

ATTORNEY GENERAL OF THE STATE OF NEW YORK
ANTITRUST BUREAU

In the Matter of

Assurance
No. 17-154

**Investigation by ERIC T. SCHNEIDERMAN,
Attorney General of the State of New York, of**

Simon Property Group, Inc.,

Respondent.

ASSURANCE OF DISCONTINUANCE

The Office of the Attorney General of the State of New York (“OAG”) commenced an investigation pursuant to Section 343 of the New York General Business Law, Section 63(12) of the New York Executive Law and Sections 1 and 2 of the Sherman Act concerning potentially anticompetitive conduct by Simon Property Group (“SPG”) in connection with radius provisions¹ in leases with Retailers² at the outlet centers known as Woodbury Common Premium Outlet (“Woodbury”) and The Mills at Jersey Gardens (“Jersey Gardens”). The OAG investigation focused on the possible anticompetitive effects of SPG’s radius provisions on consumers and businesses in New York State. As part of its investigation, the OAG, among other things, obtained testimony from numerous market participants including real estate developers and Retailers, gathered and analyzed relevant market data, consulted industry and economic experts, and reviewed documents and information produced by SPG.

¹ The term radius provision, as used herein, is intended to describe a lease provision of any kind (including but not limited to a prohibition, financial penalty, forfeiture or other charge) that prevents, or increases a tenant’s cost of, operating an additional retail location within a prescribed distance from the tenant’s location subject to the lease.

² Retailers are tenants in shopping centers that sell branded merchandise.

This Assurance of Discontinuance (“AOD” or “Assurance”) contains the findings of the OAG’s investigation and the relief agreed to by the OAG and SPG (collectively “Parties”).

OAG’S FINDINGS

1. The relevant product market is retail space in outlet centers, and the relevant geographic market is the area within one hour’s travel time from New York City (the “NYC Area”). SPG currently holds and, after it acquired Woodbury in 2004 (as a result of its acquisition of Chelsea Property Group), has held, monopoly power in this relevant market.

2. SPG is a publicly traded real estate investment trust based in Indianapolis, Indiana. SPG develops and operates outlet centers throughout the country and is the largest owner of outlet shopping centers in the United States. SPG operates two outlet shopping centers in the NYC Area, Woodbury and Jersey Gardens.

3. Woodbury was originally developed by Chelsea Property Group in 1985. SPG acquired Woodbury in 2004, when it purchased Chelsea Property Group. Woodbury is currently one of the largest and most productive outlet centers in the world.

4. NYC is one of the densest and wealthiest population centers in the world. Retailers operating, or seeking to operate, an outlet store (“Outlet Retailers”) in a NYC Area outlet center have described space in Woodbury as a “must have” to attract consumers traveling from NYC. Woodbury currently has lease agreements with over 200 of the most important Outlet Retailers. Woodbury is approximately 40 miles³ from midtown Manhattan and draws a significant portion of its customer base from NYC residents and international tourists.

5. Jersey Gardens, located in Elizabeth, New Jersey, is not a pure outlet center, but it

³ All references to mileage in this Assurance refer to air miles.

is the only other outlet center in the NYC Area that currently attracts a significant number of consumers traveling from NYC. Jersey Gardens was developed by Glimcher Realty Trust in 1999, and acquired by SPG in January 2015. Jersey Gardens is the largest and most productive outlet center in New Jersey, and is located approximately 12 miles from midtown Manhattan. The center also draws a portion of its customer base from NYC residents and international tourists, but to a smaller degree than Woodbury.

6. Retailer leases at Woodbury are typically for a term of 10 years. The majority of Retailer leases include a radius provision of 60 miles around Woodbury (the “Woodbury 60-Mile Radius”). The Woodbury 60-Mile Radius includes the area between Woodbury and Manhattan, but also extends to the Bronx, Queens, Brooklyn, and Staten Island, as well as parts of Suffolk and Nassau counties.

