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Workshop 8

Making Diverse Tenant Mixes Work: An Advanced-Level Workshop on Exclusives, Prohibited Uses, Radius Restrictions and Waivers

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by:

Howard Lind
Partner
Wendel Rosen LLP
1111 Broadway, 24th Fl.
Oakland, CA 94607
hlind@wendel.com

Mary K. Walker
Staff Attorney
Citi Trends, Inc.
104 Coleman Blvd.
Savannah, GA 31408
mwalker@cititrends.com

I. Exclusives

A. General

1. Primary Purpose. The primary reason a retail tenant requires an exclusive use right is to protect that retailer from competition. In reported cases where a retail tenant is attempting to enforce an exclusive use provision, evidence introduced at trial often shows a dramatic reduction in revenue once the competitor opens in the same center. And whether the tenant books a loss or not, if a retailer has invested in a major facelift to a store and seen no return on it due to a competitor moving in next door, that tenant is bound to be disgruntled. The breadth of the protection, remedies available to the tenant in the event of an intentional violation by landlord or a violation by a rogue tenant, and exceptions to the exclusive use provision (such as for a major tenant or for incidental uses), are largely a matter of negotiating strength of the two parties and the particulars of the shopping center.

2. Narrowly Construed. Consistent with the general notion that courts favor the free, unfettered use of real property, exclusive use restrictions are often narrowly construed by the courts. Ambiguities are often resolved in favor of allowing the competing use. This result may also be fueled by the belief that allowing competition is generally favorable to consumers. From a tenant's perspective, there are risks and drawbacks to using a list of specified competitors versus attempting to define prohibited categories:

   (a) Listed competitors - Unambiguous at the time of lease signing, but provides no protection against unnamed future competitors. May open tenant up to risk from existing competitors who are acquired or rebranded. In some cases, the landlord itself may need to be listed - e.g., a tire and oil change tenant may want to prohibit a landlord from opening an independent competitor, either on his/her own or as a silent partner to a related party getting a sweetheart deal on rent;

   (b) Prohibited categories - Potential pitfalls if the description is vague or ambiguous, but gives tenant more protection against "unknowns";

(c) Belt and suspenders - Tenant shall be the only primary vendor of widgets and gizmos in the Development. “Competitors” are defined as any vendors deriving more than 10% of revenue from the sale of widgets and/or gizmos, including but not limited to Widgets Worldwide, Gizmo Garage, and Little Miss’s Fancy Pants Boutique. In the event a Competitor opens a retail location in the Development, Tenant shall be entitled to exact Terrible Revenge per Section 6.66.

3. Alternative Means of Drafting. While the actual verbiage of an exclusive use provision varies greatly, generally there are two substantive approaches, and which approach is used may make a meaningful difference to the tenant's trying to enforce the exclusive.

(a) One way of drafting the provision states that landlord will not allow any other tenant in the center to use its premises for the stated exclusive use. A violating use in this instance gives the protected tenant a cause of action against the landlord for breach of covenant, affording tenant contract damages, and perhaps other rights if specifically set forth in the lease.

(b) The other approach states that no other premises in the center may be used for the exclusive use. A violating use in this instance arguably affords the protected tenant the option of invoking equitable remedies, including an injunction against the violating use, provided that the original tenant can show that the violating tenant has notice, e.g., via a recorded memorandum of lease.

(c) Regardless of which means is elected, parties may negotiate to bypass the courts altogether by establishing alternative or substitute rent at a lower rate as the consequence following an exclusives violation. There are benefits to landlord to this approach - primarily avoiding costs of defending litigation. Also, if the alternative rent calculation is based on the original tenant’s sales, those may not be as badly affected by the violator’s presence as the tenant fears.

4. Conditions.

(a) So long as tenant is not in default. Often landlord will push for the exclusive use protection to terminate in the event tenant is in default. Regardless, it is difficult to explain why a default should cause tenant to lose exclusive use protection that may be essential to tenant's survival as a retailer. If the default is cured and the lease continues, tenant would be forced to operate under a lease that is less desirable.

(i) At the very least, tenant should ensure that notice and applicable cure periods have expired prior to tenant’s having to forfeit the exclusive use protection.

(ii) Tenant should also resist any effort to curtail its exclusives based only on a narrow, technical default, e.g., a failure to provide landlord written notice before hanging a back-to-school sale banner. The parties might instead agree to loss of the exclusive only in the event of a financial or monetary default exceeding an agreed threshold.

