more than one Parcel. Utility lines and sewer lines serving a single Parcel shall be maintained and repaired by the Owner of such Parcel. Expenses shared under this subparagraph b. shall be divided between the Parcels in manner provided in Subparagraph d. of this Section.

c. It is agreed that the artificial lighting for the Common Area shall remain on during ordinary hours of business, which is agreed to mean that period extending to at least 1:00 a.m. Monday through Saturday and at least until 7:00 p.m. on Sunday, except on such days as the Shopping Center is closed to the public. Upon request of the Major Tenant, the Owner shall keep the Common Area lighted beyond such regular hours as the Major Tenant shall request, so long as the cost thereof is equitably allocated to, and paid by the Major Tenant.

d. To facilitate uniformity in the maintenance of the Common Area in a first-class condition, the Owners agree to select and contract with a professional real estate management firm for the management, maintenance and replacement of the Common Area improvements. The selection of the Common Area manager, and the terms of such engagement, shall be determined by Heartland, or, if Heartland is no longer the Owner of any Parcel, by the Owner of the greatest amount of building square footage in the Shopping Center. The Owners' expenses of Common Area maintenance, repair and replacement, including reasonable fees of the professional manager, shall be shared by the Owners. The percentage allocable to each Parcel shall be the percentage which the square footage of all floors of the building(s) located thereon is to the total square footage of all floors of all buildings within the Shopping Center, and shall be due and payable within fifteen (15) days following invoice from the Common Area manager. Any such amounts not paid within fifteen (15) days of invoice shall thereafter accrue interest at the rate of fifteen percent (15%) per annum until paid.

e. In the event an Owner fails or refuses at any time to pay its share of the cost of maintaining, replacing and repairing the Common Area, as set forth in Subsection (d), then legal action may be instituted against the delinquent Owner for said reimbursement plus interest at the rate of fifteen percent (15%) per annum. Furthermore, the Common Area manager, or the Owner advancing such funds on behalf of the delinquent Owner, shall have a lien on the Parcel of the delinquent Owner for the amount owed by the delinquent Owner, plus interest as provided herein, costs and attorney's fees incurred in connection with such delinquency and collection.

f. The lien provided for in Subsection (e) shall only be effective when notice of such lien is filed of record by the other Owner(s) or the Common Area manager in

the Office of the Recorder of the County of Salt Lake, State of Utah, which notice shall contain at least the following information:

- (i) A statement of the unpaid amount owed;
- (ii) A description sufficient for identification of the Parcel of the delinquent Owner which is the subject of the lien; and
- (iii) The name of the Owner or reputed Owner of the property which is the subject of the alleged lien.

Such lien, when so recorded against the real property described in the notice thereof, shall be prior and superior to any right, title, interest, lien, or claim which may or has been acquired or attached to such real property after the time of filing such lien, except for those liens for general taxes and special assessments which have priority over such lien pursuant to the laws of the State of Utah. Sale or transfer by an Owner shall not affect the assessment lien. Such lien shall be for the use and benefit of the Common Area manager or other person curing the default, and may be enforced and foreclosed in a suit or action brought in any court of competent jurisdiction, or foreclosed in the manner provided by law for the foreclosure of deeds of trust by power of sale (in which event the Common Area manager may designate as trustee any person qualified to act as a deed of trust trustee pursuant to Utah Code Ann. § 57-1-21, or any successor statute). The foregoing shall be in addition to any other remedies provided herein or otherwise available at law or equity.

3.5 Alterations. Without the prior written consent of all Owners and Major Tenant:

a. No Owner shall change or alter the location of curb cuts, roadways, access aisles and sidewalks or alter the quality, quantity, availability or location of any of the parking spaces in the Common Area.

b. No Owner shall construct any barrier, building or other structure (including temporary structures) on any portion of the Common Area nor change the points of ingress and egress to and from the Shopping Center from public roads, nor shall any Owner in any manner obstruct the visibility of Major Tenant's building.

3.6 Compliance With Law. No part of the Shopping Center shall be used in violation of any applicable federal, state or municipal statute or ordinance, any regulation, order, or directive of a governmental agency concerning the use and safety of any Parcel, any Certificate of Occupancy covering or affecting the use of any Parcel or any part thereof, or in any manner to create any public or private nuisance.

3.7 Compliance with Major Tenant Leases. So long as the leases with Major Tenant remain in effect, no Owner shall not do or omit to do anything with respect to the

Common Area which would constitute a violation of any of the terms and provisions of the leases between Heartland and Major Tenant.

IV. TAXES AND INSURANCE

4.1 Taxes. Each Owner shall timely pay and be individually and solely responsible for all general and special real estate taxes, assessments, and charges imposed by the state, county or municipality upon that part of the Shopping Center which it owns.