7. The OAG has concluded that the Woodbury 60-Mile Radius may have prevented a substantial number of Outlet Retailers from opening additional Outlet Stores⁴ in the NYC Area. The OAG has also concluded that the Woodbury 60-Mile Radius is likely to (a) prevent other outlet developers from obtaining the necessary quantity and variety of Outlet Retailers to open a competing outlet center in the NYC Area; and (b) prevent existing outlet centers and hybrid centers from obtaining the necessary outlet tenants to successfully compete with Woodbury.

8. The OAG finds that continuation of the Woodbury 60-Mile Radius is likely not justified by efficiencies or legitimate business considerations. The OAG finds that under current market conditions, the Woodbury 60-Mile Radius is likely broader than necessary to achieve any legitimate procompetitive benefits.

⁴ Outlet Store is a store that predominantly offers for sale branded merchandise at less than full price.

9. The OAG additionally finds that continuation of the Woodbury 60-Mile Radius is likely to (a) deny Retailers the benefits of competition among outlet centers in the NYC Area, (b) deprive NYC Area consumers from access to high-quality outlet centers within a short subway ride, ferry, or walk, and (c) prevent local communities in the NYC Area from obtaining additional tax revenue, jobs, and infrastructure investment that an additional outlet center would likely provide.

10. When SPG acquired Jersey Gardens in 2015, it acquired another set of outlet tenant leases that also contain radius provisions. The OAG finds that the radius provisions in Jersey Gardens leases also have the potential to limit the ability of Outlet Retailers to operate or open Outlet Stores in any non-SPG development in the New York City Area.

11. Continuation of the Woodbury 60-Mile Radius therefore is likely to have the effect of maintaining and enhancing SPG's monopoly power in the NYC Area where its market position could otherwise be threatened by new entrants. The OAG finds that continuation of the Woodbury 60-Mile Radius would likely maintain and enhance a monopoly position and unreasonably restrain competition in violation of Executive Law § 63(12), the Donnelly Act, Gen. Bus. Law § 340 *et. seq.*, and the Sherman Act, §§ 1, 2 (15 U.S.C. §§ 1, 2).

12. SPG neither admits nor denies OAG's Findings 1-11 above.

13. The OAG finds the relief and agreements contained in this Assurance appropriate and in the public interest. THEREFORE, the OAG is willing to accept this Assurance pursuant to Executive Law § 63(15), in lieu of commencing a statutory proceeding for violations of Executive Law § 63(12), the Donnelly Act, Gen. Bus. Law § 340 *et. seq.*, and the Sherman Act, §§ 1, 2 (15 U.S.C. §§ 1, 2), based on the conduct described above.

IT IS HEREBY UNDERSTOOD AND AGREED, by and between the Parties:

RELIEF

14. Following the date of this Assurance, SPG will comply with the following provisions:
- a. The Relevant Area is (1) more than 39 miles from Woodbury within the State of New York and (2) Bronx County, with the following exceptions: (a) Community Districts 8 & 12 in the Bronx, and (b) Manhattan. For avoidance of doubt, the Relevant Area is the area depicted in Exhibit A. The Relevant Area is only applicable for radius provisions that relate to Outlet Stores.
 - b. SPG will immediately waive, and within 45 business days from the date of this AOD, unilaterally, and unconditionally, amend its radius provisions in all current leases with Retailers at Woodbury and Jersey Gardens to exclude the Relevant Area from coverage. The amendment will be effective for the full term (including any renewal options arising during the term of the AOD) of the applicable existing lease agreements at Woodbury and Jersey Gardens.
 - c. SPG will exclude the Relevant Area from all radius provisions in new leases with Retailers at Woodbury and Jersey Gardens for the full term (including any renewal options arising during the term of the AOD) of the lease.
 - d. For any Simon Owned or Controlled Property⁵ (today or in the future) other than Woodbury or Jersey Gardens, SPG will exclude the Relevant Area from radius

