Wednesday, November 3, 2021
3:30 PM – 4:45 PM

Seminar 3

Getting Along in the Sandbox in a Shifting Landscape: Exclusives, Prohibited Uses and Restrictive Covenants – Then and Now

Presented to

2021 U.S. Law Conference
San Francisco Marriott Marquis
San Francisco, CA
November 3-5, 2021

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This workshop focuses on various restrictions on uses in a shopping center – exclusives, prohibited uses and restrictive covenants. These issues define what tenants can and cannot do in their particular spaces and what landlords can or cannot do (or allow others to do) in the rest of the shopping center. The issues are all inter-related, as they are with concepts such as "permitted use" and "radius restrictions." Careful consideration must be given to all such issues in any retail lease negotiation.

Retail leases come in all shapes and sizes. Types of leases include space leases, pad leases and ground leases. Types of retail tenants include merchandisers, restaurants and consumer service providers, taking spaces in properties such as malls, open air centers, mixed use facilities and urban streets. The retailers may range from big box anchors, to junior anchors, to in-line tenants to stand-alone pad operators. They may be publicly owned, owned by private equity, or owned by long-time family interests or "mom and pop" shopkeepers. While these seminar materials are intended to address issues common across a broad spectrum of such variables, they are not meant to be exhaustive. While they may identify certain negotiating positions, one size will never fit all and each party's leverage under the circumstances will always be key.

A. Exclusive Uses

1. Overview

a. Tenant's Goals.

Retail tenants seek to obtain "exclusive rights" to sell a particular good or service in their location in order to reduce competition and increase the likelihood of a successful retail operation. Prohibiting other direct competitors in the shopping center or building arguably enhances the probability that the consumer will choose their store when shopping for a particular good or service. In today's age of on-line retail shopping, never before has a tenant's desire to survive been more important.

b. Landlord's Concerns.

Retail landlords want to see a full shopping center, with tenants that pay rent, and customers that will shop. From a landlord's perspective, competition is good and will keep

all tenants operating in top form, thus enhancing the probability of success and a rental income stream. Like the tenants, landlords in the age of e-commerce want to lure customers away from their computer screens and into their retail centers.

c. Compromise.

In order to balance the desires of both the landlord and tenant, several factors must be considered: credit of the tenant, bargaining strength of each party, desire of the location, size of the location, and the details of the particular exclusive being sought.

2. Types of Exclusives.

a. Blanket Prohibition.

In this exclusive, a tenant seeks to be the only tenant in the shopping center that can sell a particular good or provide a particular service. For example, *"No other tenant in the shopping center shall have the right to sell pizza."* By including this exclusive right in its lease, a tenant can be assured it will be the only tenant in the shopping center that sells pizza (or at least that, if it is not, it will have an adequate remedy against the landlord).

b. Limits on Primary Use.

In this exclusive, a tenant seeks to be the only tenant in the shopping center that can sell a particular good or provide a particular service "as its primary use". Thus, the tenant may not be the sole provider in the center of a particular good or service, but seeks to be the only tenant whose primary use is such sales. In other words, other tenants may sell that particular good or service in some limited fashion. For example, *"Tenant shall have the exclusive right in the shopping center to sell pizza as its primary use. For purpose of this Lease, the term "primary use" shall mean that the sale of pizza comprises more than percent (50%) of a tenant's gross sales."* With this compromise position, the landlord has more flexibility and is able to lease to a café or sandwich shop that may include pizza on its menu, so long as the sale of pizza does not represent fifty percent (50%) or more of the other tenant's gross sales.

c. Incidental Sales.

In this exclusive, a tenant seeks to be the only tenant in the shopping center that can sell a particular good or provide a particular service, but will allow other tenants to sell such good or provide such service as an "incidental use". For example, "*Tenant shall have the exclusive right in the shopping center to sell pizza as its primary use; provided that the foregoing shall not prohibit another tenant from selling pizza as an incidental use (i.e., no more than fifteen percent (15%) of its gross sales may be from the sale of pizza)."* With this compromise position, the tenant gets a bit more protection, as it really limits the amount of sales another tenant in the shopping center can have.

d. Narrow Exclusives.

