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Peer to Peer 5

**THE EVOLUTION OF EXCLUSIVE AND PROHIBITED USES
IN A CHANGING RETAIL LANDSCAPE**

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by:

Nicholas Dierman
West Coast Divisional Counsel
Federal Realty Investment Trust
830 S. Pacific Coast Hwy., Ste 204
El Segundo, CA 90245
ndierman@federalrealty.com

Margaret Petersen
Principal
Petersen Law PLLC
2603 Geddes Avenue
Ann Arbor, MI 48104
margaret@petersenlawpllc.com

I. DESCRIPTION OF SESSION:

The retail landscape of 2021 is remarkably different from the once-familiar world of enclosed shopping malls and big-box centers that dominated the 1980s and 1990s. Bookstores are rare and video and record stores even rarer; fashion retailers are fewer and the traditional department store anchor is endangered – yet we are often still drafting new leases and shopping center REAs (and the like) with prohibited and exclusive use language and restrictions that have changed little, if at all, in decades.

In this peer-to-peer session, we will look at:

- Prohibited uses – does the standard roster of “non-retail no-nos” still apply? Medical, educational and office uses are now common even in upscale shopping centers; should traditional retailers still care – and why? In 2021, marijuana is a booming business and its federal legalization seems like an inevitability – so why do prohibited use clauses still treat marijuana uses as obnoxious? Should they?
- Exclusive uses – as retailers learn to adapt to rapidly shifting conditions, they’ve shaken up their merchandising and evolved what they sell. Meanwhile, new and exciting concepts in retail such as food halls, apparel “showrooms” without inventory, and micro-fitness boutiques don’t quite fit into traditional exclusive use paradigms. What should tenants be looking out for as they draft new exclusive use clauses, and what should landlords insist be carved out?

The Session will primarily involve break out groups discussions of the three Fact Patterns that are included at the end of these materials. Also included are:

- Basic “primer” information about shopping center “prohibited uses” and “exclusive uses”; and
- Examples of starting point use restriction provisions (prohibited and exclusive examples) with “back and forth” negotiation mark ups.

II. USE RESTRICTIONS: PROHIBITED USES AND USE EXCLUSIVES:

A. Prohibited Uses:

Shopping centers are often subject to private limitations on permitted uses in the center; these can be in the form of recorded declarations, reciprocal easements, and deed restrictions, and in recorded or unrecorded leases. One category of use restrictions is prohibited or restricted use provisions, which typically take the form of a laundry list (see the examples in the following Section). Such clauses call out “obnoxious” (some say “noxious”) uses that shopping centers and their tenants wish to prohibit, and the various prohibited uses may be prohibited throughout the entire shopping center or within identified areas of a center. Common prohibited uses include restrictions against adult stores/pornography, gas stations, liquor stores, dry cleaners, and auto repair shops. Shopping center owners and tenants also want to promote cross-shopping and customer foot traffic, and so a prohibited use clause might also prohibit the operation of particular businesses within the entire shopping center or within a defined zone within the center. Examples include parking intensive uses (theaters, health clubs, day spas), or non-retail uses that are nevertheless common in shopping centers but which do not necessarily attract customers that can be shared (e.g., realtors/brokerages, financial services, other office and non-retail uses). Customers going to the shopping center to exercise or see a movie take away several hours of parking, and the foregoing uses in general might only patronize a single business within the center, meaning no or minimal promotion of additional retail sales at other shopping center businesses. This does not mean that there is no place in a shopping center for businesses that do not promote cross shopping, it only means that landlords may need to be strategic. Landlords and tenants also need to recognize that a number of traditional “obnoxious” uses have changed over the years (discussed in the next section).

