

23-003159-CV-85

CAUSE NO. _____

**CBL & ASSOCIATES MANAGEMENT,
INC., AS MANAGING AGENT FOR
POM-COLLEGE STATION, LLC**
Plaintiffs

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IN THE DISTRICT COURT OF

BRAZOS COUNTY, TEXAS

V.

CITY OF COLLEGE STATION, TEXAS
Defendant

_____ **JUDICIAL DISTRICT**

PLAINTIFFS' ORIGINAL PETITION & SUIT FOR DECLARATORY RELIEF

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, **CBL & ASSOCIATES MANAGEMENT, INC., AS MANAGING AGENT FOR POM-COLLEGE STATION, LLC**, (collectively, herein "PLAINTIFF"), who files this *Original Petition and Suit for Declaratory Relief* under Chapter 37 of Tex. Civ. P. & Rem Code, and will respectfully show the Court as follows:

DISCOVERY CONTROL PLAN

1. Plaintiffs intend to conduct discovery in this matter under Level One (1), as defined in Rule 190.4 of the Texas Rules of Civil Procedure.

RULE 47 STATEMENT

2. The damages sought by this suit are within the jurisdictional limits of this Court. Accordingly, Plaintiffs seeks non-monetary relief and monetary relief less than \$250,000.

PARTIES

3. Plaintiff, POM-COLLEGE STATION, LLC, is a Texas limited liability company and is owner and landlord of the subject premises. CBL & ASSOCIATES MANAGEMENT, INC.

is the managing agent for the Plaintiff and is authorized to bring this suit on its behalf.

4. Defendant, CITY OF COLLEGE STATION, TEXAS (“COCS”) is a city located in Brazos County, Texas and may be served with process through the City Secretary, Tanya D. Smith, for the City of College Station, Texas, at 1101 Texas Ave., College Station, Texas 77840, or wherever she may be found.

JURISDICTION AND VENUE

5. The Court has jurisdiction over the parties because they are residents of this County and/or their principal place of business is in this County.
6. The Court has subject matter jurisdiction over these claims against the City of College Station pursuant to Tex. Govt. Code §271.152 because the Texas Legislature expressly waived sovereign immunity for certain breach of contract claims, such as the claims raised by Plaintiff herein. Further, Defendant’s acts or omissions giving rise to Plaintiff’s claims in this case are “proprietary” functions designed to benefit only the citizens of the local community and therefore does not have sovereign immunity. *Dilley v. City of Houston*, 222 S.W.2d 992, 993 (Tex. 1949); *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427 (Tex. 2016).
7. The relief sought herein is within the jurisdictional limits of this court.
8. Venue is mandatory in Brazos County, Texas pursuant to Tex. Civ. P. & Rem. Code §§15.002 and 15.0151.

FACTUAL BACKGROUND

9. Plaintiff is the owner and operator of Post Oak Mall located in College Station,

Texas (the “Mall”).

10. On or about October 28, 2022, Defendant purchased the former Macy’s department store (the “Property”) located at the Mall. This transaction is referenced in that certain Special Warranty Deed from West Valley JMYL, LP, as Grantor, to Defendant, as Grantee, and recorded under Instrument Number 1487607 in the Official Records of Brazos County, Texas (the “Vesting Deed”). **Exhibit A.**
11. Defendant purchased the Property subject to certain reservations and exceptions listed and identified on the face of the Vesting Deed. *Id.* Specifically, Permitted Exception number seven on Exhibit B to the Vesting Deed states that Defendant purchased the Property subject to the “terms, conditions, and stipulations as set forth in the Construction, Operation, and Reciprocal Easement Agreement (“COREA”)...” *Id.*
12. The original COREA affecting the subject Property is dated November 28, 1980 and is recorded in Volume 482, Page 447 of the Official Records of Brazos County, Texas. The original COREA was thereafter amended on the following dates:
 - a. First Amendment to COREA, dated October 22, 1982, and recorded in Volume 542, Page 710 of the Official Records of Brazos County, Texas.
 - b. Second Amendment to COREA, dated April 1, 1985, and recorded in Volume 782, Page 258 of the Official Records of Brazos County, Texas.
13. Section 22.7 of the COREA states, in relevant part, that Defendant “shall pay as reimbursement to [Plaintiff] for each Party’s share of [Plaintiff’s] cost of operating and maintaining the Common Area the amount set forth in the Separate Agreement with said Party.”

14. There are two “Separate Agreements” that affect the subject Property and the parties that are relevant to this dispute, to wit:
 - a. Supplemental Agreement, dated October 22, 1982 (see **Exhibit B**); and
 - b. Second Supplemental Agreement, dated April 1, 1985
15. Paragraph 8 of the 1982 Supplemental Agreement provides the method of calculating Defendant’s share of the Common Area costs that are to be reimbursed to Plaintiff. **Exhibit B.** Defendant’s share of the Common Area costs under this agreement is currently \$3,451.51 per month. Through the end of September 2023, Defendant owes Plaintiff **\$41,726.81** for its share of Common Area costs that have accrued since Defendant’s purchase of the Property, which amount is past-due and owing. This amount will continue to accrue each month under the terms of the COREA and Supplemental Agreements.
16. The entity from whom Defendant acquired the Property, and each of their predecessors, have paid these Common Area reimbursements costs, as required by the COREA and Supplemental Agreements, for decades without issue. However, since acquiring the Property, Defendant has now taken the position that, because it is a governmental entity who purchased the Property, that it cannot and will not comply with these contractual payment obligations to pay for the Common Area costs as required by Section 22.7 of the COREA and Paragraph 8 of the Supplemental Agreement.
17. Defendant purchased the Property with full knowledge and disclosure of the terms, conditions, and obligations of the COREA and Supplemental Agreements affecting the Property. Defendant knowingly and voluntarily agreed to purchase the Property anyway.