Arguably the most palatable exclusive to the landlord is a narrow exclusive. In this case, a tenant seeks to be the exclusive provider of one single product or service (or a very narrow range of products or services). This exclusive is an attempt to strike a balance between what a tenant "really" is trying to protect, while at the same time allowing the landlord the ability to have a broad range of retailers selling a variety of goods and services. For example, *"Landlord shall not use or allow any other person or entity (except Tenant) to use any portion of the Shopping Center for the sale of: (a) whole or ground coffee beans, (b) espresso, espresso-based drinks or coffee-based drinks, (c) tea or tea-based drinks, (d) brewed coffee, and/or (e) blended coffee beverages."* Thus, this tenant is clearly trying to be the only seller of coffee and tea in the shopping center – a fairly narrow request.

e. Broad Exclusives.

Arguably the most disfavored by landlords, this exclusive provides a tenant with the exclusive right to sell a whole host of products and/or services, creating traps to the unwary

landlord seeking to fill the balance of its shopping center. Such exclusives often require the landlord to go back to the tenant to ask for a waiver or permission to sell a particular item or provide a particular service. For example, *"Tenant shall have the exclusive right in the Shopping Center to operate a retail grocery supermarket and/or liquor store. Anything contained in this Lease to the contrary notwithstanding, Landlord shall not lease any space in the Shopping Center for use, or permit any occupant to use any space in the Shopping Center, as a retail grocery supermarket, packaged liquor store or for the sale of any food products including, but not limited to, groceries, meats, produce, frozen foods, dairy products, fruit, liquor, beer, wine, soda, bakery goods, delicatessen items, tobacco products or prescription and non-prescription pharmaceutical items."* Clearly, this tenant is trying to be a one-stop shopping place for a large array of food items, thus making it very difficult for a landlord to lease to other food sellers without the tenant's consent.

3. Conditions and Exceptions.

a. Open, Operating and No Default.

Typically, if a landlord grants an exclusive to a tenant, in order for it to be effective, the landlord will condition the rights on the tenant being open and operating in the shopping center (except for certain "permitted closures"), and not in default beyond applicable notice and cure periods. Thus, this would prevent a tenant from going dark, opening up across the street (or remaining closed), but continuing to restrict the landlord from leasing to a competitor. Likewise, this would prevent a tenant from failing to pay rent, or violating another tenant's rights, while at the same time trying to claim the benefit of an exclusive.

b. Major Tenants.

Often times, an exclusive will not apply to large or mid box tenants. This occurs for a couple of reasons. First, the large or mid box tenant usually has the negotiating power and leverage to make sure it is not subject to other exclusives in the shopping center. Second, due to the wide variety of goods and services provided in such stores, and the traffic those stores drive to the shopping center, it would not be practical or feasible to restrict such tenants.

c. Existing Leases.

The savvy landlord will make sure that when granting any sort of exclusive right, it will make an exception for all existing tenants and/or leases in the shopping center. This is a necessity because if an existing tenant has "*any lawful retail use*" as its use clause, and an exclusive is subsequently granted to a new tenant, the prior tenant could easily violate the new tenant's rights, putting the landlord in a difficult situation.

i. In carving out prior leases, be sure to capture not just "prior tenants" but specifically "prior leases". If a prior tenant assigns its lease, or changes names due to a merger or acquisition, you need to be sure the lease itself still is free from the subsequent exclusive.

ii. If you are a savvy tenant, make sure that if you allow prior leases as an exclusion, you don't allow the landlord to modify that prior lease to the detriment of your exclusive. Furthermore, make sure that to the extent the landlord has discretion to provide consent under the prior lease, you attempt to curb that discretion/consent to prohibit an exclusive violation.

d. Incidental Sales.

As mentioned above, often times landlord and tenant will compromise and agree that other tenants in the shopping center can sell the exclusive items or services on an "incidental" basis. Thus, the negotiation will turn to defining what exactly "incidental" means. Sometimes the parties agree that a certain percentage of gross sales will be deemed incidental (e.g., "*no more than 15% of gross sales*"). Other times, incidental will be defined with reference to square footage (e.g., "*no more than 100 square feet or 5%, whichever is greater, of the tenant's sales floor area*"). Note, if square footage becomes the

measurement of what is/is not incidental, be sure to calculate not only the space on the shelves, but also an allocable share of the aisle in front of the shelves, as well as the end caps of the aisles.

e. Specific Exception.