B. Exclusive Uses:

An exclusive use provision grants a tenant the right to operate a specific use exclusively within a shopping center or portion of a shopping center. Large or national/regional retailers that have significant bargaining power prefer exclusive use provisions because the restriction will limit the retailer’s competition within a specific location. For instance, a Target that anchors a shopping center would have the right to prevent the landlord from leasing a nearby space to a Wal-Mart, because Target would want to prevent a direct competitor from setting up shop and encroaching on Target’s market. Like any other restriction on use, exclusive use provisions have their pros and cons. Exclusive use provisions work well for tenants because it gives them a small amount of decision making authority about the company they keep. Landlords will also sometimes agree to exclusive use provisions with a percentage rent lease. If a landlord receives a share of the tenant’s profits, then the ability to restrict competition within the shopping center becomes more desirable to both the landlord and the tenant. Landlords also are more likely to agree to an exclusive use provision if they are hoping to lease to a competitive chain retailer that will serve as an anchor for the shopping center and attract other desirable tenants. Not all retail tenants require or feel that they need exclusive use protection; some retailers view competition as creating a critical mass and attracting customers to the center (examples may include furniture stores, department stores, and some soft goods retailers). Specific drafting concerns and issues as to exclusive uses clauses include:

- Draft a clear and specific description of what products or business constitute the use restriction. An exclusive use restriction should be no broader than legitimate business justifications reasonably require (both as a practical issue and as an unnecessary restraint on trade legal concern).
- If the exclusive use clause protects a “primary” or “principal” use (e.g., “primarily selling hamburgers”), then define “primary” or “principal” as, e.g., a menu that specializes in hamburgers with a limited list of additional food offerings. Carefully consider and draft how to “test” for a primary use.
- Is an “incidental” or “ancillary” use carve out necessary or appropriate? If so, then define the carve out carefully (caveat: do not use “not more than x percent of sales” – how could this be controlled?)

III. HOW A LANDLORD MIGHT REDLINE A STANDARD PROHIBITED USE CLAUSE

As one would expect, starting out of the gate, a form lease for a national retailer is likely to feature a standard list of prohibited uses – the tenant, of course, wants the list to be a catchall for whatever obnoxious use, “parking eater,” or other undesirable operator the tenant would rather not deal with. You’ll not be surprised to learn that the typical landlord form does not contain a prohibited use clause at all—at least insofar as the clause binds the landlord (the landlord may, of course, try to prohibit the *tenant* from engaging in certain uses).

The broadest take is that the landlord does not want to be constrained in its leasing efforts, particularly in the post-retail apocalypse day and age, while the tenant does not want to sign a lease for space in a first-class shopping center only to find that, 5 years later, its cotenants are pawn shops, check cashing stores, and weed dispensaries (none of which have a clientele compatible with tenant's perceived market).

Of course, the landlord does not *want* to lease to obnoxious uses, and the tenant would probably rather have a vital, populated retail center with a popular bowling alley, a medical facility and a small coworking facility than a center with an enormous vacant anchor box.

Herein lies the art of negotiation, and below, we have set forth a few exercises in redlining, where the art of the carveout is king and where innovations in retailing have made clarifications necessary: a prohibition on "massage parlors" was largely intended to prevent a Toys 'R Us from finding The Green Door "massage parlor" opening up next door, but no one in the 1980s envisioned a successful and thoroughly above-board chain of therapeutic massage boutiques would be located in centers nationwide just decades later.

EXAMPLE #1:

The following uses are prohibited during the Term in the Shopping Center:

a nuisance; use causing loud noises or offensive odors (including any business using exterior loud speakers); any use that produces noise and/or vibrations that can be heard and/or felt in the Common Areas and/or the Premises; manufacturing facility; dry cleaner (except facilities for drop off and pick up of clothing cleaned at another location); automobile repair shop or service station or any facility storing or selling gasoline or diesel fuel in or from tanks, excluding (i) stereo service and installation facilities, and (ii) gas stations, in the case of (i) and (ii), any of which are located on one or more outparcels to the Shopping Center (meaning outside the mall "ring road" and adjacent to public streets); used clothing or thrift store (except the sale of bona fide antiques, vintage apparel, or resale of merchandise by establishments such as "Game Stop" or "Once Upon A Child" or "Plato's Closet" commonly found in first class shopping centers shall be permitted so long as same are located more than 100 feet from the Premises) or liquidation outlet; massage parlor except for stores operating under the trade name "Massage Envy" or similar stores, and except in conjunction with a health club (as permitted hereunder) or physical therapy office or as typically found in a first class shopping center, however, in no event shall such facility be located less than 300 feet from the Premises; adult book shop or adult movie house (not including the incidental sale of adult materials in a first class bookstore, game store or other retailer of electronic media and other than adult themed movies shown in a first class movie theatre); mortuary or funeral parlor; coin operated laundry; cocktail lounge, bar or tavern or sale of alcoholic beverages, whether or not packaged, except a martini bar or in conjunction with a restaurant permitted hereunder; night club; place of recreation or hot tub, including, but not limited to, skating rink, carnival, or game arcade (except as part of a permitted health club, gym or exercise facility, and except any recreational activities in a facility like a Dave and Busters, or as incidental to a restaurant or cinema); church; children's recreational, educational or day care facilities (other than for training of employees or customers incidental to another permitted use, and other than a children's play area as a Shopping Center amenity); offices of 2,000 square feet of Floor Area or more, provided, that (1) offices incidental to and within an otherwise permitted use and (2) retail offices, and retail service offices, such as, for example only, financial services, insurance agencies and travel agencies, shall be permitted; schools of any nature (including a beauty school, barber's college, reading room, place of instruction or any other operation serving primarily students or trainees rather than retail customers [other than for training of employees or customers incidental to another permitted use]); health club, cinema or theater located less than 300 feet from the exterior of the customer front entrance into the Premises, excepting the health clubs, cinemas or theaters operating under Existing Leases (as defined in Section 5.3 of the Lease), or their respective successors, assignee, subtenants or licensees.

EXAMPLE #2:

No use shall be permitted in the Shopping Center which is inconsistent with the operation of a first class Shopping Center. Without limiting the generality of the foregoing, the following uses shall not be permitted:

1. Any use which emits an obnoxious odor, noise or sound which can be heard or smelled outside of any Building in the Shopping Center.
2. An operation primarily used as a storage warehouse operation and any assembling, manufacturing, distilling, refining, smelting, agricultural or mining operation; provided, however, the foregoing shall not be deemed to prohibit a customer-facing brewpub or distillery.

3. Any “second hand” store “surplus” store, or pawn shop; provided, however, the foregoing shall not be deemed to prohibit (i) upscale consignment or vintage clothing or furniture shops, such as What Goes Around Comes Around or The RealReal; or (ii) the sale of pre-owned video games, records, videotapes and other media alongside new merchandise.
4. Any mobile home park, trailer court, labor camp, junkyard, or stockyard.
5. Any dumping, disposing, incineration or reduction of garbage; provided, however, that the foregoing shall not prohibit dumpsters, trash receptacles and trash collection in the ordinary course of operations.
6. Any fire sale, bankruptcy sale (unless pursuant to a court order) or auction house operation.
7. Any central laundry, dry cleaning plant or laundromat; provided, however, that the foregoing shall not prohibit (i) dry cleaning storefronts where dry cleaning is performed off-premises, or (ii) laundry facilities within any residential, hotel or office portion of the Shopping Center.
8. Any automobile, truck trailer or recreational vehicle sales, leasing, display or body shop repair operation; provided, however, that the foregoing shall not prohibit automobile showrooms such as Tesla, Rivian or Lucid.
9. Intentionally deleted.
10. Intentionally deleted.
11. Any veterinary hospital or animal raising or boarding facility; provided, however, that any veterinary hospital or boarding components of a larger pet supply store such as Petco or PetSmart shall not be deemed prohibited hereby.
12. Any mortuary or funeral home.
13. Any establishment selling or exhibiting “obscene” material, except that this provision shall not prohibit (i) first-class book stores such as Amazon Books or Barnes & Noble which are not perceived to be, nor hold themselves out as “adult book” stores, but which incidentally sell books, magazines and other periodicals which may contain pornographic materials, so long as such sale is not from any special or segregated section in the store, or (ii) the showing of movies from a movie theater that are “R-rated” or are “non-rated” or “NC-17 rated” (or similar ratings).
14. Any establishment selling or exhibiting drug-related paraphernalia; provided, however, that if marijuana is legalized on a federal level hereafter, Landlord shall be permitted to lease space at the Shopping Center to an upscale cannabis dispensary such as Med Men, Silverpeak, or Serra, or to an upscale edible cannabis shop such as Defonce.
15. Intentionally deleted.
16. Intentionally deleted.
17. Any massage parlor or similar “red light” establishment, provided that bona fide therapeutic massage operators such as Massage Envy or The Now shall not be prohibited hereby.
18. Intentionally deleted.
19. Any flea market (other than upscale flea markets such as Brooklyn Flea or Smorgasburg), amusement or video arcade (except as may be incidental to the operation of a restaurant or movie theater, or except as may be part of an entertainment facility such as a Chuck E. Cheese or a Dave & Buster’s), car wash (except that Landlord shall be permitted to operate a car wash service in the parking areas of the Shopping Center as a customer amenity) or dance hall.