(iii) Investigate whether the parties might accomplish their respective goals with an exclusive that temporarily abates on default without terminating entirely.

(b) So long as tenant is using the premises for the exclusive use. Landlord argues here that if tenant is not using the premises for the specified use, landlord should be free to allow another tenant to so use its premises. This is more logically supportable than landlord’s argument above. Tenants will want to build in protections for initial buildout, damage and destruction, alterations requiring closing, and transitions to an assignee or subtenant.

B. Breadth of Exclusive Use Restriction

1. Specified Uses - Landlord Concerns.

   (a) Groceries. This is an extremely broad category. The Winn-Dixie case cited below states that included in "groceries" are "many household supplies (such as soap, matches, paper napkins)."

      (i) It would be difficult to persuade a jury that Party City's sale of napkins significantly affects a neighboring grocery store's bottom line.

      (ii) It's increasingly popular among a broad swath of non-grocery retailers - Kohl's and Home Depot to name two - to offer snack food and a soft drink cooler in the checkout line. A de minimis carveout for sales less than 1,000 square feet or 10% of revenue may save a landlord grief.

   (b) Produce. Landlord might cavalierly agree with a grocer that it has the exclusive right to sell produce, not realizing that the national coffee chain landlord thought would complement tenant mix will not locate in the center because it cannot sell bananas or snack boxes that often include apple slices and grapes.

   (c) Coffee. The overall coffee exclusive granted to the national coffee chain might not apply to the major grocer, since landlord was astute enough to carve out major tenants. However, landlord might have a hard time attracting a mini-mart that is a part of gas station, and landlord might not be able to lease to any restaurant.

      (i) Landlord might differentiate between beans, fresh-brewed, and bottled/canned coffee, and should pay attention to the right to allow restaurants in the center.

      (ii) The tenant coffee shop in this example should specify that the restaurant exemption applies to full service, sit-down establishments, not restaurants with drive-thrus and menu boards.

   (d) Restaurants. A restaurant tenant may want to ensure it is the only pizza parlor in the center. A pizza exclusive however might preclude an upscale Italian restaurant that requires the right to sell pizza as one of many entrees. In order to allow more flexibility in establishing tenant mix, Landlord might consider differentiating by menu selections (e.g. more than 50% Italian entrees), table service, table clothes, average entrée price, average per person charge.

      (i) Post COVID-19, the world is full of restaurateurs who never dreamed of offering curbside take-out or UberEats service at their fine dining establishments, but now find themselves doing exactly that. Review your old leases carefully before recycling language.

   (e) Electronics. A general electronics or consumer electronics exclusive can be dangerous as well, catching many unintended items. Was that intended to mean computers? Home appliances? An auto parts shop selling stereo upgrades? Headphones and phone chargers at the pharmacy?

2. Geographic.

   (a) Tenant will want protection if there is any expansion of the center, especially if that expansion is contiguous. Landlord may argue that tenant's initial protection was limited to a specific area, that tenant was satisfied with that degree of protection, and that no further protection should be afforded should landlord expand the center. There is the argument, however, that while not partners, landlord and tenant do have a mutual interest in tenant's succeeding in its retail location, and that therefore tenant should be entitled to additional protection in the event the center grows.

(b) Tenant may ask for protection in other centers in which landlord has an ownership interest, within a set distance from the premises (e.g., one mile). Landlords will argue that this protection goes too far, and that landlord should be free to lease to any tenant in a totally separate center.

(i) If landlord agrees to this provision applying to other centers within a prescribed radius, landlord will want to carve out existing tenants in after-acquired centers, and will want to carefully consider the parameters relating to what constitutes an ownership interest. If not careful, landlord could find itself in violation of this provision where landlord has, for example, a minority interest in a single purpose entity owning a center some distance away.

3. Typical Exclusions.

(a) Major Tenants. Due to negotiating strength, the importance of having major tenants in a center, and the increasing product mix seen in many large grocery stores and drug stores, exclusive use provisions often do not apply to major tenant premises.

(i) Generally square footage is used to set the threshold. The square footage threshold used to define a major tenant can be as low as 20,000 square feet.

(ii) Tenant willingness to accept these exceptions varies significantly. A 1,200 square foot shoe store can be expected to oppose a department store with a 3,000 square foot shoe section.

(b) Existing Leases.