⁵ Simon Owned or Controlled Property, as used herein, includes either (1) greater than 50% ownership, or (2) control over the leasing for retail space.

provisions in all new leases with Retailers for the full term (including any renewal options arising during the term of the AOD) of the lease, with the following exceptions: (i) for any property that SPG acquires, or assumes control of, after the date of this AOD, SPG need not amend the leases that exist at the time of the acquisition or assumption of control; (ii) for properties with a current lease and radius provisions as of June 1, 2017, SPG may continue to enforce the existing radius provision and may continue to include such radius provision in any leases at that property; and (iii) if SPG develops a new full-price mall located in the Relevant Area after the date of this AOD, SPG may adopt radius provisions within the Relevant Area provided that the radius provisions with respect to Outlet Stores, for a particular Retailer, are no greater than those that apply to full-price stores for that Retailer in that mall.

- e. After 45 business days from the date of this AOD, a temporary “waiver” of a radius provision that is not permitted by this AOD does not satisfy provisions 14b-14d. It is also not permissible for SPG to (1) unilaterally change a radius provision after the termination of the AOD where there is an existing lease; or (2) at any time before the termination of the AOD, agree with a Retailer to a future radius provision if the radius provision is not currently permissible under the AOD. For the avoidance of doubt, after the termination of the AOD, SPG is permitted to renegotiate the terms of any lease then in effect with any Retailer.
- f. SPG shall not shorten the customary duration of new lease agreements as a means of avoiding the intended effect of this AOD, but may enter into any lease term that

is consistent with prevailing terms at the time of execution of the lease, taking into account the nature and use of the tenant and the size of the leased premises. For the avoidance of doubt, a lease term of five years or more is presumptively customary for purposes of this AOD, but a lease term shorter than five years is not a violation of the AOD if it is consistent with prevailing terms at the time of the execution of the lease agreement, taking into account the nature and use of the tenant and the size of leased premises.

- g. To the extent that SPG does not control the leasing for retail space of a center, but has greater than 25% ownership of the property, it must not be involved in any discussions, negotiations, or decisions regarding radius provisions that relate to that property with any other party, including, but not limited to, (i) joint-venture partners, or (ii) Retailers.

15. SPG shall not enter into, implement, continue, or enforce (or attempt to do any of the foregoing), any condition, agreement, contract, contract term or understanding that has the purpose of limiting or restricting the ability of a Retailer to open an Outlet Store in the Relevant Area. For example, the following is a violation of the AOD:

- a. Conditioning the availability of a material benefit or other item of significant pecuniary value in a leasehold on a Retailer's agreement not to open an Outlet Store in the Relevant Area; and
- b. Charging a Retailer material additional rent, other material fees or material penalties that are payable if said retailer opens, or intends to open, an Outlet Store in the Relevant Area.

Provided, however, that nothing in this paragraph 15 is intended to restrict SPG's ability to (i) compete on the merits to obtain and retain Retailers at any SPG Owned or Controlled Property, (ii) act in good faith to meet or exceed offers from competing developers, managers, owners or other landlords, and (iii) offer to, and provide, Retailers with a leasehold in more than one SPG Owned or Controlled Property, in each of cases (i)–(iii), so long as such actions are not inconsistent with this AOD.

16. SPG shall not penalize or otherwise retaliate against a Retailer because the Retailer commits to open, or opens, an Outlet Store in the Relevant Area. The following are examples of violations of the AOD:

- a. Terminating or suspending any validly existing lease or other agreement with the Retailer because the Retailer intends to open, or opens, an Outlet Store in the Relevant Area;
- b. Requiring terms and conditions in a leasehold that are different than otherwise would have been the case because the Retailer intends to open, or opens, an outlet store in the Relevant Area; and
- c. Withholding any service that is generally made available to similarly situated Retailers because the Retailer intends to open, or opens, an Outlet Store in the Relevant Area.