18. Article 39 of the COREA provides that “the covenants, conditions, and agreements contained in [the COREA] shall bind and inure to the benefit of [Plaintiff] and [Defendant] and their respective heirs, successors, administrators, and assigns.” Similarly, Paragraph 21 of the Supplemental Agreement specifically states that its terms “shall bind and inure to the benefit of the parties hereto and their respective successors and assigns.”
19. Plaintiffs have complied with all conditions precedent, and/or all conditions precedent have occurred, prior to filing this suit.

DECLARATORY RELIEF

20. Plaintiffs incorporate all preceding paragraphs as if fully stated herein.
21. There are clear disputes between these parties relating to the interpretation and enforceability of the COREA and Supplemental Agreements at issues. The COREA and the Supplemental Agreements are contracts. Plaintiff and Defendant are the only relevant parties to these contracts who would be affected by this request for declaratory relief.
22. Despite purchasing the Property voluntarily and with actual knowledge of the terms and obligations in the COREA and Supplemental Agreements, including any amendments, Defendant now claims, ***after it purchased the Property***, that it is constitutionally prohibited from complying with the contractual terms and obligations that run with the Property requiring Defendant to pay its share of the Common Area costs.
23. Defendant attempts to rely on two constitutional provisions to justify its unilateral position that it does not have to comply with the contracts it voluntarily entered into as part of its purchase of the Property—Article III, Section 52 and Article II, Section

3 of the Texas Constitution. Neither of these two constitutional provisions apply in this situation.

24. Article III, Section 52(a) provides, in relevant part:

“...the Legislature shall have no power to authorize any...city...to lend its credit or to grant public money or thing of value in aid or, or to any individual, association, or corporation whatsoever, or to become a stockholder in such corporation, association, or company.”

This provision has no applicability to the current situation as the Legislature is not seeking to authorize, direct, or compel the Defendant to do anything. The Defendant, in its sole discretion, knowingly and voluntarily decided to purchase the Property as a “proprietary function” presumably for the benefit of the citizens within the limits of College Station, Texas. This was an authorized act by Defendant and does not include any legislative authorization or approval for which this constitutional provision would apply.

25. Next, Defendant cites to Article II, Section 3 of the Texas Constitution which provides, in relevant part:

“No county, city, or other municipal corporation shall hereafter become a subscriber to the capital of any private corporation or association, or make any appropriation or donation to the same, or in anywise loan its credit; *but this shall not be construed to in any way affect any obligation heretofore undertaken pursuant to law* or to prevent a county, city, or other municipal corporation from investing its funds as authorized by law.” (Emphasis added)

This provision similarly does not apply to this situation. Defendant had the full legal authority and appropriate authorization to purchase the Property. Defendant knew that the Property was subject to certain contractual terms, conditions, and obligations prior to agreeing to purchase the Property. Defendant’s obligations to

pay for common area maintenance and other charges affecting the Property does not violate this constitutional provision because Defendant is not making a gratuitous investment, donation on its own sought out knew what is was purchasing before it agreed to buy the Property had the legal authority to enter in this transaction and to spend city funds on its purchase. The City knew prior to purchasing the Property that the Property was subject to the terms of the COREA. The City knew that the terms of the COREA required it to join the Merchant's Association and to pay certain charges for common area maintenance and the general upkeep, maintenance, and preservation of the Mall.

26. Texas courts have held that the purpose of the two referenced constitutional provisions is to “**prevent the gratuitous grant of [public] funds** to any individual, corporation, or purpose whatsoever.” *Bryd v. City of Dallas*, 6 S.W.2d 738, 740 (Tex. 1928); *Texas Mun. League Intergovt'l Risk Pool v. Texas Workers' Comp. Comm'n*, 74 S.W.3d 377, 283 (Tex. 2002). These constitutional provisions do not prohibit payments made by cities, like Defendant, for services rendered wherein the city obtains a benefit for said services. Clearly the payments required by the COREA are not gratuitous in nature and the City is obtaining a clear benefit as a result of these payments.
27. Given the above, pursuant to Chapter 37.004 of Tex. Civ. P. & Rem. Code, Plaintiff seeks to have the Court declare the rights, status, or legal relations of these parties as follows:
 - a. Declare the covenants, conditions, and agreements contained in the COREA and Supplemental Agreements, including any amendments thereto, constitute valid and enforceable contracts that are binding upon the City;

- b. Declare the City's voluntary purchase of the Property was a "proprietary" function, as defined by law;
- c. Declare that Article III, Section 52 of the Texas Constitution does not prohibit Defendant's compliance with the contractual terms and obligations contained in the COREA or Supplemental Agreements, as amended, in this circumstance;
- d. Declare that Article II, Section 3 of the Texas Constitution does not prohibit Defendant's compliance with the contractual terms and obligations contained in the COREA or Supplemental Agreements, as amended, in this circumstance; and
- e. Declare that Defendant breached its contractual obligations by failing and refusing to pay the amounts required under the COREA and Supplemental Agreements, including any amendments thereto, when due.

ATTORNEY'S FEES

28. Pursuant to Chapter 37 of Tex. Civ. P. & Rem. Code and the terms of COREA, as amended, Plaintiff respectfully requests that the Court award them their reasonable and necessary attorney's fees in having to bring this action. The award of attorney's fees in this instance is equitable and just because Defendant knowingly and voluntarily agreed to purchase the Property and it knew that the owner of the Property was subject to various contractual obligations, including the covenants, conditions, and agreements contained in the COREA and the Supplemental Agreements regarding the payment of Common Area costs. Despite this knowledge and intentional decision to purchase the Property, Defendant is now seeking to avoid responsibility and unilaterally invalidate contractual obligations based upon a very self-serving and misguided application of two constitutional provisions that do not apply in this case. As a result of Defendant's position, Plaintiff is forced to bring this suit and incur attorney's fees and costs so that the Defendant will comply with its contractual obligations that it knowingly and voluntarily agreed to perform when it purchased the Property.