(i) When granting an exclusive, a landlord should not fail to ensure that landlord is protected with regard to existing leases. This protection should cover the renewal of an existing lease with the then-existing tenant, and possibly the relocation or even replacement of the existing tenant.

(ii) Landlords should be aware of existing leases that permit any lawful use, regardless of the tenant's current actual use. For example, lease number one allows any lawful use, and lease number two grants an exclusive right to sell coffee, subject to existing leases. When tenant number one comes to landlord to extend lease number one, should tenant number two insist that landlord restrict tenant number one so that the exclusive use right held by tenant number two now applies going forward to tenant number one? The parties may attempt to draft around this with phrasing like "landlord will afford tenant number two the protection in the future if landlord is contractual able to do so."

(c) Incidental Uses. Allowing another tenant to use an incidental portion of its premises for an otherwise excluded use, or to have incidental sales of otherwise excluded merchandise, can both provide general protection to the tenant granted the exclusive use, while allowing other uses that would be excluded under a strict exclusive use provision. From a tenant's perspective, this is likely to be more attractive to a larger retailer and less attractive to a specialty retailer whose entire footprint could be gobbled up by a big box company's "incidental" use.

(i) Failing to define an "incidental use" with sufficient specificity can lead to future arguments. One party's expectation of what is incidental can be vastly different from another party's, to say nothing of a judge's or jury's notions.

(ii) One common means of describing an allowable incidental use, that is allowed notwithstanding the general exclusive use, is to state that a competing use will be deemed incidental if no more than a set square

footage or a set percentage of floor space is devoted to the sale of the otherwise prohibited item.

(A) For example, a lease granting an exclusive for the sale of groceries may state that other tenants will not be deemed to violate that exclusive provided that no more than 2,000 square feet of sales space is devoted to the sale of groceries.

(B) From the standpoint of the tenant holding the exclusive use right, it is imperative that when a set square footage is used to define an acceptable incidental use, the corresponding aisle space adjacent to the competing use be included in making the determination. If not, it could be that only the shelf space of the competing use is included, giving a greatly expanded incidental use.

(iii) Another approach to defining incidental use is revenue based. For example, no more than 10% of the sales of another tenant may be derived from the sale of groceries.

(iv) A less common means of describing an incidental use is to allow a certain number of linear feet of shelf space to be used for the sale of restricted items.

C. Remedies

1. Rent Abatement. Frequently rent abates during the period of exclusive use violation - either completely, by a fixed percentage, or by a percentage based on tenant's sales. It is common to see abatement of 50% to 100% of base rent/minimum monthly rent. It is less common to see abatement of additional rent, such as CAM and real property tax payments.

   (a) Landlord often attempts to obtain notice and a cure period prior to the imposition of rent abatement.

   (b) Tenant will argue that damages it sustains are immediate, and that no lag is appropriate.

2. Termination Right. It is also common for tenant to have a termination right, in the event the exclusive use violation continues for an extended period of time, often a year.

   (a) Sometimes, when tenant elects to terminate on account of an ongoing exclusive use violation, landlord is obligated to reimburse tenant for the unamortized value of improvements to the premises paid for by tenant, because tenant was unable to enjoy the use of the tenant improvements over their expected lifetime, and that tenant should therefore be made whole for this loss.

3. Lost profits. If you do not explicitly establish your remedies for breach (rent abatement, termination rights, and/or a liquidated damages) in the lease, you may find yourself in court trying to prove or disprove lost profits damages. This is not a place you want to be if you can possibly avoid it.

4. Duration of Remedies. Landlords frequently require a tenant, whose exclusive use is being violated, at some point (typically one year) to exercise its termination right, or to commence paying full rent and forfeit the termination right. From a tenant's perspective, this obligation to "fish or cut bait" can be inequitable. A tenant may not know early on the long term impact of a competing tenant in the center. Forcing tenant to make this election earlier than is prudent from a tenant's standpoint, when the entire situation arises from a clear landlord breach, is often inequitable. From landlord's perspective, the looming possible termination of the lease can be quite problematic (e.g., financing may be difficult to obtain).

5. Rogue Tenants. As used in the context of exclusive uses, a "rogue tenant" is a tenant that is obligated to honor an exclusive use right of another tenant, but violates the exclusive.

For example, one tenant may have a clear, enforceable exclusive right to sell candy in a center, and regardless of this exclusive right another tenant (the "rogue tenant") starts selling candy bars at its check-out stands. In the instance of a rogue tenant, landlord is less culpable and may have done nothing wrong.