Some tenants already know there will be specific tenants likely to lease in the shopping center, so the lease can proactively provide an exception. For example, a coffee shop exclusive may allow for "non-branded" coffee sales, or allow for coffee to be sold in a sit down restaurant. Or a soft goods retailer may know (and actually want) its competitors in the development, and allow them by name.

f. Geographic Exclusions.

In large shopping centers (or where development of the center is phased), it may make sense to provide exclusives that apply only to certain portions of the shopping center. For example, if there is an entry road which naturally bisects a large shopping center into two "halves," a landlord may not want the scope of an exclusive granted on one half, to bind the tenants on the other half.

g. Sunsets.

It is possible to provide for a tenant's exclusive to end, or become narrower, after a certain period of time. In any event, a tenant's exclusive should end when the tenant assigns or sublets for a different use than that which was intended to be protected by the exclusive or when the tenant otherwise ceases to use its premises for the protected purpose.

4. Remedies.

a. Rent Abatement.

The most common remedy a tenant seeks for an exclusive use violation is the whole or partial abatement of rent. The theory is, of course, that but for the violation, the tenant would have generated more revenues and thus has suffered a loss that can only be compensated for by a rent reduction.

i. Note, while logic would dictate that a tenant must somehow prove it has actually lost sales, most (if not all) tenants will not go down that rabbit hole, and will make it a presumption that it has suffered a loss and must be compensated.

ii. Another theory behind this logic: The lease is a contract. The parties agreed on its terms. The landlord breached and this is the agreed upon remedy. Then tenant does not need to prove its losses.

iii. Should the rent abatement ever end? Most tenants would say "no" – not until the exclusive use breach is cured. After all, the tenant lost the benefit of the bargain. Others say, at some point, "fish or cut bait" – take your rent abatement for some time (e.g., one year) and either go back to full rent or terminate the lease.

iv. Rent abatement can either be via (x) a set reduced amount (e.g., 50% of Base Rent) or (y) pure percentage rent (e.g., 5% of Gross Sales without regard to a sales breakpoint) not to exceed the Base Rent (together with any Percentage Rent) as would have applied absent the abatement situation.

b. Termination.

At some point, a tenant may want the right to terminate its lease if its exclusive rights are violated. However, depending on the circumstance and situation, such a remedy may not be adequate for the tenant and in certain situations could be used by a landlord for force out a low rent paying tenant for a new higher paying tenant selling the same goods and

services. In such a case, a tenant would rather abate rent and stay to keep the landlord from forcing it out.

c. Rogue Tenant.

When a new tenant in the shopping center is specifically prohibited in its lease from violating another tenant's exclusive rights, but decides to "go rouge" and violate it anyway, what is the landlord to do, and what rights should the protected tenant have? After all, the landlord did what it was supposed to do – it restricted the new tenant. Thus, typically, landlord must agree to use good faith diligent efforts to pursue remedies against the rogue tenant, including litigation if necessary. During that time, the protected tenant should not have the right to abate rent or terminate, so long as the landlord is doing all it can to stop the rogue tenant from violating its lease.

i. Strong landlords will say, as long as they do what they can, the tenants must continue to pay, and can never abate rent or terminate. Again, the theory is, what more can the landlord do? If the courts will not stop the rogue tenant, how can the landlord, and why should the landlord suffer?

ii. Strong tenants will say, they don't care. They are losing the benefit of the bargain, and no matter what, at some point, they want the right to abate rent and/or terminate. It's a matter of allocating the risk and the landlord is in the better position to combat the risk

5. Some Drafting Tips.

a. The preciseness of drafting is key with exclusive use provisions. As the forgoing materials indicate, there are a whole host of traps and pitfalls just ripe for litigation and interpretation.

b. Particular attention must be paid to what exactly is being protected. A lease that says the tenant has the exclusive right to sell "sandwiches" may not be as clear as it seems. Would that restrict the sale of a submarine sandwich? How about a burrito? What about a hot dog? Would bagels be allowed?

c. Equally important is the language surrounding the exceptions, the remedies, and the notices. There is no "one size fits all" when it comes to drafting, and particular care should be given to each aspect in each situation.