PRAYER

WHEREFORE, PREMISES CONSIDERED, and for the reasons set forth herein, Plaintiff respectfully prays that the Court issue citation for Defendant to appear and answer herein; that Plaintiff be granted the declaratory relief requested herein; that the Court enter judgment for all general and specific relief requested herein; that Plaintiff have and recover their reasonable and necessary attorney's fees and costs of suit; and for all other and further relief, at law or in equity, to which Plaintiff may show itself entitled.

Respectfully Submitted,

RODGERS, MILLER, & RODRIGUEZ, P.C.

/s/ Nick Fusco

By: _____

NICK M. FUSCO
State Bar No. 24093461
E-Mail: fusco@rodgersmiller.com
4444 Carter Creek Pkwy., Suite 208
P.O. Box 4884
Bryan, Texas 77802
Tel: 979-260-9911
Fax: 979-846-7083

ATTORNEY FOR PLAINTIFFS'

EXHIBIT A

SPECIAL WARRANTY DEED

YOU MAY REMOVE OR STRIKE ANY OR ALL OF THE FOLLOWING INFORMATION FROM ANY INSTRUMENT THAT TRANSFERS AN INTEREST IN REAL PROPERTY BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.

SPECIAL WARRANTY DEED

STATE OF TEXAS §
 § KNOW ALL MEN BY THESE PRESENTS THAT:
COUNTY OF BRAZOS §

THAT West Valley JMYL, LP (the "Grantor"), for and in consideration of the sum of TEN AND NO/100 Dollars (\$10.00) and other good and valuable consideration in hand paid by the City of College Station, Texas, a Texas home rule municipal corporation (the "Grantee"), the receipt and sufficiency of which are hereby acknowledged, has GRANTED, SOLD, AND CONVEYED and by these presents does hereby GRANT, SELL, AND CONVEY unto Grantee that certain real property situated in Brazos County, Texas and more particularly described on Exhibit A attached hereto and made a part hereof for all purposes (the "Land"), together with: (i) all and singular the rights, benefits, privileges, easements, tenements, hereditaments, and appurtenances therein or in anywise appertaining to the Land; (ii) all right, title, and interest to all minerals, oil, gas, and other hydrocarbon substances thereon or thereunder; (iii) all air, water, riparian, and solar rights related thereto; and, (iv) all right, title, and interest of Seller in and to all strips and gores and any land lying in the bed of any street, road, or alley, open or proposed, adjoining the Land (the Land, together with any and all of the related improvements, appurtenances, rights and interests referenced in items (i) through (iv) above are herein collectively referred to as the "Property").

TO HAVE AND TO HOLD the Property, AS IS, WHERE IS, and WITH ALL FAULTS, together with all and singular the rights and appurtenances thereto in any wise belonging, unto Grantee, its successors and assigns forever, subject to the matters described on Exhibit B attached hereto (collectively, the "Permitted Exceptions") and Grantor does hereby bind itself, its successors and assigns, to WARRANT AND FOREVER DEFEND all and singular the Property, subject to the Permitted Exceptions, unto Grantee, its successors and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof by, through, or under Grantor, but not otherwise.

All ad valorem taxes and assessments for the Property for the year in which this Deed is executed have been prorated by the parties hereto and Grantor hereby expressly assumes liability for the payment thereof. If such proration was based upon an estimate of such taxes and assessments for such year, then upon demand the parties hereto shall promptly and equitably adjust all such taxes and assessments as soon as actual figures for the Property for such year are available.

[Signature and Acknowledgement Page Follows]

EXECUTED to be effective for all purposes as of the 28th day of OCTOBER, 2022, to be effective October 31, 2022.

West Valley JMYL, LP

By: [Signature]
Edward Corn, Jr., General Partner

THE STATE OF California §
 §
COUNTY OF San Diego §

ACKNOWLEDGEMENT

This instrument was acknowledged before me on this 28th day of October, 2022, by Edward Corn, Jr., as General Partner of West Valley JMYL, LP, on behalf of said West Valley JMYL, LP.

Notary Public in and for the State of _____

[SEAL]

Printed Name of Notary

My Commission Expires: _____

see attached certificate for notary

CALIFORNIA ACKNOWLEDGMENT

CIVIL CODE § 1189

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

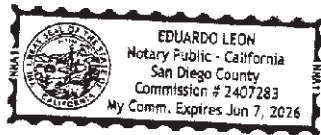
State of California

County of San Diego

On Oct. 28th, 2022 before me, Eduardo Leon, notary public
Date Here Insert Name and Title of the Officer

personally appeared Edward Corn Jr.
Name(s) of Signer(s)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.



I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature el
Signature of Notary Public

Place Notary Seal and/or Stamp Above

OPTIONAL

Completing this information can deter alteration of the document or fraudulent reattachment of this form to an unintended document.

Description of Attached Document

Title or Type of Document: _____

Document Date: _____ Number of Pages: _____

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s)

Signer's Name: _____ Signer's Name: _____

Corporate Officer - Title(s): _____ Corporate Officer - Title(s): _____

Partner - Limited General Partner - Limited General

Individual Attorney in Fact Individual Attorney in Fact

Trustee Guardian or Conservator Trustee Guardian or Conservator

Other: _____ Other: _____

Signer is Representing: _____ Signer is Representing: _____

EXHIBIT A: LEGAL DESCRIPTION OF THE REAL PROPERTY

Certain real property located in Brazos County, City of College Station, Texas, legally described as follows:

PARCEL 1:

All that certain 7.641 acre tract or parcel of land lying and being situated in the Morgan Rector League, Abstract 46, College Station, Brazos County, Texas, and being Lot 3 in Block 1, as shown on Re-plat of Lots 3 and 4, Block 1, POST OAK MALL, recorded in Volume 529, page 17 of the Deed Records of Brazos County, Texas, and being more particularly described by metes and bounds as follows:

COMMENCING at a 5/ 8" iron rod marking the most easterly corner of Lot 4, Block 1 of the said re- plat, said iron rod also marking the intersection of the northwest right- of- way line of Sutton Place (commonly referred to as Holleman Drive) with the southwest right- of- way line of State Highway No. 6 - East By-pass;

THENCE N 30° 42' 32" W with the said southwest right- of- way line for a distance of 714.21 feet to a point for corner;

THENCE S 49° 38' 40" W for a distance of 111.26 feet to a point for the PLACE OF BEGINNING; THENCE continue S 49° 38' 40" W for a distance of 208.00 feet to a point for corner;

THENCE S 40° 21' 20" E for a distance of 20.00 feet to a point for corner;

THENCE S 49° 38' 40" W for a distance of 252.11 feet to a point for corner;

THENCE S 02° 34' 03" E for a distance of 388.94 feet to a point for corner;

THENCE N 87° 25' 57" E for a distance of 518.20 feet to a point for corner;

THENCE N 42° 12' 46" E for a distance of 93.72 feet to the point of beginning of a curve concave to the west;

THENCE along the arc of said curve for a distance of 273.64 feet to a point for the end of said curve (curve data: central angle = 72° 55' 18", Radius = 215.00 feet, tangent = 158.86 feet, chord = 255.54 feet);

THENCE N 30° 42' 32" W for a distance of 298.30 feet to a point for the beginning of a curve concave to the southwest:

THENCE along the arc of said curve for a distance of 61.09 feet to a point for the end of said curve, (curve data: central angle = 28° 00' 06", Radius = 125.00 feet, tangent = 31.17 feet, chord = 60.48 feet);

THENCE N 58° 42' 22" W for a distance of 106.64 feet to the PLACE OF BEGINNING and containing 7.641 acres of land more or less.

PARCEL II:

The reciprocal and non-exclusive easements for access (including, but not limited to, a perpetual easement over the Ring Road for ingress and egress), use of Common Area (including, but not limited to, the Enclosed Mall, Parking Area and Common Utility Facilities), parking, utilities, construction, erection and maintenance of foundations, footings and supports, attachment of buildings, and other matters" appurtenant to Lot 3 in Block 1 of the POST OAK MALL, a subdivision in the City of College Station, Texas, all as created by that certain Construction, Operation and Reciprocal Easement Agreement by and among CBL & Associates, Inc., Sears, Roebuck and Co., Dillard Department Stores, Inc. and Construction Developers, Inc., dated as of November 28, 1980 and recorded in Volume 482, page 447, of the Deed Records of Brazos County, Texas, as amended by the First Amendment to said Agreement among said parties and Federated Department Stores, Inc., dated as of October 22, 1982 and recorded in Volume 542, page 710, Deed Records of Brazos County, Texas: the Assignment, Assumption and Ratification Agreement by and between CBL Associates, Inc. and Post Oak Mall Associates, dated October 22, 1982, and recorded in Volume 560, page 254, Deed Records of Brazos County, Texas: and the Second Amendment to the said Agreement by and between Post Oak Mall Associates, et al, and J. C. Penney Properties, Inc., dated as of April 1, 1985, and recorded in Volume 782, page 258, and Assumed in Volume 15744, page 110, Official Records of Brazos County, Texas: Assignment and Assumption Agreement in Volume 17656, page 245, Official Records of Brazos County, Texas.

EXHIBIT B: PERMITTED EXCEPTIONS

1. Easements and building lines as shown of record on plat of Post Oak Mall, recorded in Volume 517, Page 689, Deed Records of Brazos County, Texas.
2. Easement from CBL & Associates, Inc. to General Telephone Company of the Southwest, dated November 6, 1980, recorded in Volume 479, Page 441, Deed Records of Brazos County, Texas.
3. Easement from CBL & Associates, Inc., a Tennessee Corporation to City of College Station, Texas, dated August 14, 1981, recorded in Volume 497, Page 394, Deed Records of Brazos County, Texas.
4. Easement from CBL & Associates, Inc., a Tennessee Corporation to City of College Station, Texas, dated August 14, 1981, recorded in Volume 497, Page 400 Deed Records of Brazos County, Texas.
5. Easement from CBL & Associates, Inc., a Tennessee Corporation to City of College Station, Texas, dated August 14, 1981, recorded in Volume 497, Page 405, Deed Records of Brazos County, Texas.
6. Easement from Federated Department Stores, Inc., a Delaware Corporation to City of College Station, Texas, dated September 24, 1984, recorded in Volume 727, Page 73, Official Records of Brazos County, Texas.
7. Terms, conditions and stipulations as set forth in Construction, Operation and Reciprocal Easement Agreement by and among CBL & Associates, Inc., Sears, Roebuck and Co., Dillard Department Stores, Inc. and Construction Developers, Inc., dated as of November 28, 1980 and recorded in Volume 482, Page 447, of the Deed Records of Brazos County, Texas, as amended by the First Amendment to said Agreement among said parties and Federated Department Stores, Inc., dated as of October 22, 1982 and recorded in Volume 542, Page 710, Deed Records of Brazos County, Texas; the Assignment, Assumption and Ratification Agreement by and between CBL Associates, Inc. and Post Oak Mall Associates, dated October 22, 1982, and recorded in Volume 560, Page 524, Deed Records of Brazos County, Texas; and Second Amendment to the said Agreement by and between Post Oak Mall Associates, et al and J. C. Penney Properties, Inc., dated as of April 1, 1985, and recorded in Volume 782, Page 258, Official Records of Brazos County, Texas; and the Assignment and Assumption of REAs in Volume 15744, Page 110, Official Records of Brazos County, Texas; Assignment and Assumption Agreement in Volume 17656, Page 245, Official Records of Brazos County, Texas.
8. All leases, grants, exceptions or reservations of coal, lignite, oil, gas and other minerals affecting the herein described property, together with all rights, privileges and immunities relating thereto, appearing in the Public Records of Brazos County, Texas.