20. Any training or educational facility, including but not limited to: beauty schools, barber colleges, reading rooms, (unless part of a book store), places of instruction or other operations catering primarily to students or trainees rather than to customers; provided, however, tutoring storefronts such as Kumon or Code Ninjas shall not be prohibited hereby.
21. Any gambling facility or operation; including but not limited to; off-track or sports betting parlor; table games such as blackjack or poker; slot machines, video poker/blackjack/keno machines or similar devices; or bingo hall; provided, however, that the foregoing shall not prohibit supermarkets, pharmacies, newsstands, and the like from selling lottery tickets in the ordinary course of business.

IV. HOW A LANDLORD AND A TENANT MIGHT REDLINE AN EXCLUSIVE USE CLAUSE

A properly crafted exclusive use right can be critical to ensure the success of a tenant out of the gate. A landlord slotting in a direct competitor next door to an original tenant could spell disaster for the original tenant, and may well dilute both tenants' gross sales. With the exception of fashion retailers and general merchandisers where a center's leasing team often takes a "the more the merrier" approach – and the retailers thrive on each other's co-tenancy – specialty retailers and restaurants will often demand a covenant of exclusivity from the landlord. Particularly if the landlord is collecting percentage rent, the landlord will generally not want to kneecap its tenant by leasing to a direct competitor.

What exactly constitutes a direct competitor, however, is a subject of much dispute in lease negotiations. Should the lease for a restaurant specializing in sushi serve to prohibit the landlord from leasing space to a teppanyaki joint? What is the threshold for determining whether an item being sold in a store is ancillary or "primary"? Exclusive use clauses may be negotiated down to the most granular level – individual menu items, pieces of merchandise sold, brands offered, even – if a certain mega-online retailer has its way – *manners of selling* merchandise.

ROUND 1: THE ORIGINAL CLAUSE NEGOTIATED IN THE LOI (BY LEASING AGENTS, NOT LAWYERS)

Tenant shall have the exclusive right during the Term to sell, display, or distribute, either singly or in any combination, any items included in any one or more of the following categories of merchandise: (i) cosmetics, (ii) makeup, (iii) skin care products, (iv) hair care products, (v) perfumes and/or (vi) fragrances, except on an incidental basis.

ROUND 2: THE CLAUSE AS DRAFTED BY LANDLORD'S ATTORNEY

Provided Tenant is not in Default, and is operating a business from the Premises in accordance with the Permitted Use, Tenant shall have the exclusive right during the Term to sell, display, or distribute, either singly or in any combination, any items included in any one or more of the following categories of merchandise: (i) cosmetics, (ii) makeup, (iii) skin care products, (iv) hair care products, (v) perfumes and/or (vi) fragrances, except on an incidental basis. As used herein, "incidental basis" means that the sale of (a) cosmetics, (b) makeup, (c) skin care products, (d) hair care products, (e) perfumes and/or fragrances, either singularly or in combination, comprises no more than ten percent (10%) of the Floor Area of such premises. In no event shall an Anchor Store or a Suitable Replacement for an Anchor Store occupying 11,000 square feet of Floor Area or more be deemed to be a Competing Tenant. Further, in no event shall a traditional pharmacy or drugstore, such as Walgreens, CVS, or Rite-Aid, regardless of floor area, be deemed a Competing Business.