6. The Future.

a. The existence of extensive exclusives in shopping centers often result in long term headaches for owners trying to re-tenant, re-position or re-develop older shopping centers burdened by older leases with obsolete or unnecessary exclusives that were not designed to evolve with the times or to eventually sunset. While many tenants may be willing to negotiate changes to their exclusives to allow for such changes in the center, negotiations may be difficult and success with all of the tenants needed to implement the changes can never be assured.

b. Many landlords have tried the "give none, get none" approach, whereby the tenant agrees to forego requiring an exclusive in exchange for not being bound by any other tenant exclusives in the center. Landlords in such cases may want the option of granting exclusives to new tenants in the future (as that may be needed in order to lure a particular new tenant) in which case the existing leases may provide the existing tenants with "springing" exclusives that will be binding against the new tenant getting the exclusive and any other future tenants once the first exclusive is granted. These situations can be very challenging to manage or administer.

c. From time to time there is legislative talk about limiting the enforcement of exclusives (as well as their quid-pro-quo -- restrictive "permitted use" clauses). But those proposals never seem to get anywhere. Although such provisions are arguably anti-competitive, they are legitimate and useful tools of commerce. From the landlord's perspective they are necessary components of the landlord's desire to curate the uses of its privately-owned

commercial enterprise (i.e., the shopping center) – which clearly competes with other retail destinations for customer traffic and market share. From the tenant's perspective, they are necessary and legitimate incentives for tenants that would not otherwise invest capital in a new center or market without some assurance of exclusiveness.

d. Exclusives have been around for a long time. Although the problems they create are not going away, neither are the exclusives themselves. For that reason it is important for the parties to try to build in as much flexibility for the future as they can in the first instance and for parties to be reasonable in any future negotiations. After all, it will not do a tenant any good to be stuck in a failing center with a landlord that cannot implement changes due to the existence of obsolete or problematic exclusives.

B. Prohibited Uses

While the purpose of an exclusive use clause is to give the tenant the right to be the only tenant in the shopping center providing particular goods or services, prohibited uses are uses that the tenant does not want anyone to partake in within the shopping center (or within proximity to its business), even though these uses do not compete with the tenant's business. In many cases the tenant and landlord will agree that some or all of the prohibited uses are mutually binding so that tenant may not partake in such uses either.

1. Categories of Prohibited Uses.

Prohibited uses fall into different categories, protecting different concerns of the tenant. Typical categories of prohibited uses are as follows. Note that many of the concerns within these categories overlap with one another.

a. Noxious Uses.

Noxious uses are those that produce objectionable sensory events such as unpleasant odors, loud noises/vibrations or visual impairments. They are considered *per se* objectionable and anathema to the operation of a consumer-friendly shopping environment. Examples would include:

- o nuisances
- o drilling, mining, smelting and manufacturing
- o agriculture, animal raising or storage
- o waste storage, disposal or treatment
- o junk yards

b. Uses that overburden the center.

These uses are those that tend to put unacceptable demands on parking because their customers tend to park in one place for an extended period of time, likely without patronizing other establishments in the center. They can also include uses that tend to require heightened security concerns in the common areas. Tenants often prohibit them only in certain areas so that their impact on the particular tenant's business is minimized. These uses are not *per se* objectionable, though they are still problematic. Examples would include:

- o restaurants
- o movie theatres, auditoriums and other entertainment uses
- o amusement centers
- o sports and recreational activities
- o gyms and health clubs

c. Interfering uses.

These would include uses that are likely to create problems that will interfere with the tenant's business such as environmental contamination or other activities in the common areas that are not conducive to a pleasant consumer shopping experience. Examples would include:

- o dry cleaners or laundromats;
- o car wash, auto repairs or services, gas stations, or gas station
- o automobile, motorcycle, boat, trailer or truck leasing, rental or sales.

d. Objectionable Uses.