**Brazos County
Karen McQueen
County Clerk**

Instrument Number: 1487607
Volume : 18310
ERecordings - Real Property

Recorded On: October 31, 2022 04:14 PM

Number of Pages: 7

" Examined and Charged as Follows: "

Total Recording: \$50.00

******* THIS PAGE IS PART OF THE INSTRUMENT *******

Any provision herein which restricts the Sale, Rental or use of the described REAL PROPERTY because of color or race is invalid and unenforceable under federal law.

File Information:

Document Number: 1487607
Receipt Number: 20221031000136
Recorded Date/Time: October 31, 2022 04:14 PM
User: Cathy B
Station: MXL0512813

Record and Return To:

Simplifile
5072 NORTH 300 WEST
PROVO UT 84604



STATE OF TEXAS
COUNTY OF BRAZOS

I hereby certify that this Instrument was FILED In the File Number sequence on the date/time printed hereon, and was duly RECORDED in the Official Public Records of Brazos County, Texas.

Karen McQueen
County Clerk
Brazos County, TX

EXHIBIT B

SUPPLEMENTAL AGREEMENT

THIS AGREEMENT, made as of the 22nd day of October, 1982, by and between CBL & ASSOCIATES, INC., a Tennessee corporation having its principal office at One Northgate Park, Chattanooga, Tennessee 37415 (hereinafter called "DEVELOPER") and FEDERATED DEPARTMENT STORES, INC., a Delaware corporation having its principal office at 7 West Seventh Street, Cincinnati, Ohio 45202 (hereinafter called "FOLEY'S");

W I T N E S S E T H:

WHEREAS, DEVELOPER, SEARS, ROEBUCK AND CO. (hereinafter called "SEARS"), CONSTRUCTION DEVELOPERS, INC. (hereinafter called "CONDEV") and DILLARD DEPARTMENT STORES, INC. (hereinafter called "DILLARD") have entered into a Construction, Operation and Reciprocal Easement Agreement dated as of November 28, 1980 and recorded in Volume 482, Page 447 of the Deed Records of Brazos County, Texas, respecting the construction and operation of a shopping center known as Post Oak Mall on certain land located in College Station, Brazos County, Texas; and

WHEREAS, DEVELOPER, SEARS, CONDEV, DILLARD and FOLEY'S have entered into a First Amendment to Operating Agreement of even date herewith amending said Construction, Operation and Reciprocal Easement Agreement (said Construction, Operation and Reciprocal Easement Agreement, as amended by said First Amendment to Operating Agreement, is hereinafter called the "Operating Agreement"); and

WHEREAS, the parties hereto desire to set forth certain understandings and agreements between them not set forth in the Operating Agreement;

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the parties hereto covenant and agree as follows:

1. Incorporation of Operating Agreement. The Operating Agreement is hereby incorporated herein and made a part hereof as if fully set forth herein, and all defined terms herein (indicated by initial capital letters) shall have the same meanings as are ascribed thereto in the Operating Agreement. In the event of any conflict between this Agreement and the Operating Agreement, the provisions of this Agreement shall prevail as between the parties hereto.

2. Floor Area of FOLEY'S Building. Notwithstanding the provisions of Paragraphs 11 and 12 on pages 4, 5 and 6 of the Operating Agreement, the Floor

Area and Gross Leasable Area of the FOLEY'S Building shall not include any space covered by elevators, dumb waiters, stairs, escalators and conveyors.

3. Approval of Design Criteria. DEVELOPER acknowledges and agrees that it has received and approved the Design Criteria for construction of FOLEY'S Improvements and that said Improvements as shown therein will be architecturally harmonious with the DEVELOPER Buildings and the layout, lighting, paving and landscaping of the Common Area, and will conform with the Plot Plan.

4. Construction by DEVELOPER. (a) DEVELOPER warrants and represents to FOLEY'S that DEVELOPER has substantially completed all On-Site Work on the FOLEY'S Tract and all Off-Site Work in accordance with the Plans and Specifications therefor prepared by the Project Engineer and approved by FOLEY'S, except for relocation of the roadway around the perimeter of the FOLEY'S Building, relocation of certain curbs and landscaped areas in the Parking Area on the FOLEY'S Tract, and installation of such additional lighting standards, if any, as may be necessary to satisfy the lighting requirements specified in the Operating Agreement. DEVELOPER agrees, at its sole expense except as provided in Section 6 hereof, to commence such work, and any other uncompleted On-Site Work on the FOLEY'S Tract and Off-Site Work, promptly upon the completion by FOLEY'S of the curbs outside the Building Perimeter Sidewalks on the FOLEY'S Tract. Upon the commencement thereof, DEVELOPER shall diligently prosecute such work to completion and shall, subject to unavoidable delays, fully complete all such work in accordance with the Plans and Specifications therefor not later than sixty (60) days prior to the completion of the FOLEY'S Building.

(b) DEVELOPER agrees, at its sole expense, to construct a brick facade along all exterior walls of the DEVELOPER Building in the vicinity of the FOLEY'S Building so as to make such walls architecturally harmonious with the existing Improvements in the Shopping Center. Such work shall be coordinated with the progress of the work to be performed by FOLEY'S pursuant to the Operating Agreement and this Agreement, and shall, subject to unavoidable delays, be fully completed not later than sixty (60) days prior to the completion of the exterior facade of the FOLEY'S Building.

(c) DEVELOPER agrees, at its sole expense, no later than the date FOLEY'S commences construction of the FOLEY'S Building, to install and maintain temporary water and electric lines to the building pad on the FOLEY'S Tract such temporary water and electric

utilities as may be necessary to proceed with construction of the FOLEY'S Improvements. FOLEY'S shall pay any fees imposed after the date of this Agreement by public authorities for permanently connecting the FOLEY'S Improvements to the utility systems.