ROUND 3: TENANT'S MARKUP OF LANDLORD'S DRAFT

Provided Tenant is not in Default, and is operating a business from the Premises in accordance with the Permitted Use, Tenant shall have the exclusive right during the Term to sell, display, or distribute, either singly or in any combination, any items included in any one or more of the following categories of merchandise: (i) cosmetics, (ii) makeup, (iii) skin care products, (iv) hair care products, (v) perfumes and/or (vi) fragrances, except on an incidental basis. As used herein, "incidental basis" means that the sale of (a) cosmetics, (b) makeup, (c) skin care products, (d) hair care products, (e) perfumes and/or fragrances, either singularly or in combination, comprises no more than ten percent (10%) of the Floor Area of such premises. In no event shall an Anchor Store or a Suitable Replacement for an Anchor Store occupying 11,000 square feet of Floor Area or more be deemed to be a Competing Tenant so long as such Anchor Tenant's primary use is not for the sale of items, services and merchandise of the type in the categories set forth in clauses (i) through (vi) above. Further, in no event shall a traditional pharmacy or drugstore, such as Walgreens, CVS, or Rite-Aid, regardless of floor area, be deemed a

Competing Business so long as any such store dedicates no more than twenty percent (20%) of its Floor Area to the sale of cosmetics (any of the above, a "Permitted Pharmacy").

ROUND 4: LANDLORD'S NEXT REDRAFT

Provided Tenant is not in Default, and is operating a business from the Premises in accordance with the Permitted Use, Tenant shall have the exclusive right during the Term to sell, display, or distribute, either singly or in any combination, any items included in any one or more of the following categories of merchandise: (i) cosmetics, (ii) makeup, (iii) skin care products, (iv) hair care products, (v) perfumes and/or (vi) fragrances, except on an incidental basis. As used herein, "incidental basis" means that the sale of (a) cosmetics, (b) makeup, (c) skin care products, (d) hair care products, (e) perfumes and/or fragrances, either singularly or in combination, comprises no more than ten percent (10%) of the Floor Area of such premises. In no event shall an Anchor Store or a Suitable Replacement for an Anchor Store occupying 11,000 square feet of Floor Area or more be deemed to be a Competing Tenant so long as such Anchor Tenant's primary use is not for the sale of items, services and merchandise of the type in the categories set forth in clauses (i) through (vi) above (it being expressly understood and agreed that Target, T.J. Maxx, Ross and similar retailers are not Competing Tenants). Further, in no event shall a traditional pharmacy or drugstore, such as Walgreens, CVS, or Rite-Aid, regardless of floor area, be deemed a Competing Business so long as any such store dedicates no more than twenty percent (20%) of its Floor Area to the sale of cosmetics (any of the above, a "Permitted Pharmacy"). For avoidance of doubt, the 20% limitation set forth above shall not apply to personal care products that are generic and/or sold under brands that are mass marketed (such as, by way of example only, Colgate toothpaste, Listerine mouthwash, Degree deodorant, Dove soap, Suave shampoo, Tresseme hairspray, Bausch & Lomb eye care products, Coppertone sunscreen and other toiletries of similar quality sold at similar price points) traditionally and routinely sold as of the date hereof by any such pharmacy or drug store in substantially all of its stores in the United States.