SPG also shall not retaliate against, or punish any Retailer for furnishing information to the Monitor or OAG concerning SPG's compliance with this Assurance.

Provided, however, that nothing in this paragraph 16 shall: (i) create or be deemed to create or establish any additional contractual or property interest or property right for a Retailer, (ii) alter

SPG's rights and remedies under the applicable lease or as permitted by applicable law, rule, regulation or order, (iii) require SPG to enter into a new lease or renewal or extension with a Retailer at the expiration or earlier termination of any lease term, or (iv) prevent SPG from exercising its own business judgment on whether and how to pursue, develop, expand, or compete at its Simon Owned or Controlled Property, so long as SPG does not act in a manner inconsistent with this AOD.

17. For the avoidance of doubt, it shall not, in and of itself, constitute a violation of this AOD for SPG to offer particular terms, or refuse to offer particular terms, to a Retailer, where there are objective and verifiable business reasons for such offer or refusal other than the fact that the Retailer has opened, or intends to open, an Outlet Store in the Relevant Area.

18. To the extent that SPG makes an extraordinary investment in the leasehold of a particular outlet Retailer, SPG may bargain in such cases for a radius provision that exceeds the geographic scope otherwise permitted by this AOD if the following conditions are met: (a) Retailers covered by this exception must also have an aggregate total no greater than 50,000 square feet of gross leasable area at Woodbury at any time; (b) the investment is more than \$1,000,000, and is not made generally available to all Retailers; (c) the agreement must be in writing, include the terms of the investment and new radius provision, and be provided to the Monitor within 5 days of the full execution of the lease.

19. Within 30 days of execution of this Assurance, SPG shall (i) provide all current outlet Retailers at Woodbury and Jersey Gardens with a copy of this Assurance and the notice attached hereto as Exhibit B, and incorporated herein by reference, and (ii) until the expiration or termination of this Assurance, SPG will provide any prospective new Retailer at Woodbury and

Jersey Gardens with a copy of this Assurance and the same notice prior to the execution of the lease by such new Retailer.

20. Within 45 business days of execution of this Assurance, SPG shall comply with all of the provisions of this Assurance.

21. Subject to approval by the OAG, the Monitor shall be selected and appointed by SPG. SPG shall select the Monitor within 10 days of execution of this Assurance, and appoint the Monitor within 30 days of execution of this Assurance. The Monitor shall serve at the cost and expense of SPG pursuant to a written agreement between SPG and the OAG. The compensation of the Monitor shall be on reasonable and customary terms commensurate with the individual's experience and responsibilities. SPG shall use its reasonable best efforts to assist the Monitor in monitoring SPG's compliance with its obligations under the AOD. The Monitor shall have full and complete access to the personnel, books, records, and facilities required to monitor compliance with the AOD. The Monitor must agree to maintain confidentiality of SPG's competitively sensitive commercial information, and to share it only with the OAG. The Monitor shall serve until the date this AOD terminates, or such earlier date as the OAG may determine. The Monitor shall provide periodic written reports to the OAG at least annually, or more frequently as required by the OAG, that are sufficient to provide the OAG with timely information regarding SPG's compliance with its obligations under the AOD. The Monitor shall provide copies of these reports to SPG. To the extent that such reports contain information that is trade secret or competitively sensitive, the OAG will not make such information public consistent with New York Freedom of Information Act and New York Public Officers Law § 87(2), to the extent permitted by law. Should it become necessary for any successor to the

Monitor to be selected, such person (“Successor Monitor”) shall be appointed by SPG within a reasonable time, subject to approval by the OAG, and the provisions in this paragraph 21 shall be fully applicable to any Successor Monitor.

22. SPG shall provide to the OAG copies of all lease amendments made pursuant to this AOD within 60 days of execution of this Assurance and will do so for all new leases signed during the term of this Assurance within 60 days.