(a) Perhaps because landlord has a limited ability to prevent a rogue tenant violation, it is common to afford additional time to address a rogue tenant violation before rental abatement or termination rights arise.

(b) Some landlords will argue that rental abatement and termination rights are too extreme during the period landlord is taking reasonable steps to address the violation. Tenant's counterargument is that the impact to sales is immediate, and that landlord should be equally motivated to deal with the rogue tenant.

6. Adequacy of Rent Abatement/Termination. The two common remedies for an exclusive use violation, rental abatement and termination, may be woefully inadequate to protect a tenant. Opening and operating a retail store requires a large allocation of capital and resources. This investment, and the ongoing viability of the store, may be seriously compromised should a competing tenant open in the center.

(a) Allowing the initial tenant to pay a lesser rental amount may not come close to compensating that tenant for lost revenue incurred on account of the competition, especially where the period of reduced rent is limited to a year or so.

(b) Allowing the initial tenant the right to terminate its lease, and forfeit its store and investment, is not much of an option.

(c) One means of addressing the inadequacy of the two common remedies is to state that they are in addition to all other rights and remedies available to tenant. Landlords will always attempt to make the rent abatement/termination remedies the exclusive remedies available to tenant. That said, tenant is likely to have the more compelling equitable case for enjoining a competitor.

7. Other remedies

(a) Another means of addressing the inadequacy of the two common remedies is to require landlord to take reasonable steps to curtail the offending use, including the obligation to commence litigation if necessary. But if landlord has given the violating tenant a lease with broad latitude to operate, and that tenant had no prior notice of the original tenant's exclusive, litigation is likely to prove futile.

(b) If landlord does not want an ongoing obligation to curtail the offending use, Landlord may offer to assign to tenant landlord's right to enforce an exclusive use provision against an offending tenant. In addition, at times tenant may want this right as well.

(i) In this instance, some landlords require that tenant indemnify landlord from any liability relating to tenant's undertaking enforcement actions against the offending tenant, since the application of the exclusive use provision may be less than clear.

D. Tenant's Agreement Not To Violate Other Exclusives

1. Tenant is generally required to agree to not violate exclusive use rights under existing leases. Tenant should be clearly informed of existing exclusives that it is agreeing to honor.

(a) Tenant should require landlord to provide a list of all existing exclusive uses.

(b) Tenant should also require landlord to warrant and represent that the permitted uses in a lease will not violate any existing exclusive use restrictions in existing leases in the center.

2. Tenant should not be subject to future exclusive use provisions in future leases, or alternatively should not be subject to future exclusive use provisions that would impinge upon tenant's permitted uses.

E. Notice

1. Exclusive use rights should be included in the memorandum of lease that is recorded against the center, so as to afford constructive notice to prospective tenants.

    (a) Instead of generally incorporating the provisions of a lease in the memorandum of lease, it is preferable to actually recite the terms of the exclusive use rights.

2. In some states, inquiry notice could still afford protection to a tenant granted exclusive use rights.

II. Prohibited Uses

A. Generally

1. Definition. Restricted or prohibited uses are generally what the term implies- a particular use or type of use of leased or owned space is not permitted. In many ways these restricted or prohibited uses are "related cousins" to the exclusive use protections afforded to others- that is, in both cases a use is not permitted, either to protect that use for another user or to ensure that space in a shopping center or development is not used at all for a particular use.

B. Primary Purpose

Restricted or prohibited uses are put in place for several important reasons.

1. These reasons can include protecting a development against over-parking and therefore intensive parking uses such as a sports bar would be prohibited. Sports bars can be particularly troublesome since patrons tend to spend several hours in the premises (especially during "prime time events" like the Super Bowl or the NCAA men's basketball tournament) and the parking spaces are not turned for other customers of the center

2. Other reasons would be to maintain the general "retail" nature of a development, and therefore office or industrial uses would be prohibited.

3. Some restrictions are put in place to prohibit so called "noxious" or undesirable uses such as tattoo parlors, pool halls or massage parlors. Arguably these prohibitions are intended to maintain a certain 'quality" of customer by avoiding uses that might attract a less than desired quality of customer.

    (a) The quality of customers may be important not only to maintain the desired 'customer" mix but also to attract higher quality tenants and minimize the need to allocate resources to management concerns such as added security.