ROUND 5: TENANT'S LAST COMMENTS, AND THE FINAL VERSION

Provided Tenant is not in Default, and is operating a business from the Premises in accordance with the Permitted Use, Tenant shall have the exclusive right during the Term to sell, display, or distribute, either singly or in any combination, any items included in any one or more of the following categories of merchandise: (i) cosmetics, (ii) makeup, (iii) skin care products, (iv) hair care products, (v) perfumes and/or (vi) fragrances, except on an incidental basis. As used herein, "incidental basis" means that the sale of (a) cosmetics, (b) makeup, (c) skin care products, (d) hair care products, (e) perfumes and/or fragrances, either singularly or in combination, comprises no more than ten percent (10%) of the Floor Area of such premises. In no event shall an Anchor Store or a Suitable Replacement for an Anchor Store occupying 11,000 square feet of Floor Area or more be deemed to be a Competing Tenant so long as such Anchor Tenant's primary use is not for the sale of items, services and merchandise of the type in the categories set forth in clauses (i) through (vi) above (it being expressly understood and agreed that Target, T.J. Maxx, Ross and similar retailers are not Competing Tenants). Further, in no event shall a traditional pharmacy or drugstore, such as Walgreens, CVS, or Rite-Aid, regardless of floor area, be deemed a Competing Business so long as any such store dedicates no more than twenty percent (20%) of its Floor Area to the sale of cosmetics (any of the above, a "Permitted Pharmacy"). For avoidance of doubt, (i) the 20% limitation set forth above shall not apply to personal care products that are generic and/or sold under brands that are mass marketed (such as, by way of example only, Colgate toothpaste, Listerine mouthwash, Degree deodorant, Dove soap, Suave shampoo, Tresseme hairspray, Bausch & Lomb eye care products, Coppertone sunscreen and other toiletries of similar quality sold at similar price points) traditionally and routinely sold as of the date hereof by any such pharmacy or drug store in substantially all of its stores in the United States and (ii) in no event shall a Shoppers Drug Mart or similar non-traditional drug store be deemed a Permitted Pharmacy hereunder.

V. FACT PATTERNS FOR BREAKOUT GROUPS DISCUSSIONS:

FACT PATTERN 1(A)

Entire Foods Marketplace ("EFM") is an anchor in a thriving outdoor lifestyle center with multiple restaurant concepts. EFM has a broad and restrictive exclusive use clause which prohibits any other retailer at the center from selling groceries, defined as the sale for off-premises consumption of any of the following: fresh produce, fresh meat, fresh poultry, fresh seafood, dairy, cheese, cereals, grains, frozen foods, prepared foods, grocery products, bulk foods, and alcoholic beverages.

At the beginning of the COVID-19 pandemic, the jurisdiction where the center is located shut down all restaurants for onsite dining. One of the restaurants, Acme Restaurant, decided to pivot to a temporary "general store" concept, selling produce, fresh meat and poultry, pantry staples and toilet paper to customers to meet community needs.

The owner of the center, Lifestyle Development Co., has been made aware that Acme is not operating pursuant to the permitted use clause of its lease. Lifestyle's counsel has been tasked with deciding whether to enforce the permitted use clause against Acme.

QUESTIONS FOR FACT PATTERN 1(A):

1. **Would you advise Lifestyle to permit Acme to temporarily operate as a general store, or would you advise Lifestyle to enforce the permitted use clause in Acme's lease?**
2. **If Lifestyle chooses to look the other way, is Lifestyle violating its lease with EFM by permitting Acme to temporarily operate as a general store?**
3. **If you are counsel for EFM, would you invoke the exclusive use clause of EFM's lease with Lifestyle?**
4. **What are some ways that attorneys can draft future leases to permit flexibility for merchandising in temporary situations such as this one?**

FACT PATTERN 1(B)

EFM's parent company, internet giant Nile.com, has been developing new proprietary cashier-less checkout technology and is insisting that all future EFM leases contain the exclusive right to a cashier-less checkout system. Lifestyle wants to do another lease with EFM at a new development, but Nile.com is insistent that the exclusive use clause also operate to prohibit Lifestyle from leasing to any other tenant with cashier-less checkout technology.

QUESTIONS FOR FACT PATTERN 1(B):

1. **Representing Lifestyle, what reasons would you give for pushing back on this exclusive use?**
2. **Representing EFM and Nile.com, what reasons would you give for requiring this exclusive use?**

FACT PATTERN 2

You are negotiating a new lease in a big-box center with a large national off-brand apparel retailer, Schloss Dress Cheaper. Schloss insists on using its own form, which contains a lengthy list of prohibited uses which was first drafted in 1986 and has not been updated since.

Among other uses, Schloss's lease prohibits the Landlord from leasing to: "schools or educational facilities," "flea markets," "veterinary services or dog boarding kennels," "massage parlors," "bowling alleys," "skating rinks," "the sale of motor vehicles," "laundromats or laundry facilities," and "the sale of marijuana, cannabis products or paraphernalia associated with marijuana and cannabis products."