23. On each of the anniversary dates from the date of execution of this Assurance, SPG shall certify to the OAG, in writing, that SPG has complied with this Assurance.

24. This Assurance will terminate, without any further action by the Parties, 10 years from the last date signed by the Parties, unless terminated earlier by the mutual agreement of the Parties.

25. Within 5 business days, SPG agrees that it will pay by wire transfer, payable to the State of New York, a monetary payment of \$945,000.

26. Any payments and all correspondence related to this Assurance must reference Assurance # 17-154.

MISCELLANEOUS

Subsequent Proceedings.

27. In any subsequent investigation, civil action, or proceeding by the OAG to enforce this Assurance, for violations of the Assurance, or if the Assurance is voided pursuant to paragraph 29, the Respondent expressly agrees and acknowledges:

- a. that any statute of limitations or other time-related defenses are tolled from and after the effective date of this Assurance;
- b. that the OAG may use statements, documents or other materials produced or provided by the Respondent prior to or after the effective date of this Assurance;
- c. that any civil action or proceeding must be adjudicated by the courts of the State of New York, and that Respondent irrevocably and unconditionally waives any objection based upon personal jurisdiction, inconvenient forum, or venue.

28. If a court of competent jurisdiction determines that the Respondent has violated the Assurance, the Respondent shall pay to OAG the reasonable cost, if any, of obtaining such determination and of enforcing this Assurance, including without limitation legal fees, expenses, and court costs.

Representations and Warranties:

29. The OAG has agreed to the terms of this Assurance based on, among other things, the representations made to OAG by the Respondent and their counsel and OAG's own factual investigation as set forth in Findings 1-11 above. The Respondent represents and warrants that neither it nor its counsel has made any material representations to the OAG that are inaccurate or

misleading. If any material representations by Respondent or its counsel are later found to be inaccurate or misleading, this Assurance is voidable by the OAG in its sole discretion.

30. No representation, inducement, promise, understanding, condition, or warranty not set forth in this Assurance has been made to or relied upon by the Respondent in agreeing to this Assurance.

31. The Respondent represents and warrants, through the signatures below, that the terms and conditions of this Assurance are duly approved, and execution of this Assurance is duly authorized.

Effects of Assurance:

32. Nothing contained herein shall be construed as to deprive any person of any private right under the law.

33. Any failure by the Attorney General to insist upon the strict performance by Respondent of any of the provisions of this Assurance shall not be deemed a waiver of any of the provisions hereof, and the Attorney General, notwithstanding that failure, shall have the right thereafter to insist upon the strict performance of any and all of the provisions of this Assurance to be performed by the Respondent.

34. All terms and conditions of this Assurance shall continue in full force and effect on any successor, assignee, or transferee of the Respondent. Respondent shall cause this Assurance to be adopted in any such transfer agreement. No party may assign, delegate, or otherwise transfer any of its rights or obligations under this Assurance without the prior written consent of OAG.

Communications:

35. All notices, reports, requests, and other communications pursuant to this Assurance must reference Assurance No. 17-154, and shall be in writing and shall, unless expressly provided otherwise herein, be given by hand delivery; express courier; or electronic mail at an address designated in writing by the recipient, followed by postage prepaid mail, and shall be addressed as follows:

If to SPG, to: Simon Property Group, Inc.
225 West Washington Street
Indianapolis, IN 46204
ATTN: General Counsel

If to the OAG, to: Chief, Antitrust Bureau
New York State Office of Attorney General
120 Broadway, 26th Floor
New York, NY 10271

General Principles:

36. Nothing in this Agreement shall relieve Respondent of other obligations imposed by any applicable state or federal law or regulation or other applicable law.

37. Acceptance of this Assurance by OAG is not an approval or endorsement by OAG of any of SPG's practices or procedures, and SPG shall make no representation to the contrary.