4. Finally, other restrictions relate to uses which do or could generate excessive odors or noise. Obviously these are intended to maintain a pleasant atmosphere and environment for customers and tenants in a development.

C. Precise Language

Drafting precise language to describe a prohibited or restricted use is critical to avoid unintended results.

1. For example simply prohibiting a massage parlor may inadvertently prohibit the use of space for a "high end" day spa that offers massages or a physical therapy or health club facility that uses massage as a therapy treatment.

2. Even what might appear obvious may be problematic. For example, what is excessive noise? Live music from a country and western bar? Speakers playing music for outdoor seating or dining areas? These can be very subjective areas of personal taste or tolerances and the more detailed the language (i.e. maximum decibel levels, etc.) the more likely a document will be helpful if there is a dispute. See sample restricted use provision below.

3. Many times there is a prohibition on a "bar" or a "tavern." Generally this is intended to prohibit a typical neighborhood type establishment primarily serving alcohol. Of course, this prohibition can be broadly interpreted to prohibit restaurants having bar facilities. A common way to avoid this problem is to allow alcohol-serving establishments so long as their total revenue (note revenue- not profit) is less than a certain percentage (e.g., 15%). This is intended to ensure that the primary revenue driver is food and not alcohol sales.

D. Notice of Prohibited Use

1. It is imperative that existing and future tenants and lenders be on notice that certain uses are not permitted in a development. The easiest way to provide such notice is to record the list of prohibited uses in the chain of title so that all parties have constructive notice-whether they perform a title review or not. This recording in the public records is usually accomplished by recording of an REA or Memorandum of Lease but can also be done with "standalone" declarations or agreements. It is also highly recommended that a list of prohibited or restricted uses be included in all new leases.

2. WARNING – Care must be exercised to make sure that any recorded documents are amended (of record) to reflect any changes to such restricted uses. Also remember that unless otherwise agreed to by a particular tenant, amended restricted uses will NOT be binding on that tenant if they are put in place after that tenant's lease is executed. Therefore practitioners should consider identifying in new leases that certain restrictions may not apply to tenants existing at the time the new lease becomes effective. Consider providing that less than 100% of tenants are required to approve amendment to recorded restricted uses.

3. ANOTHER WARNING – Be careful about projects that may be developed in phases. The intent may be that a future phase (which may be located hundreds of feet from the initial development and may include outparcels) not be subject to certain restrictions. Be mindful of the legal descriptions used and the definitions (e.g. "Shopping Center") when recording restrictions so they don't inadvertently bind portions of a project not intended to be bound by some or all of the restrictions. This is especially true of parcels which may not have as many tenants, and therefore the parking concerns which drive many restricted uses should not be applicable.

E. Practical Issues to be Addressed in Changing Retail Environmental

1. Someone would have to have had a pretty good crystal ball to be able to predict what has happened (and is happening as you read this outline) to the retail world in a very short period of time.

   (a) Bankruptcy and discontinuing of operations of long-standing retailers.

   (b) Internet sales severely impacting consumer shopping patterns resulting in lower "in store" sales and putting pressure on traditional brick and mortar selling platforms (e.g. smaller stores carrying less inventory such as Target and Walmart recent smaller prototype stores).

   (c) Multiple products being sold by retailers who traditionally did not sell those products (e.g., drug stores selling perishable foods).

   (d) Changing social patterns relating to issues such as legalization or decriminalization of cannabis products and mainstream popularity of tattoos and body piercings.

   (e) Outdoor queues to effect social distancing, necessitating not only the use of space outside of the premises, but the posting of requisite signage as well.

2. Each one of the changes described above has had and will have a significant impact on drafting and negotiating documents affecting new retail developments and analyzing restrictions for existing developments. This is especially true in the area of restricted and prohibited uses. The following are a few areas of concern and some ideas on how to deal with these real world issues.

(a) Be careful about defining noxious uses. As of the date of this outline the sale of cannabis products (recreational or medicinal) has been legalized in various states. Billions of dollars are being invested in the marijuana business. Owners of grow facilities and larger distribution facilities are carefully eyeing vacant spaces in retail developments and such uses create a great opportunity to "repurpose" such developments that are no longer economically viable with traditional retail users. Be mindful of these facts as you include a "head shop" or "sale of drug paraphernalia" as a restricted use. Be aware of any prohibition or limitation on "industrial or manufacturing use."