4.2 Insurance. Each Owner shall purchase and maintain at all times comprehensive general public liability insurance (including contractual liability) covering injuries to persons and damage to property occurring in, upon, or about the Common Area of that part of the Shopping Center which it owns, naming all Owners, Major Tenant and such additional insured parties as any Owner or Major Tenant may reasonably request. Such insurance shall be issued by insurers licensed to do business in the State of Utah and acceptably rated by national rating organizations. The limits of liability of all such insurance shall be not less than Three Million Dollars (\$3,000,000.00) for personal and bodily injury or death to all persons in any one occurrence, and for property damage. Upon request, each Owner shall furnish the other Owners and Major Tenant with originals, copies or certificates of the policies. Each such policy shall contain a provision that no unintentional act or omission of the insured shall affect or limit the obligation of the insurance company to pay the amount of any loss sustained. The policies of such insurance shall provide that the insurance represented by such certificates shall not be changed or cancelled without the giving of thirty (30) days written notice to the holders of such insurance and the holders of such certificates.

V. GENERAL PROVISIONS

5.1 Covenants Run With the Land. During the term of this Declaration, every covenant, condition, restriction, and easement on each Parcel shall be a burden on that Parcel, shall be appurtenant to and for the benefit of each other Parcel, and shall run with the land.

5.2 Successors and Assigns. The covenants, conditions, restrictions, and easements created hereby shall inure to the benefit of, and be binding upon, the Owners and their successors and assigns; provided, however, that if any Owner sells any portion or all of its interest in any Parcel, such Owner shall thereupon be released and discharged from any and all obligations as Owner in connection with the property sold by it arising under this Declaration after the date of sale and conveyance of title.

5.3 Tenants and Subtenants. Nothing within this Declaration shall be deemed to preclude an Owner from delegating, in writing, any of the rights or duties of such Owner to

tenants and/or subtenants, provided that no such delegation shall relieve such Owner of primary responsibility for performance by such Owner of obligations under this Declaration.

5.4 Duration. The term of this Declaration shall be for seventy-five (75) years from the date hereof, and upon expiration thereof the covenants, conditions, restrictions, and easements provided within this Declaration shall lapse and be of no further force or effect.

5.5 Injunctive Relief. In the event of any violation or threatened violation by any Owner, Major Tenant, Occupant or Permittee of any portion of the Shopping Center of any of the terms, covenants, conditions, or restrictions of this Declaration, any or all of the other Owners or Major Tenant, as long as each, respectively, has interest in the Shopping Center, shall have the right to have such violation or threatened violation enjoined by a court of competent jurisdiction. The right of injunction shall be in addition to all other remedies set forth in this Declaration and all remedies available under statute, law and equity.

5.6 Modification and Amendment. This Declaration may not be modified in any respect whatsoever or rescinded, in whole or in part, except with the consent of all Owners of the Shopping Center, and then only by written instrument duly executed and acknowledged by all of the Owners, duly recorded in the Office of the Recorder, County of Salt Lake, State of Utah.

5.7 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 the general public or for any public purposes whatsoever, it being the intention of the parties that this Declaration shall be strictly limited to and for the purposes herein expressed.

5.8 Breach Shall Not Permit Termination. It is expressly agreed that no breach of this Declaration shall entitle any Owner to cancel, rescind or otherwise to terminate this Declaration, but such limitations shall not affect in any manner any other rights or remedies which such Owner may have hereunder by reason of any breach of this Declaration. Any breach of this Declaration shall not defeat or render invalid the lien of any mortgage or deed of trust made in good faith for value, but this Declaration shall be binding upon and be effective against any Owner whose title is acquired by foreclosure, trustee's sale, or otherwise.

5.9 Notices. All notices to be given pursuant to this Declaration shall be in writing and must be given by United States certified or registered mail, postage prepaid, properly addressed to the Owner of each Parcel and Major Tenant (where applicable) by name and address as shown on the then current real property tax rolls in County of Salt Lake, State of Utah. In addition, such notice shall be given to any lender holding a security interest in any portion of the Shopping Center, and any tenant in the Shopping Center, if the Owner giving written notice has theretofore received from such lender or tenant a request for notice designating the name and address for mailing thereof. Any notice to Heartland shall be sent by certified or registered mail, postage prepaid, to:

Heartland West Valley Commercial Limited Partners
77 West 200 South, Suite 200
Sail Lake City, UT 84101
Attn: Michael L. Nielsen

Any notice to Major Tenant shall be sent certified or registered mail, postage prepaid to Major Tenant at:

Toys "R" Us, Inc.
461 From Road
Paramus, New Jersey 07652
Attn: Real Estate Dept.

Heartland and Major Tenant may change their address for notice purposes herein at any time upon written notice to the other and to all other Owners of Parcels in the Shopping Center.

5.10 Attorneys' Fees. In the event any person entitled to the benefits of this Declaration brings an action at law or in equity to enforce or interpret this Declaration, the prevailing party in such action shall be entitled to recover from the other party reasonable attorney's fees and all court costs in addition to all other appropriate relief.

5.11 Severability. Should any provision or provisions of this Declaration be held invalid or unenforceable, all remaining provisions shall remain in full force and effect.

5.12 Headings Not a Part. The captions contained within this Declaration are not a part and shall not be utilized for interpretation or limitation of the provisions hereof.