(d) DEVELOPER agrees, at its sole expense, promptly upon the date FOLEY'S commences construction of the FOLEY'S Improvements, to prepare a building pad on the FOLEY'S Tract in the area within and extending 20 feet outside the proposed walls of the FOLEY'S Building as shown on the Plot Plan. Such preparation shall be in accordance with the requirements of Article 2.1A(1) of the Operating Agreement and the reasonable requirements of FOLEY'S, including, without limitation, the following: remove all vegetation and other organic matter; scarify and lime stabilize the subsoil to a depth not less than 9 inches as necessary to properly stabilize the subsoil in the area within and extending 5 feet outside the proposed walls of the FOLEY'S Building; stub all utility lines within 5 feet of the proposed walls of the FOLEY'S Building at the service points designated by FOLEY'S; grade to within 6 to 8 inches below the finished floor slab elevation and compact to 95% standard Proctor compaction, all as required to support, without extraordinary construction costs or procedures, a 2-level department store having normal spread footings and a poured concrete floor slab. All such work shall be coordinated with work to be performed by FOLEY'S pursuant to the Operating Agreement and this Agreement, and DEVELOPER shall diligently pursue such work to completion.

(e) DEVELOPER agrees, at its sole expense, to deliver to FOLEY'S, on or before July 1, 1983, all complex source air permits, water management permits, zoning variances and permits, and all other governmental permits and approvals, if any, (except for building permits for construction to be performed by FOLEY'S pursuant to the Operating Agreement and this Agreement which shall be obtained by FOLEY'S at its expense) necessary in connection with the construction permitted to be performed by FOLEY'S pursuant to the Operating Agreement and this Agreement.

5. Construction by FOLEY'S. FOLEY'S shall, at its sole expense, perform all work necessary for the construction of an opening in the Enclosed Mall to afford access to the FOLEY'S Building and for the attachment of the Enclosed Mall to the FOLEY'S Building; provided, however, that DEVELOPER shall, at its sole expense, install a lintel on the wall of the Enclosed Mall as necessary to prevent collapse of such wall and the roof upon construction of

such opening by FOLEY'S. FOLEY'S shall, prior to beginning work on such opening, submit Plans and Specifications for the attachment of the Enclosed Mall to the FOLEY'S Building to DEVELOPER for its approval, which approval shall not be unreasonably withheld or delayed. All such work shall be performed in a good and workmanlike manner and shall not unreasonably interfere with the conduct of business in the DEVELOPER Building. FOLEY'S shall, at its sole expense, repair all damage to the DEVELOPER Buildings caused by it during such work. FOLEY'S agrees that the brick used on the exterior facade of the FOLEY'S Building shall reasonably match the appearance of the brick used by DEVELOPER on the facade of the exterior walls of the DEVELOPER Building in the vicinity of the FOLEY'S Building.

6. FOLEY'S Share of Construction Costs. Notwithstanding any contrary provision of the Operating Agreement, FOLEY'S shall pay to DEVELOPER, as FOLEY'S full share of the cost of all On-Site Work, Off-Site Work, Site Preparation Work and other construction work by DEVELOPER concerning the Shopping Center, the sum of Six Hundred Seventy-Two Thousand Four Hundred Eight Dollars (\$672,408.00). Said sum shall be paid in three (3) installments as follows: the first installment in the amount of \$336,204.00 shall be paid on the date FOLEY'S commences excavation for the footings and foundations of the FOLEY'S Building, the second installment in the amount of \$268,963.20 shall be paid on the first business day which is six (6) months after the date of payment of the first installment, and the third installment of \$67,240.80 shall be paid on the day (but not before payment of the second installment) that the Project Architect certifies to FOLEY'S that all such On-Site Work, Off-Site Work, Site Preparation Work, and other construction work (including all work to be performed by DEVELOPER pursuant to this Agreement) has been fully completed in accordance with the Plans and Specifications therefor approved by FOLEY'S.

7. Merchants' Association Contribution. Commencing on the date the FOLEY'S Building initially opens for business with the public, FOLEY'S agrees to contribute to the Merchants' Association referred to in Article 15 of the Operating Agreement an annual amount equal to five cents (\$.05) multiplied by the number of square feet of Floor Area of the FOLEY'S Building payable in equal monthly installments (prorated for any partial month) in arrears on the first day of each calendar month; provided that such contributions shall be due only so long as (i) FOLEY'S is reasonably satisfied that the requirements and conditions of Article 15 of the Operating Agreement are being satisfied, (ii)

DEVELOPER furnishes, in addition to the cash contributions required by Paragraph (C) of Article 15 of the Operating Agreement and without charge to or reimbursement from the Merchants' Association, such office space as may be reasonably required to manage the Merchants' Association, and (iii) the Occupants of each of the other DEPARTMENT STORE Buildings and Buildings D and E (when constructed) and at least eighty percent (80%) of all other Occupants contribute to such Merchants' Association an annual amount equal to at least five cents (\$.05) multiplied by the number of square feet of Floor Area in their respective stores. Notwithstanding any contrary provision of the Operating Agreement, FOLEY'S shall only be obligated to contribute to the Merchants' Association for a period of three (3) years from the date the FOLEY'S Building initially opens for business with the public, and thereafter participation in the Merchants' Association by FOLEY'S shall be at FOLEY'S sole discretion. All contributions by FOLEY'S and others to the Merchants' Association shall be used only for the promotion of the Shopping Center and shall not be used to defray expenses of the Shopping Center nor to promote the goods or services of any particular Occupant.