(b) The 'Amazon effect" is upon us. This surge in online shopping has spurred demand for distribution points to provide same day or expedited delivery to consumers. Retail developments may provide prime real estate for these uses in that they generally are centrally located in population dense areas, and have good access to public transportation and major road systems. A restricted use which prohibits a "non-retail" use may limit your client's ability to take advantage of a lucrative tenant opportunity.

(c) Be careful about overly broad descriptions of restricted uses. For example a "no pet store" prohibition may have been in place to avoid noises or odors that could be produced by such use. However, the sale of pet food, supplies, overnight boarding and "doggie day care" uses may get caught in the overly-broad reach of such restrictions. Consider allowing such uses with appropriate conditions such as sound-proofing, refuse collection programs and limitations on square footage sales areas for such products.

(d) The redevelopment of vacant space in a development is creating great opportunities for non-traditional retail uses such as medical office, surgi-center, dialysis and cancer treatment facilities and urgent care facilities. Many big box or supermarket vacancies are ideal for these uses and retail developments in general provide amenities such as ample parking, access to public transit and evening operating hours which are highly attractive to such uses. Again, a poorly drafted restriction on "office use" or non-retail use could chill these opportunities.

(e) Another example of changing social patterns affecting restricted uses relate to uses like a pool hall (billiard) facility, bowling alley and ping pong facilities. All of these uses traditionally may have been frowned upon as attracting a less than desired customer. However, today, there are several upscale tenants operating these facilities that are attracting a very desirable customer. A poorly drafted restriction document or clause may eliminate the chance for a developer to include one of these popular uses in its project.

III. Radius Restrictions

A. General

1. Definition. While some radius clauses/radius restrictions preclude a landlord from allowing a competing use on property owned by the landlord within a set radius of the premises, here we are addressing a radius restriction imposed by a landlord on a tenant, prohibiting that tenant from opening a competing business within a predetermined radius of the premises. Absent such a prohibition, a tenant could open a competing business next door to the premises; in fact it is common to see certain coffee shops, for example, opening multiple stores within a very small geographic area.

(a) Primary Purposes. A radius clause is very common in a lease where the tenant's rent is, at least partially, calculated as a percentage of gross sales generated from

the premises. The landlord has an interest in ensuring that the tenant maximizes the gross sales generated from the premises, and does not want a nearby store of that tenant to attract business that otherwise would occur in the premises. In addition, for the benefit of a center generally, and the other tenants in a center, a landlord wants to promote a certain vibrancy, and allowing a tenant to divert business to a nearby location is at odds with a landlord's goal.

(b) Argument Against. Tenants try to remove or severely limit the application of a radius restriction. The poor decision to locate a competing store too close to the premises is going to have a much greater impact upon the tenant than upon the landlord. Most tenants believe, and probably rightfully so, that they are better able to determine whether a particular, competing location is supported by demographics and other market factors, and whether an unacceptable impact on existing store sales is likely.

2. Narrowly Construed. As is the case with exclusive use restrictions, radius restrictions are often narrowly construed by the courts. Ambiguities are often resolved in favor of allowing another tenant location within the prescribed radius.

3. Breadth of Restrictions. In addition to prohibiting the tenant from opening a competing business within a certain radius of the premises, often the radius clause will restrict related entities as well. If not, a tenant could easily circumvent the application of the radius clause by using a subsidiary or parent corporation to open in the offending location. A tenant will want to limit the restriction to an operation that is substantially similar to the operation on the premises, perhaps by identifying the goods and services that may not be offered in the competing location.

4. Geographic Restriction. The reach of a radius restriction will depend upon the location of the premises. In a city, the restriction may cover only a few blocks, whereas in the suburbs a radius restriction could restrict a competing business within a mile or more. Measurements are typically made "as the crow flies" with the measurement being made from any portion of the premises if not specified. From a tenant's standpoint, it is preferable to cause the measurement to be made from the front door of the premises. Often tenants will identify other shopping centers or areas where a future location might be desirable, and either carve out that center/area from the operation of the radius clause, or shorten the length of the radius to fall short of the future location.

B. Common Carveouts

1. Tenant's Acquisition of Chain. A tenant with any possibility of expanding by acquiring a competing chain will want to ensure that a radius clause does not apply to any violating location that is part of the acquisition. Otherwise, one provision in a lease in one location could prevent a very desirable acquisition by the tenant.