5.13 Choice of Law. This Declaration shall be construed and enforced in accordance with the laws of the State of Utah.

EXHIBIT A

Description of the Shopping Center

PARCEL NO. 1:

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 which is 815.125 feet South $0^{\circ}00'44''$ West along the East line of said Northwest Quarter and 200.00 feet South $89^{\circ}56'30''$ West from the Northeast Corner of said Northwest Quarter of Section 33; running thence South $89^{\circ}56'30''$ West 331.90 feet to the East line of Market Street; thence North $0^{\circ}00'20''$ East 95.50 feet along said Easterly line of Market Street; thence leaving said Easterly line North $89^{\circ}56'30''$ East 130.00 feet; thence North $0^{\circ}00'44''$ East 113.92 feet; thence North $89^{\circ}56'30''$ East 201.91 feet; thence South $0^{\circ}00'44''$ West 209.42 feet to the point of BEGINNING.

PARCEL NO. 2:

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 which is 815.125 feet South $0^{\circ}00'44''$ West along the East line of said Northwest Quarter and 33.00 feet South $89^{\circ}56'30''$ West from the Northeast Corner of said Northwest Quarter of Section 33; running thence South $89^{\circ}56'30''$ West 167.00 feet; thence North $0^{\circ}00'44''$ East 165.00 feet; thence North $89^{\circ}56'30''$ East 167.00 feet; thence South $0^{\circ}00'44''$ West 165.00 feet to the point of BEGINNING.

PARCEL 3

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 on the West line of 2700 West Street, being 501.25 feet South 0°00'44" West along the East line of said Northwest Quarter and 33.00 feet South 89°53'20" West from the Northeast Corner of said Northwest Quarter of Section 33; and running thence South 0°00'44" West 51.845 feet; thence South 89°56'30" West 167.00 feet; thence South 0°00'44" West 52.58 feet; thence South 89°56'30" West 201.91 feet; thence South 0°00'44" West 113.92 feet; thence South 89°56'30" West 130.00 feet to the East line of Market Street; thence along the Easterly line of Market Street as follows: North 0°00'20" East 46.88 feet; thence Northwesterly along the arc of a 526.66 foot radius curve to the left 183.99 feet (Long Chord bears North 10°00'10" West 183.06 feet, Central Angle equals 20°01'00") and Northwesterly along the arc of a 466.66 foot radius curve to the right 16.87 feet (Long Chord bears North 18°58'32" West 16.87 feet, Central Angle equals 2°04'16"); thence leaving said Easterly line North 89°53'20" East 276.24 feet; thence South 0°00'44" West 25.30 feet; thence North 89°53'20" East 260.00 feet to the point of BEGINNING.

PARCEL 4

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 on the East line of Market Street, being 592.00 feet South 89°53'20" West along the Section line and 273.95 feet South 0°00'20" West from the Northeast Corner of said Northwest Quarter of Section 33; and running thence North 89°53'20" East 541.97 feet; thence South 0°00'44" East 46.05 feet; thence North 89°23'20" East 17.00 feet to the West line of 2700 West Street, said West line being 33.00 feet Westerly of and parallel to the East line of said Northwest Quarter of Section 33; thence South 0°00'44" West 181.25 feet along said West line; thence South 89°53'20" West 260.00 feet; thence North 0°00'44" East 25.30 feet; thence South 89°53'20" West 276.24 feet to the East line of Market Street at a point in a curve in which the radius point bears North 72°03'36" East; thence along the Easterly line of Market Street as follows: Northwesterly along the arc of a 466.66 foot radius curve to the right 146.16 feet (Long Chord bears North 8°58'02" West 145.57 feet, Central Angle equals 17°56'44") and North 0°00'20" East 58.17 feet to the point of BEGINNING.

PARCEL NO. 5:

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 which is South $89^{\circ}53'20''$ West 330.00 feet along the North line of said Northwest Quarter and South $0^{\circ}00'44''$ West 198.952 feet from the Northeast corner of said Northwest Quarter of Section 33; running thence South $0^{\circ}00'44''$ West 29.048 feet; thence North $89^{\circ}53'20''$ East 280.00 feet to a point 50.00 feet perpendicularly distant West of the East line of said Northwest Quarter; thence South $0^{\circ}00'44''$ West 45.95 feet parallel to said East line; thence South $89^{\circ}53'20''$ West 422.00 feet; thence North $0^{\circ}00'44''$ East 75.00 feet; thence North $89^{\circ}53'20''$ East 142.00 feet to the point of BEGINNING.

PARCEL NO. 6:

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 which is South $89^{\circ}53'20''$ West 330.00 feet along the North line of said Northwest Quarter and South $0^{\circ}00'44''$ West 48.00 feet from the Northeast corner of said Northwest Quarter of Section 33; running thence South $0^{\circ}00'44''$ West 150.952 feet; thence South $89^{\circ}53'20''$ West 142.00 feet; thence North $0^{\circ}00'44''$ East 150.952 feet; thence North $89^{\circ}53'20''$ East 142.00 feet to the point of BEGINNING.