38. Nothing contained herein shall be construed to limit the remedies available to the OAG in the event that the Respondent violates the Assurance after its effective date.

39. To the extent not already provided under this Assurance, SPG shall, upon request by OAG, provide all documentation and information necessary for OAG to verify or effectuate compliance with this Assurance.

40. Respondent expressly agrees and acknowledges that a default in the performance

of any obligation under this paragraph is a violation of the Assurance, and that the OAG thereafter may commence the civil action or proceeding contemplated in paragraph 13, *supra*, in addition to any other appropriate investigation, action, or proceeding, and that evidence that the Assurance has been violated shall constitute prima facie proof of the statutory violations described in paragraph 13, pursuant to Executive Law § 63(15).

41. This Assurance may not be amended except by an instrument in writing signed on behalf of the Parties to this Assurance.

42. In the event that any one or more of the provisions contained in this Assurance shall for any reason be held by a court of competent jurisdiction to be invalid, illegal, or unenforceable in any respect, in the sole discretion of the OAG, such invalidity, illegality, or unenforceability shall not affect any other provision of this Assurance.

43. SPG acknowledges that they have entered this Assurance freely and voluntarily and upon due deliberation with the advice of counsel.

44. This Assurance shall be governed by the laws of the State of New York without regard to any conflict of laws principles.


45. The Assurance and all its terms shall be construed as if mutually drafted with no presumption of any type against any party that may be found to have been the drafter.

46. This Assurance may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same agreement.

47. The effective date of this Assurance shall be August 21, 2017.

IN WITNESS WHEREOF, this Assurance is executed by the Parties on August 21, 2017

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
120 Broadway
New York, NY 10271


By: 

Bryan L. Bloom, Esq.
Assistant Attorney General

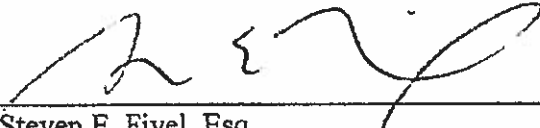
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Chief, Antitrust Bureau

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Executive Deputy Attorney General for Economic Justice