2. Existing Locations. Most tenants will exclude existing locations from the operation of a radius clause for a new location. Landlords will grant this, but often with such limited language that a tenant has future problems. A tenant will want to be certain that is can extend an existing, offending lease, renew that lease, or even relocate an existing, offending store.

C. Remedies

1. Notice and cure. While as with most non-monetary defaults, tenant should be afforded notice and an opportunity to cure a breach of the radius clause. However, unlike many other non-monetary defaults, curing the violation of the radius clause (closing the violating retail location, e.g.) can be a very costly and extreme step to take.

2. Include gross sales of offending location in protected location. One of the common remedies a landlord includes in a lease, for the violation of the radius clause by tenant, is requiring tenant to include in its gross sales for the violating location in the gross sales for the primary location. While this probably makes landlord more than whole (it is unlikely that the subject location suffered sales losses equal to the sales of the offending location),

there is a certain logic to this remedy. It also obviates the need for landlord to demonstrate actual damages, and provides a strong incentive for tenant not to violate the exclusive use provision.

3. Liquidated damages. While not as common, a lease might provide for liquidated damages for every day that the violating location operates within the prescribed radius.

4. Equitable remedies; specific performance. If legal remedies are inadequate, landlord may be successful in enjoining tenant's operation in the offending location within the radius.

IV. Waiver

A. Kinds of waiver

1. Waiver of exclusives

   (a) Prospective tenant's proposed use is minimal, e.g., a drug store that sells a little bit of everything and generally improves local foot traffic.

   (b) New tenant's proposed use is not minimal, but landlord is willing to pay for the privilege.

   (c) Original tenant is no longer using the space as originally anticipated.

2. Waiver of prohibited use

   (a) Prohibited use is loud or smelly, but not offensive as long as it's far enough away.

   (b) Prohibited use is a parking hog, but new tenant's peak hours do not overlap with existing tenants'.

   (c) Category as a whole is suspect (massage parlors, head shops), but specific tenant has a good reputation (professional therapeutic massage, medical marijuana dispensary).

   (d) Original tenants could afford to be picky in boom times, but during a bust have to be a little more open-minded about keeping traffic coming to the center

3. Waiver of radius restriction

   (a) Tenant under restriction has a new, non-competing concept, e.g., an athletic wear retailer with a shoe spinoff.

   (b) Landlord wants to market adjoining development to potential buyers, free of tenant's restrictions on competition.

B. Drafting and negotiations

1. When in doubt, waive it!

   (a) Ten thousand dollars in lease concessions now can save you a hundred thousand in litigation costs down the road.

2. All of your Contracts I classics apply - statute of frauds, parol evidence rule, four corners rule. Put it in writing, and make sure your form is rock solid.

3. Apparent authority to contract for the company. For a chain, the local store manager does not have it.

4. Waiver by laches. Where a statute of limitations on breach of contract actions applies, this is generally controlling. As long as suit is timely filed, extraordinary circumstances are

required to demonstrate that the original tenant has consented to the violating use by laches. Dollar Plus Stores, Inc. v. R-Montana Associates, 209 P.3d 216 (Mont. 2009).

5. Restrictions and prohibited uses are generally construed narrowly by the courts

   (a) Tenants, if you have an exclusive on "dental practice" don't assume that will keep out an orthodontist or a surgical spa offering tooth whitening.

   (b) Landlords, don't get over-confident. If you have an existing donut store, give serious thought to getting a waiver for:

      (i) The new Mexican restaurant that's going to have churros on the menu;

      (ii) The Cantonese place selling dim sum pastries on Sunday morning;

      (iii) The convenience store with a line of snack cakes;

      (iv) The caterer who bakes wedding cakes and holds tastings on premises.

6. "Oh brave new world that has such people in it". There are new things under the sun. Consider whether the parties need a waiver if:

   (a) Tenant has a prohibition on kiosks within 100 feet of its entrance, and landlord wants to add an unattended Amazon delivery locker.

   (b) Tenant has gas and auto service stations as a prohibited use within 500 feet of its premises, and landlord wants to add an electric vehicle charging point.

   (c) Tenant A was an Italian pasta place whose lease prohibits "restaurants making substantially similar use", but during the COVID-19 pandemic it switched from a sit-down pasta place to espresso and gelato. Prospective Tenant B is a Tuscan chop house that also has a few pasta dishes on the menu.

