

Wednesday, November 3, 2021
2:00 - 3:15 pm

Peer to Peer 1

**EVERYONE WANTS TO RULE THE WORLD:
QUEST FOR CONTROL IN SUPERMARKET LEASING**

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DESCRIPTION OF SESSION

Using hypothetical scenarios, we will consider the challenges of revitalizing a shopping center. We will discuss changes of tenant mix and uses and identify the concerns of both developers and tenants when an overhaul is being proposed.

FACT PATTERN 1

The United Plaza has been a successful neighborhood shopping center for the past 60 years. It has been anchored by retailers including Sports Mastery, Roebucks and All for Babies each of which occupied over 40,000 square feet of space. The changing landscape of retail as well as the COVID-19 pandemic has unfortunately forced these players into bankruptcy and the owners of United Plaza, Orz & Smith LLC, have been forced to invest significant capital to redevelop the Shopping Center.

A grocery store, Not Your Typical Market, is new to this market and is willing to take 50,000 square feet of space. In addition, a general merchandise store, All That and More, is willing to take 75,000 square feet of space within the Shopping Center. The letters of intent are complete and the parties are ready to go to lease. Orz & Smith LLC has decided to negotiate the lease with Not Your Typical Market first and then with All That and More.

PART 1

Not Your Typical Market has negotiated a very broad use clause which will permit them to sell groceries, alcohol, and pet food, as well as non-food items. In addition, they want a broad exclusive. This is the first lease that Orz & Smith LLC is entering into at this Shopping Center. They want to be cautious so that they will not impair their ability to lease to All That and More, but Orz & Smith LLC also knows that all new leasing efforts will be challenging and they want to maintain maximum flexibility in its negotiations with Not Your Typical Market.

Proposed Use Clause For Not Your Typical Market: Tenant shall initially open for business in the Premises as a Not Your Typical Market, and may thereafter use the Premises for the purpose of conducting thereon, a retail grocery store selling all types of alcoholic beverages, including beer, wine and liquor for off-premises consumption; nonalcoholic beverages, including, but not limited to, fresh juices, hot packed juices, sodas, waters, coffee and tea; groceries, including specialty foods, spices, sauces, dried fruit, nuts, fish, bakery products, meat and produce; delicatessen; fresh cut flowers and plants; vitamins and supplements; homeopathy products; health and beauty aids; prepared take home meals; housewares, kitchen gadgets and supplies; gift baskets; greeting cards; and pet food and supplies and other items compatible with the items offered for sale (or rental) in a majority of other Not Your Typical Market grocery stores operated by Tenant now or in the future, not in conflict with any exclusives or restricted uses set forth on Exhibit F attached to the Lease. Landlord shall not grant any other tenant or occupant of the Project an exclusive right or use restriction that would restrict Tenant's use of the Premises for the uses set forth above.

Proposed Not Your Typical Market Exclusive Use Provision: During the Term including all renewal terms, Tenant shall have the exclusive right within the Shopping Center, the Outparcels, and the Adjacent Property either directly or indirectly via remote distribution (e.g., ordering, processing, or delivery by internet, mail order, etc.), to:

- A. Engage in the retail sale of groceries.
- B. Operate a grocery supermarket, bakery and delicatessen.
- C. Sell or distribute drugs or other products which are required by law to be dispensed by a licensed pharmacist (or similar health care practitioner authorized by law), even though such pharmacist or health care practitioner may not be required to be present for delivery of such products.
- D. Engage in retail sales of items of food for “off-premises” consumption.
- E. Engage in retail sales of beer and wine for “off-premises” consumption.
- F. Engage in retail sales of distilled spirits and other alcoholic beverages for “off-premises” consumption (i.e. a liquor store).
- G. Engage in the sale of other products typically offered for sale in a grocery supermarket.

Notwithstanding the foregoing, the following shall not be prohibited by Tenant’s Exclusive Use:

- (a) a sit down restaurant offering prepared ready-to-eat food items for consumption either on or off the premises;
- (b) a “quick serve” or “fast casual” restaurant, serving prepared ready to eat food items for consumption on or off the premises (such as McDonald’s, Wendy’s, Chick-fil-A or Burger King);
- (c) an ice cream parlor or frozen yogurt store, franchise doughnut shop (equivalent to a Dunkin’ or Krispy Kreme operation), bagel shop, coffee shop, candy store, or a pickup or delivery outlet (such as pizza or Chinese delivery), all of which may offer the sale of food items for consumption on or off the premises.

QUESTIONS:

- 1. How can use clause for Not Your Typical Market be updated to reflect additional uses inspired by the recent pandemic?
- 2. What red flags are immediately noticeable with respect to Not Your Typical Market’s exclusive?
- 3. What can Orz & Smith do to limit Not Your Typical Market’s exclusive?
- 4. As the Grocery Store, what are you most concerned about with respect to competition?
- 5. Create a list of at least of 5-10 specific carveouts to the exclusive language. First, rank them in order of importance if you are Orz & Smith LLC. Next, identify objections that Not Your Typical Market may have to these carveouts.

PART 2

Not Your Typical Market will also want several rights in the common areas, including the right to have exclusive parking spaces for its customers to pick up merchandise, the ability to display merchandise in the sidewalk areas, to install cart corrals and electric vehicle charging stations and to hold farmer’s markets or other promotional events. While Not Your Typical Market is negotiating for these rights, their lease prohibits other tenants from having similar rights. All That and More is asking for similar rights to use the common areas. In addition, Orz & Smith LLC knows that most tenants are going to be looking for rights to have short- term parking, outdoor seating and sidewalk sales.

Beyond these operational restrictions, Not Your Typical Market is seeking (1) a no build area which would prohibit future structures anywhere in the common areas which are located outside of the existing building footprints; (2) to limit the height of all buildings in the Shopping Center (including any future outparcels); and (3) to freeze the site plan to restrict any modifications to the parking areas, drive aisles or other common areas.

1. What are some of the reasons that Not Your Typical Market wants to control the operations of the Common Areas are used?
2. What are some of the reasons Orz & Smith LLC is concerned about granting these rights to Not Your Typical Market?
3. What flexibilities could Orz & Smith LLC propose in order to grant some of these operational restrictions to Not Your Typical Market, while keeping the flexibility it needs to enter into new leases both now and in the future?
4. Discuss the pitfalls and benefits of a no build area and freezing the site plan.
5. What are some compromises that can be reached?