These uses are *per se* objectionable as they are considered illegal or immoral. Examples would include:

- o drug paraphernalia, illegal drugs and cannabis*
- o adult bookstores or entertainment
- o massage parlors
- o tattoo parlors or body piercing shops
- o gambling or gaming operations
- o check cashing facilities.

* Should cannabis be included or excluded as objectionable? See discussion in Section B.7. below.

e. Incompatible uses.

These are uses that the tenant believes are not compatible with a first class shopping center offering a consumer-friendly shopping environment or that may introduce a customer clientele that is detrimental to the tenant's business and reputation as a first class operator. In other words, these uses include everything else that the tenant does not want to see at the shopping center.

Examples would include:

- o tavern or bar
- o dance hall, disco or nightclub
- o gun shops, pawn shops, auction houses, flea markets or thrift stores
- o uses for occult sciences
- o drug treatment centers and ambulatory care
- o medical, dental or hospital related center or offices, nursing home or old age center
- o governmental facility, recruiting center or employment center
- o funeral parlors
- o school, library, reading room, or house of worship
- o hotel or motor inn, residential use or day-care facility
- o warehouse, industrial or office uses

2. Who is Bound?

Prohibited uses are often a two-way street -- in that they restrict not only the landlord in leasing up other areas of the center, but the tenant as well (including where the tenant is changing its use or assigning or subleasing for a different use). While the landlord may or may not have other means to restrict the tenant from changing its use or assigning or subleasing for a different use, the prohibited uses establish a baseline of uses that the landlord never has to even consider (even when the landlord is required under the lease to act reasonably in approving a proposed new permitted use).

To ensure enforcement against successors or assigns of the parties, prohibited uses should be stated to "run with the land" and/or be binding on the restricted party "and its successors or assigns."

3. Geographic Limitations.

Prohibited uses can also be prohibited only with respect to a certain geographic area of a shopping center. Some of the "interfering" or "incompatible" uses identified above might be tolerated as long as they are not within a certain distance from the tenant's store. Geographic considerations should certainly be factored into any negotiation involving a large or multi-phased center or one having mixed-use components.

4. Existing Tenants.

Existing tenants under existing leases should always be carved out from being bound by the prohibited uses under a new tenant's lease. Similar to the exclusive use, however, the new tenant can request that, to the extent the landlord has the ability to withhold its consent to a change in an existing tenant's permitted use, it will do so if the change in permitted use would result in a violation of the prohibited uses agreed to under the new tenant's lease.

5. Remedies.

Similar to exclusive use violations, in the event of a prohibited use violation by the landlord, the tenant may be entitled to an "alternate rent" remedy in the form of (i) an abatement of all fixed rent, (ii) an abatement of a portion of fixed rent (often somewhere between 25% and 75% of the fixed rent otherwise due) and/or (iii) payment of pure percentage rent (*i.e.*, a percentage of sales without regard to a sales breakpoint) in lieu of all other fixed or percentage rent otherwise due. Note that if the tenant is paying pure percentage rent, then the landlord should require the tenant to operate in the ordinary course (particular if a tenant otherwise has the right to go dark) and the percentage rent should never exceed the amount of fixed rent plus percentage rent that would have been payable absent the particular violation.

If the prohibited use violation continues for a significant period of time (typically 1-2 years) after the tenant has commenced paying "alternate rent," then the landlord may require the tenant to either terminate the lease or resume paying full rent. If the tenant elects to terminate, the tenant may request that the landlord reimburse the tenant for its then unamortized cost of leasehold improvements (excluding any portion paid for by the landlord such as through a construction allowance).

The tenant may also require the right to exercise all other remedies available at law or in equity. However, the landlord may be hesitant to give the tenant the right to seek injunctive relief against the actual tenant in violation of the prohibited use. In any event the landlord might insist that the "alternate rent" be the tenant's sole monetary remedy on account of a particular violation.

6. Rogue Tenants.

Similar to exclusive use violations, if the prohibited use violation exists through no fault of the landlord (*e.g.*, another tenant at the shopping center is operating in violation of its lease), the landlord should request that the tenant not be permitted to exercise its remedies so long as the landlord is using some meaningful amount of effort (typically "commercially reasonable efforts" which may be defined to require that the landlord at least seek injunctive relief) to get the rogue tenant to cease the violation. The tenant may request the right to start exercising its remedies if the violation continues after a certain pre-determined period of time.

