



Wednesday, October 23, 2018
2:00 PM – 3:15 PM

Workshop 3

You Can't Always Sell What You Want!
Permitted, Exclusive and Prohibited Uses

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Hypothetical #1.

Your client is a landlord of a modest retail center. The center is filled with an array of local shops, national franchise food establishments, a national retail mid-box and, believe it or not, a local mom and pop pharmacy. Marijuana is not yet legal in this state, but CBD shops are becoming very popular. Your client has a small vacancy, and has been approached by a CBD shop operator that is interested in this center. Knowing that you regularly attend the ICSC Law Conference and are thus keeping up on all of the latest retail leasing issues, your client does the smart thing and asks for your advice before signing up the new tenant. What issues do you need to consider in order to advise your client here?

Hypothetical #1 (continued).

1. What does the pharmacy lease say?
2. CBD – prescription or non-prescription drug?
3. What sort of “use” clause is the CBD operator looking for?
4. What if marijuana is legalized in the future?
5. What does the assignment/sublet clause allow for?
6. What uses are prohibited by the national mid box retailer (i.e. noxious uses)?
7. Do any existing tenants (e.g., massage therapy/physical therapy or nutrition store) have potential competing use clauses?
8. Does the CBD tenant require an exclusive?

Hypothetical #2

Your client is the owner of a grocery-anchored shopping center. This center is also home to one of the fastest-growing sub shops known to mankind! A struggling barbecue franchise in the center just went out of business with 5 years remaining on its lease, and the tenant approached your client with a potential subtenant. A well-known deli operator is looking to expand, and this center would be a perfect location. Your client was so excited about great corned beef, he consented immediately. However, one of the other tenants caught wind of the deli deal, and, although she too loves a good corned beef sandwich, questions started to fly! Embarrassed that he allowed this subtenant to proceed without first consulting you, your client comes to you now to ask for advice. What are the issues you will need to consider?

Hypothetical #2 (continued)

1. What is the “permitted use” clause for the deli subtenant?
2. What does the grocery store’s exclusive use clause cover?
3. What is a “submarine sandwich”?
4. What is a “sandwich”?
5. What does the assignment and sublet clause say in the BBQ lease?
6. Assuming the hastily-given consent was wrongfully given:
 - what remedies do the other tenants have under their leases?
 - what happens next under the BBQ lease and the deli sublease?

Hypothetical #3.

Your client is developing a large, exciting, mixed-use project. The development will consist of 100 apartment units, a large regional furniture store, a national department store, a national grocery store, all the usual discount retail suspects, a couple of small shop retail buildings, a handful of restaurant out lots, and a large medical office building. The multi-family and retail phases are complete and mostly filled. The medical office building is almost done, and your client is trying to obtain permanent financing. An overzealous lender's counsel is scrutinizing the medical office "anchor" lease that your client negotiated with a local hospital. Although the construction lender and its counsel had no issues or concerns, the new lender's counsel is concerned.

Hypothetical #3 (continued)

The hospital's lease contains the following exclusive:

“Landlord agrees that during the Term, Landlord shall not permit any portion of the Development other than the Premises to be used for the provision of medical, health and related services, including without limitation, the operation of a hospital clinic, ambulatory surgery center, urgent care, medical office building, diagnostic center, physical therapy or rehabilitation facility.”

Lender's counsel wants this lease amended for various reasons. What could some of those issues be?

Hypothetical #3 (continued)

Lender's counsel wants this lease amended for various reasons. What could some of those issues be?

1. Existing tenants in the Development?
2. Incidental uses?
3. What are "health and related services"?
4. Will developer have flexibility to lease/backfill the Development?
5. What happens if developer sells a portion of the Development, how does that affect the landlord or future landlords?

Hypothetical #4

Your client is the owner of vacant land that she has been trying to develop for years. Due to unrealistic expectations from the Village, various uses have been denied. While the Village allowed your client to develop a Goodwill store, other supporting retailers were not allowed by the Village, or their requirements made them look elsewhere. Since Goodwill required its own tax parcel to maintain and pay taxes on, and because the development would require shared access to/from the main street, your client recorded an REA over the entire property. Your client planned to sell off the remaining parcels, and wanted some control over what would be developed. The Village and Goodwill also had some concerns they wanted to include.

Hypothetical #4 (continued)

What sort of issues should be considered in setting up “prohibited uses” in the REA for this development?

1. Consider the need for the developer to enhance the ability to sell the lots.
2. Consider the changing uses in retail, and need for flexibility, and the changes in what was traditionally considered “noxious” uses.

Hypothetical #5

Your client recently purchased a vacant Blockbuster Video building. This building sits out on the main street – an out lot of a retail shopping center. Your client acquired this property to develop a build-to-suit specialty prescription pharmacy business. Unfortunately, he purchased this property without consulting with his favorite retail real estate attorney. Prior to closing, he signed up a lease with this pharmacy user, and has just about finished the build out. However, for some odd reason, the tenant's attorney just decided to review title, and sees that there is an REA in place that affects this out lot. As part of the REA, a national chain pharmacy was granted an exclusive right to sell prescription drugs -- which the new tenant will surely violate. However, the national chain pharmacy moved out of this center years ago. What advice do you give to your developer client?

Hypothetical #5 (continued)

1. Asking permission v. begging for forgiveness?
2. Lessons for developers (why do I need an attorney)?
3. Lessons for attorneys drafting leases (how do you know what exclusives are out there?)
4. Tips for drafting exclusives in an REA.



Thank you!

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