8. Enclosed Mall Operating Expenses. Commencing on the date FOLEY'S initially opens its Building for business and continuing for so long as a retail store is being operated or is required to be operated in the FOLEY'S Building pursuant to Article 26A of the Operating Agreement and the Enclosed Mall is open and being operated and maintained in accordance with Article 22 of the Operating Agreement, FOLEY'S agrees to pay to DEVELOPER, as FOLEY'S full contribution to the cost of operating and maintaining the Enclosed Mall, an annual amount equal to ten cents (\$.10) multiplied by the number of square feet of Floor Area of the FOLEY'S Building, payable in equal monthly installments (prorated for any partial month) in arrears on the first day of each calendar month. Said amount shall, on the fifth anniversary of the date FOLEY'S initially opens its Building for business and at five (5) year intervals thereafter, be adjusted upward or downward by multiplying said amount at the time said adjustment is made by the percentage increase or decrease, if any, in "The Consumer Price Index for Urban Wage Earners and Clerical Workers, U.S. City Average, All Items (1967=100)" published by the U.S. Bureau of Labor Statistics, or any successor or substitute index appropriately adjusted, since the later of said initial opening date or the most recent adjustment hereunder.

If the FOLEY'S Building shall be reopened for the operation of a retail store following a discontinuance of the payments required by this Section 8, such payments shall be reinstated upon such reopening and shall continue so long as the conditions stated above are satisfied.

9. Maintenance of Perimeter Sidewalks. Notwithstanding any contrary provision of the Operating Agreement, during all periods in which DEVELOPER is obligated to maintain the Common Area on the FOLEY'S Tract, DEVELOPER shall diligently remove all papers, debris, filth and refuse and wash and thoroughly sweep the Building Perimeter Sidewalks on the FOLEY'S Tract; provided, however, that FOLEY'S shall be responsible for all repairs to the Building Perimeter Sidewalks on the FOLEY'S Tract.

10. Common Area Maintenance Costs. Commencing on the date FOLEY'S initially opens its Building for business and, except as hereinafter provided, continuing so long as business operations are being conducted in the FOLEY'S Building, DEVELOPER shall maintain the Common Area on the FOLEY'S Tract in accordance with the requirements of Article 22 of the Operating Agreement. During the period DEVELOPER performs such maintenance, FOLEY'S agrees to pay to DEVELOPER, as FOLEY'S full contribution to the cost of such maintenance, an annual amount equal to twenty cents (\$.20) multiplied by the number of square feet of Floor Area of the FOLEY'S Building, payable in equal monthly installments (prorated for any partial month) in arrears on the first day of each calendar month. Said amount shall, on the fifth anniversary of the date FOLEY'S initially opens its Building for business and at five (5) year intervals thereafter, be adjusted in the same manner as provided in Section 8 for adjustment of FOLEY'S contribution to Enclosed Mall operating expenses.

Notwithstanding any contrary provision of the Operating Agreement, FOLEY'S may elect at any time, by giving at least one (1) year prior written notice to DEVELOPER, to assume the obligation to maintain the Common Area on the FOLEY'S Tract, and after the date of such assumption FOLEY'S shall not be obligated to make any payment whatsoever to DEVELOPER with respect to such maintenance.

11. Payments and Right of Offset. FOLEY'S and DEVELOPER agree that, except as expressly set forth in this Agreement, FOLEY'S shall not be obligated to make any payments whatsoever to DEVELOPER in connection with the development, maintenance and operation of the Shopping Center. FOLEY'S may

offset any amounts payable by it to DEVELOPER against any amount owed by DEVELOPER to FOLEY'S under the terms of the Operating Agreement or this Agreement and, if DEVELOPER is at the time in default under the terms of the Operating Agreement or this Agreement and fails to cure such default after written notice and within the period, if any, specified in the Operating Agreement or this Agreement for curing such default, FOLEY'S may withhold any amounts then due to DEVELOPER until DEVELOPER has fully cured such default. The failure of FOLEY'S to offset or withhold payment as provided in this Section shall not constitute a waiver of any default by DEVELOPER or of any right or remedy of FOLEY'S.

12. Payment of Assessments. Notwithstanding the provisions of Article 20 of the Operating Agreement, DEVELOPER shall pay and discharge, when due and before any interest or penalty accrues for the non-payment thereof, any and all assessments at any time levied or made with respect to the FOLEY'S Tract by reason of the construction of the Off-Site Work or the On-Site Work.

13. DEVELOPER Operating Covenant. DEVELOPER agrees that its operating covenant under Paragraph 24.1 of the Operating Agreement shall continue for a period of at least fifteen (15) years from the date of the first opening of the FOLEY'S Building for business with the general public.

14. Enforcement of Operating Covenants. DEVELOPER warrants and represents to FOLEY'S that Articles 25 and 26 of the Operating Agreement recite the entire operating covenants to DEVELOPER by SEARS and DILLARD, respectively, with respect to the Shopping Center, and that such covenants have not been superceded, modified or supplemented and are in full force and effect. DEVELOPER shall not release SEARS or DILLARD from their respective operating covenants as stated in the Operating Agreement nor agree to the cancellation, termination or shortening thereof, or any other modification which could make the same less onerous to SEARS or DILLARD, respectively, and any such action taken by DEVELOPER without the prior written consent of FOLEY'S shall forthwith relieve FOLEY'S from all further obligations under Article 26A of the Operating Agreement. DEVELOPER agrees, upon receipt of notice from FOLEY'S, to promptly exercise reasonable efforts to enforce the respective operating covenants of SEARS and DILLARD, including the commencement of litigation, if necessary, using attorneys reasonably acceptable to FOLEY'S. If DEVELOPER fails to enforce the operating covenant of DILLARD, DEVELOPER hereby authorizes FOLEY'S

to take such action at the expense of DEVELOPER as FOLEY'S deems necessary to enforce said operating covenant of DEVELOPER as a condition of DEVELOPER.