7. Evolutions, Exceptions and the Future of Prohibited Uses.

a. Evolutions and Exceptions

i. While it's probably safe to say that we may never see the day when smelting plants or animal rendering becomes acceptable within a shopping center, the world of prohibited uses has evolved and will likely continue to evolve. Uses that were once unthinkable are now often desirable. Consider the following:

ii. With seismic changes in consumer shopping patterns in the past few years due largely to e-commerce, many shopping centers must evolve into desired "destinations" in order to remain viable. To do that, a solid mix of food/beverage and entertainment options may be critical. Many retailers now see that and have adapted so long as they believe the uses will not be detrimental to their businesses and that their customers will still find convenient parking opportunities.

iii. Many of the prohibited uses described above may be deemed acceptable if they are "upscale, reputable or otherwise of the type customarily allowed in first class shopping centers." For example, pool halls, bowling alleys and the like should be welcomed for operations like Jillians, Dave & Busters and Kings (an upscale

bowling concept) or Spin (upscale ping pong concept). The traditionally seedy "massage parlor" has given way to acceptable operations like a Massage Envy and similar providers of legitimate therapeutic services.

iv. Health and exercise clubs, if of a manageable size insofar as parking demands are concerned, may now be seen as enhancements to shopping centers by bringing in customers who will patronize other establishments in the center.

v. While traditional warehouse-style "close out," "liquidation" or "job lot" operators may still not work for certain types of centers, concepts like Tuesday Morning may very well work.

vi. While traditional thrift stores may not seem like a proper fit for a first class center, quality second-hand goods operations like Plato's Closet, Style Encore, Music-Go-Round, Play it Again Sports, or Once Upon a Child may very well be acceptable.

vii. Should automobile sales be allowed for first class "showroom" type operations (like Tesla) that do not include or any onsite inventory or service of vehicles?

viii. And what about cannabis? While marijuana and THC derivatives may still be considered incompatible with a first class shopping center, CBD products are now all the rage. However, since they are still not legal under federal law, it remains to be seen what the future holds for cannabis. If marijuana retailers can't find banks where they can save and liquidate their profits, will they be able to survive? Upscale outlets like "Med Men" are popping up in street retail, but will they ever be welcomed in shopping centers? This continues to be an evolving area of prohibited uses (and use in general) in the shopping center context.

ix. Some tenants may not be in favor of upscale kiosks and carts being located near their premises, but such retailers can add revenue for the landlord, without tying up existing space. If done properly, such kiosks and carts can add to the vibrancy of a shopping center, and only tenants with significant clout may be able to force a landlord to exclude them completely.

x. It's no secret that Amazon has changed the way people shop. But should Amazon drop-off centers, which only allow for customers to drop off items purchased from the website, be allowed in shopping centers? Sure, they may generate foot traffic, but it is unclear whether such uses will be welcomed by landlords, or even allowed by tenants who view Amazon as serious competition. Or are they a convenience that shoppers will come to expect?

b. <u>The Future</u>

i. Much like exclusives, the existence of prohibited use restrictions at shopping centers often result in long term headaches for owners trying to re-tenant, re-position or re-develop older shopping centers burdened by older leases with obsolete or unnecessary restrictions that were not designed to evolve with the times or to eventually sunset. While many tenants may be willing to negotiate changes to their exclusives to allow for such changes in the center, negotiations may be difficult and success with all of the tenants needed to implement the changes can never be assured.

ii. Prohibited use restrictions have been around for a long time. Although the problems they create are not going away, neither are the prohibited use restrictions. For that reason it is important for the parties to try to build in as much flexibility for the future as they can in the first instance and for parties to be reasonable in any future negotiations. After all, it will not do a tenant any good to be stuck in a failing center with a landlord that cannot implement changes due to the existence of obsolete or problematic use prohibitions.