The center has undergone a recent redevelopment and expansion which includes a large common area, a hotel, and an upscale apartment building.

QUESTIONS FOR FACT PATTERN 2:

1. **Assuming you do not strike Schloss's language entirely, what carve-outs would you make to each of the prohibited uses listed above to ensure that the center could adapt to existing and future retail conditions?**
2. **Let's assume the above prohibited uses were not negotiated and a lease was signed. Would you advise the landlord's leasing agent and operations managers to proceed with the following *without* Schloss's consent? And if so, why?**

- a. **A lease with Kumon, Kaplan, Code Ninjas or a similar tutoring school?**
 - b. **A lease with Massage Envy?**
 - c. **A lease for a Tesla showroom?**
 - d. **A lease with PetSmart which includes its veterinary and boarding facilities?**
3. **Should the Landlord be concerned that the apartment building contains a laundry facility on the ground floor? What if Landlord's marketing team wants to construct a seasonal ice skating rink in the common area plaza between the hotel and the retail portion of the center?**

FACT PATTERN 3

Gigando Mall is an enclosed mall that was developed in the 1960s in a traditional center court, four small shop "wings," and department store anchors at the end of each "wing" format. The mall is owned in fee by a single owner (Gigando Owner, not the original developer), although one of the department store parcels (including some parking field area) is owned by the department store company, Spheres. The entire mall is encumbered by a COREA document to which the shopping center owner (as successor in interest) and the department store owner are parties. Spheres is in the process of closing most of its remaining department stores nationwide, and two of the other department stores are operating in the red, so closure of one or both is likely.

The COREA includes the following provisions:

- Spheres covenants to operate as a "department store", defined as "a retail establishment offering a wide range of consumer goods in different areas of the store, each area ("department") specializing in a product category".
- Gigando Owner covenants to operate the Gigando Mall a "shopping mall", defined as "a retail complex containing a variety of stores and restaurants and other business establishments commonly found in shopping centers".
- A list of "prohibited uses" that includes cinemas or theaters, places of entertainment (including arcades, game rooms), places of recreation (including gyms, bowling alleys, billiards, skating), offices, professional uses (including medical and dental uses), schools or places of instruction, "outlet" stores, and residential uses. None of the foregoing is prohibited by local zoning.

Gigando Owner, Spheres, and the two operating-in-the-red department stores are in conceptual agreement that the mall needs to be renovated and redeveloped. The fourth department store is willing to go along with redevelopment but has concerns about opening up the permitted uses to include uses that are on the prohibited uses list. Spheres wants to subdivide its building into smaller premises that may include non-retail uses and perhaps even residential. The two operating-in-the-red department stores are thinking along the same lines. The various mortgagees of the parcel owners are willing to consider consenting to major property renovations and redevelopment but, being risk averse, have no appetite for law suits given the COREA's limitations.

You are one of the lawyers (among several) that is being consulted to think "Big Picture", "Next Steps", and "How to Redevelop the Entire Mall Property", including dealing with the use restrictions and the operating use requirements.

QUESTIONS FOR FACT PATTERN 3:

1. **What are your considerations and next steps as to either amending (in part) or amending and restating a COREA-type document, among other things to modify a prohibited uses list that no longer makes sense for the encumbered property? What party or parties may need to agree in writing to any such change? What if the COREA is silent as to any provisions describing how and who may amend the COREA?**

2. **What are your considerations for modifying required uses as well as updating specific COREA-type use restrictions for a “Gigando Mall” setting? What about in a long-term space lease or ground lease – same considerations? Do you take into account the rights or potential claims of the in-line tenants (or other major tenants) who are not parties to the COREA-type document, and what are your considerations for doing so or not doing so?**
3. **If a Gigando Mall redevelopment (a “re-imagining” of a mall) includes opening the door to non-retail uses, including office, residential, hotel, service / professional, and entertainment uses (among others), then what is left to prohibit or restrict? What are your drafting considerations for the future to take the property into the next 50 years?**