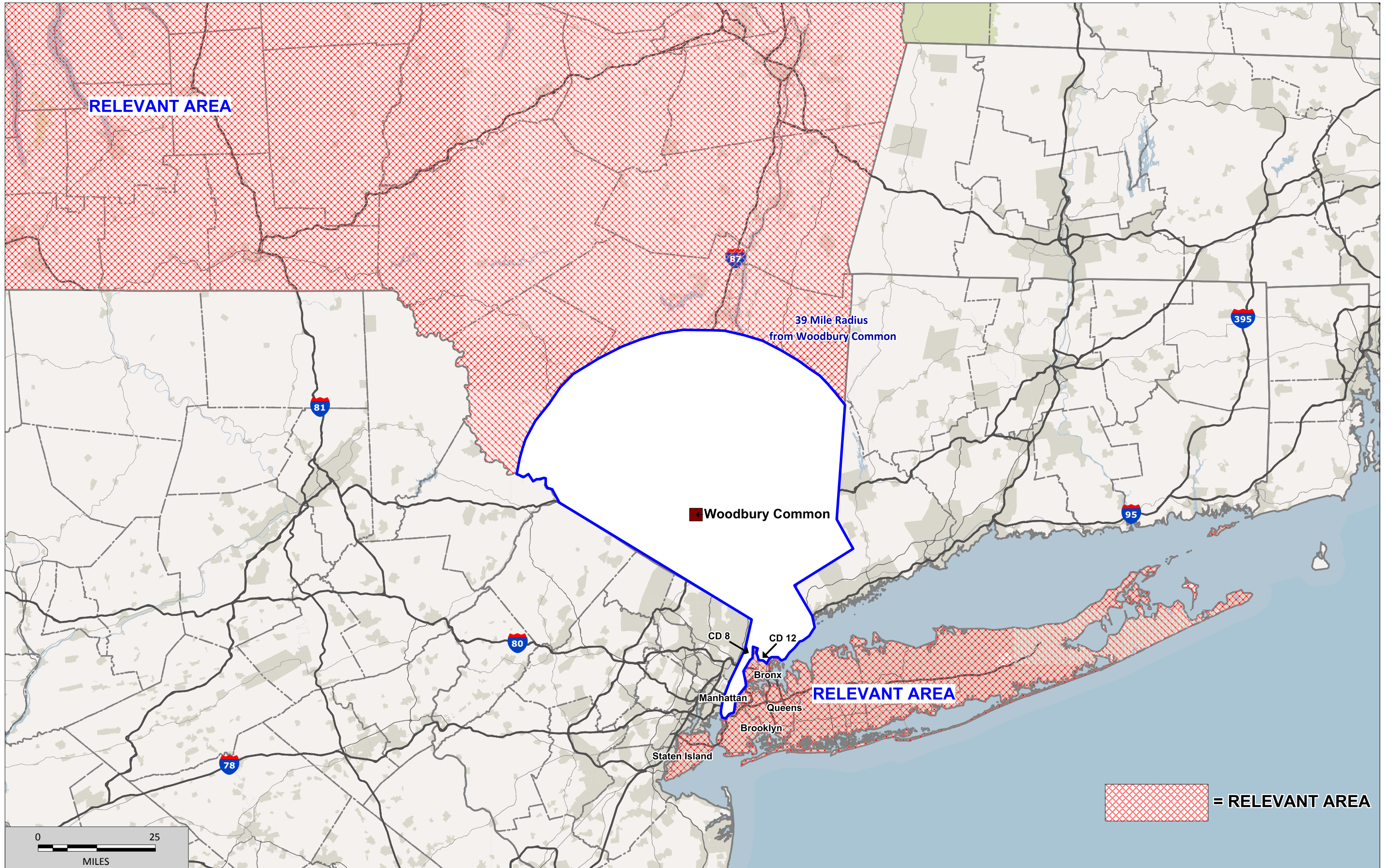
By: 

Ilene Knable Gotts, Esq.
Wachtell, Lipton, Rosen & Katz
Counsel for SPG
51 West 52nd Street
New York, NY 10019

By: 

Steven E. Fivel, Esq.
Representative for SPG

EXHIBIT A



RELEVANT AREA

39 Mile Radius
from Woodbury Common

Woodbury Common

CD 8

CD 12

Bronx

Manhattan

Queens

Brooklyn

Staten Island

RELEVANT AREA

 = RELEVANT AREA

0 25
MILES

EXHIBIT B

TO: TENANTS AT [WOODBURY COMMON] OR [JERSEY GARDENS]:

We hereby notify you on behalf of [Landlord entity name], an affiliate of Simon Property Group (“SPG”) of the enclosed Assurance of Discontinuance (“AOD”) entered into between the Office of the Attorney General of the State of New York and SPG dated August 21, 2017. Pursuant to the terms of the AOD, and as set forth in greater detail in paragraph 14 of the AOD, [Landlord entity name] is immediately waiving, and within 45 days of the date of the AOD, will unilaterally, and unconditionally, amend the radius provision in your lease at [Woodbury Common] or [Jersey Gardens] to exclude from coverage an area defined as the Relevant Area. The Relevant Area is (1) more than 39 miles from Woodbury within the State of New York and (2) Bronx County, with the following exceptions: (a) Community Districts 8 & 12 in the Bronx, and (b) Manhattan. For avoidance of doubt, the Relevant Area is the area depicted in Exhibit A to the AOD.

The time period and extent of such waiver and amendment are only as set forth in the AOD. This notice does not affect any other provisions in your lease(s) or any other obligations you may have under such lease(s) and/or any applicable laws.

DATED: _____, 2017

By: Woodbury entity

JG entity

Simon Property Group