C. Restrictive Covenants.

Restrictive covenants are similar to prohibited uses in that they typically involve restrictions placed on a shopping center consisting of multiple ownership parcels that limit the uses that may occur on other parcels in the center and other elements concerning the conduct of business on those parcels. Such covenants are usually recorded in a separate document binding on each owner, such as CC&Rs or REAs, and, unless otherwise stated, they typically bind the entire shopping center. Restrictive covenants may also include limitations on building dimensions, permissible building areas and limitations on changes to common areas. In addition to appearing in documents like CC&Rs or REAs, these types of restrictions may appear in leases where a tenant wishes to protect itself from future changes to the center that may harm the tenant's business.

1. Height/Building Restrictions. One type of restrictive covenant is a restriction on the height of a certain building, and also a restriction that a building be one floor only. Many of these restrictions are driven by local governmental ordinances, but others can be introduced in recorded documents by tenants with a fair amount of clout who don't want a building constructed that is taller (and, therefore, perhaps more "grand") than the building the particular tenant will be occupying. In addition, some larger tenants will not want buildings constructed on outparcels to be greater than a certain height, as such structures could block the visibility of the restricting tenant's premises by vehicles traveling along the streets surrounding the shopping center (among other reasons). Such restrictive covenants affect not only potential tenants, but also the landlords at the applicable shopping centers who must construct (and require, for example, ground tenants to construct) buildings of only a certain height, for example.

2. No Change Areas. Other common restrictive covenants include restrictions on a parcel owner's or landlord's ability to make changes to, or allow other activities within, certain common areas of the shopping center (which areas would be typically identified on a site plan attached to the document imposing the restriction). Examples would include prohibiting (i) material changes to vehicular access, driveways, sidewalks, parking aisles and parking ratios; (ii) non-emergency common area repairs during peak sales periods (e.g., November 15 – January 5), (iii) the erection of any signs or structures above a user's storefront, and (iv) use of the common areas for commercial or promotional activities.

3. Square Footage Limitations. Another example of a restrictive covenant is a limitation on the size of a particular premises, usually due to the local parking requirements. Such limitations are typically found in CCRs/REAs. Ground tenants may only be able to construct on their parcels a building that is sized so that sufficient parking can be striped on the parcel to comply with applicable law. For example, a minimum of four parking spaces per 1,000 square feet of square footage built may be required. Impacted tenants will need to address these limitations when putting together their plans for the applicable location to make sure they are in compliance.

4. Exclusives in Separate Documents. In certain circumstances, when a landlord, who has granted an exclusive to a particular tenant that is intended to bind the entire shopping center, decides it wants to sell off a portion of the center (e.g., an outparcel), the tenant who is the beneficiary of the exclusive may require the landlord and the purchasing party to enter into a separate agreement in which the exclusive is specifically set forth. Sometimes, these documents are called "junior" CC&Rs or an "Agreement Affecting Real Property". The purpose of such documents is to put the relevant parties on notice that the exclusive is in effect as drafted in the applicable lease and is binding on the Outparcel. Obviously, potential buyers need to be aware of such documents, as one does not want to purchase a pad for development of a fast food burger restaurant, only to find out the such a restaurant is not permitted. The issue may also be resolved by the inclusion of the exclusive in a recorded memorandum of lease.

    a. Not as common are documents that contain exclusives, but that are recorded against a neighboring property. For example, if a party owns two adjacent parcels of land under separate ownership entities, a tenant with some clout might be able to force the owner to record a restrictive covenant protecting that tenant's exclusive on the adjacent property. Therefore, the tenant's exclusive will arguably be protected not only in the applicable shopping center, but also in the neighboring property, which could limit unwanted competition in the vicinity. The tenant can also protect itself in this situation with the recording of a memorandum of lease that is joined in by the by the owner of the adjacent property.

5. Preparing for the Future.

Just like exclusives and prohibited uses in leases, restrictive covenants, wherever they appear, may result in long term headaches for owners trying to re-tenant, re-position or re-develop older shopping centers burdened by older leases with obsolete or unnecessary restrictions that were not designed to evolve with the times or to eventually sunset. It is therefore important for the parties to try to build in as much flexibility for the future as they can in the first instance and for parties to be reasonable in any future negotiations.