15. Occupant Selection. DEVELOPER agrees that no portion of the DEVELOPER Tract shall be leased or used for any commercial office building, new or used automobile dealer, or funeral parlor, and that DEVELOPER shall not, without the prior written consent of FOLEY'S, at any time permit any Occupant of the DEVELOPER Tract to: (i) conduct or authorize any auction, fire, bankruptcy, or going-out-of-business sale within the DEVELOPER Tract (but this shall not restrict the absolute freedom of such Occupant to determine its own selling prices nor shall it preclude the conduct of periodic seasonal, promotional, or clearance sales); (ii) conduct or permit any selling activities on the DEVELOPER Tract outside the Buildings thereon, except activities sponsored by the Merchants' Association; or (iii) use or permit the use of any portion of the DEVELOPER Tract for clearly objectionable uses, including, for purposes of illustration, establishments selling or exhibiting pornographic materials. DEVELOPER further agrees that no portion of the DEVELOPER Tract shall be leased or used for any hotel or motor inn, except the portion thereof designated "Future Parking" on the Plot Plan, "EXHIBIT B"; and FOLEY'S agrees that, notwithstanding the provisions of Paragraph 6.1(4) of the Operating Agreement, it shall not unreasonably withhold consent to the construction of a hotel or motor inn in such Future Parking area so long as there is located within such Future Parking area at least 1 Parking Space for each hotel room in any such hotel or motor inn plus at least 5.5 Parking Spaces for each 1,000 square feet of Floor Area in such hotel or motor inn devoted to retail, restaurant, or other auxiliary uses. FOLEY'S further agrees not to unreasonably withhold consent to the construction of a retail department store in such Future Parking area so long as such construction will not reduce the amount of parking in the Shopping Center below the applicable parking index specified in the Operating Agreement. DEVELOPER further agrees that it will not lease or otherwise consent to the occupancy of any Floor Area in the DEVELOPER Building located within 150 lineal feet from the entrance from the FOLEY'S Building to the Enclosed Mall for use as an amusement center, pet shop, laundry or dry cleaning service, theatre, supermarket, cafeteria, or restaurant selling prepared food for on or off premises consumption. Since

damages for violation of the provisions of this Section would be difficult to ascertain and, in any event, would not afford an adequate remedy. Such provisions shall be enforceable by injunction.

16. No Arbitration. Notwithstanding the provisions of Article 35 of the Operating Agreement, disputes between FOLEY'S and DEVELOPER shall not be submitted to arbitration without in each case the prior written consent of both FOLEY'S and DEVELOPER.

17. DEVELOPER Warranties. DEVELOPER warrants and represents to FOLEY'S that there are no leases or other agreements concerning all or any part of the Shopping Center which would restrict the use of the FOLEY'S Tract for the construction and operation of the FOLEY'S Improvements or which would interfere with the right of FOLEY'S to use the Common Area on the Shopping Center Tract as contemplated by the Operating Agreement and this Agreement. DEVELOPER agrees to indemnify and hold FOLEY'S harmless from any and all claims, liability, loss, cost or expense arising out of any breach of the foregoing warranties and representations.

18. Pre-Construction Obligations. Notwithstanding any contrary provisions of the Operating Agreement or this Agreement, commencing on the date of this Agreement and continuing until the date FOLEY'S commences excavation for the footings and foundations of the FOLEY'S Building, DEVELOPER shall, at its sole expense, perform all duties and obligations of FOLEY'S arising under the Operating Agreement, including, without limitation, all maintenance obligations under Articles 19 and 22 of the Operating Agreement and all insurance obligations under Article 21 of the Operating Agreement. DEVELOPER shall indemnify and hold FOLEY'S harmless from any and all claims, liability, loss, cost or expense, including, without limitation, reasonable fees of attorneys, arising out of any failure of DEVELOPER to perform such obligations.

If, prior to the date FOLEY'S commences excavation as aforesaid, a portion of the FOLEY'S Tract is taken for any public or quasi-public use under any governmental law, ordinance or regulation, or by right of eminent domain, or by private purchase in lieu thereof, and the Operating Agreement is not terminated with respect to the FOLEY'S Tract, then upon request by FOLEY'S, DEVELOPER shall convey to FOLEY'S such portion of the DEVELOPER Tract adjoining the FOLEY'S Tract as is necessary to provide, at ground level, the number of parking spaces required on the FOLEY'S Tract by the Operating Agreement. Upon such conveyance the parties hereto shall cause the Operating Agreement to be

amended to exclude the property conveyed from the DEVELOPER Tract and to include such property in the FOLEY'S Tract. Also upon such conveyance, FOLEY'S shall assign to DEVELOPER the condemnation award payable to FOLEY'S by reason of condemnation of such portion of the FOLEY'S Tract, less an amount necessary to alter the roadways and other Improvements on the FOLEY'S Tract on account of such condemnation.

19. Headings. The Section headings herein are for convenience and reference only and in no way define or limit the scope and content of this Agreement or in any way affect its provisions.

20. Term. This Agreement shall terminate upon the termination of the Operating Agreement as to the FOLEY'S Tract.

21. Successors and Assigns. This Agreement shall bind and inure to the benefit of the parties hereto and their respective successors and assigns.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

ATTEST:

Stem S. Bevell
Assistant Secretary

CBL & ASSOCIATES, INC.

By John A. Day
Vice President

ATTEST:

Richard R. Reynolds
Assistant Secretary

FEDERATED DEPARTMENT STORES, INC.

By James B. Selovick
Senior Vice President

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Brandy Cooke on behalf of Nicholas Fusco
Bar No. 24093461
cooke@rodgersmiller.com
Envelope ID: 81079048
Filing Code Description: Petition
Filing Description: & SUIT FOR DECLARATORY RELIEF
Status as of 10/30/2023 9:43 AM CST

Associated Case Party: CBL & Associates

Name	BarNumber	Email	TimestampSubmitted	Status
Brandy Cooke		cooke@rodgersmiller.com	10/29/2023 9:48:11 PM	SENT