   (d) Tenant A has an exclusive on drive-in and curbside food service, but so far has not enforced that when Tenant B went take-out only and Tenant C opened a sidewalk cafe to stay afloat during the pandemic.

   (e) Tenant A is a delivery-focused Chinese restaurant with an exclusive on rice and noodle dishes for consumption off-premises. Tenant B is an Indian restaurant that just signed up with Uber Eats and DoorDash.

   (f) Tenant A's lease prohibits car washes and pet stores within 100 feet of its premises. Tenant B wants to open a self-service dog wash.

   (g) Tenant A's lease prohibits noxious use. Under your state's common law, that included sales of marijuana and marijuana accessories. Five years ago, medical use was legalized, and starting January 1, recreational use and possession under 50 grams will be legal.

   (h) Tenant A's lease prohibits adult entertainment but does not define it ("I know it when I see it?"). Tenant B wants to open up an axe-throwing venue, because something had to fill the vacuum left by all the roller rinks and bowling alleys, so that's a thing now. They sell beer on premises, and it's not the kind of venue where you can book a children's birthday party, but then again the women are more likely to be wearing chainmail than pasties.

C. Limitations

1. Geographic - New use waived, so long as it's not within a certain distance from tenant

   (a) Radius restriction lifted for a new store 9.5 miles away, but not right across the street

   (b) Landlord can bring in a heavy parking user, provided it's at least 200 feet from Tenant's front door

   (c) Reduces future flexibility in relocating new tenant

2. Based on sales volume.

   (a) Less than 15% of new tenant's total sales

3. Based on sales area

   (a) Square footage of floor area

   (b) Linear footage of shelving

4. Personal to landlord/tenant, or runs with the estate

   (a) Tenant's lease has general prohibition on "massage" parlors, but will grant specific exceptions for legitimate massage therapy

   (b) There have been cases where a landlord agrees to a restriction, and sells the center without disclosing the restriction to the buyer. In situations like these, the new buyer is generally not liable, but tenants can pursue the landlord for breach of contract in not disclosing the restriction to the buyer.

   (c) If you're representing a tenant, be proactive. If the landlord is fishing around for an estoppel certificate prior to sale, consider independently sending a copy of your lease to the buyer.

D. Consideration

1. Cash. Who doesn't love to get it?

2. Rent reduction.

   (a) Use defined terms carefully

   (b) If a net lease, will tenant still be required to pay common area maintenance, etc. during the abatement period?

   (c) If more than one rent reduction event occur at the same time (e.g., an abatement in consideration of waiver, and an abatement due to an anchor closing), how will you handle?

3. Alternatives

   (a) Restriction refresh. If tenant's use has changed too, it may be time to renegotiate exclusives.

   (b) Makeover. Spruce up those plantings. Upgrade your lighting. Let the original tenant have a choice spot on the pylon.

(c) Injunctive relief is not going to be available to a tenant whose lease provides exclusive remedies, e.g., reduced rent or termination. *Reichert v. Rubloff Hammond, LLC*, 645 N.W.2d 519 (Neb. 2002)

E. Fourteen ways to wind up in court

1. **Be too Vague**. *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 881 F.3d 835 (11th Cir. 2018) ("Grocery" exclusive held to include products related to food preparation and kitchen cleaning); *Blueberries Gourmet, Inc. v. Aris Realty Corp.*, 291 A.D.2d 520 (N.Y. App. Div. 2002) (Bagel shop sale of grocery items did not make it a grocery store).

2. **Be too Specific**. *Northglenn Gunther Toody's, LLC v. HQ8-10410-10450 Melody Lane LLC*, 702 Fed.Appx. 702 (10th Cir. 2017) (50's theme diner's exclusive on other diners "similar in concept" held not to prevent landlord from bringing in an IHOP).

3. **Don't Seek a Waiver when Existing Tenants Expand Their Use**. *Ernie Otto Corp. v. Inland Southeast Thompson Monticello, LLC* 91 A.D.3d 1155 (N.Y. App. Div. 2012) (LL gave original tenant unrestricted right to sell greeting cards, then an exclusive to subsequent tenant on more than 36 feet of rack space for cards. When original tenant expanded to 120 feet of rack space, litigation ensued).

4. **Don't Seek a Waiver when Existing Tenants Change Use**. *Hussein Environment, Inc. v. Roxborough Apartments Corp.* 92 A.D.3d 426 (N.Y. App. Div. 2012) (when take-out pizzeria began advertising itself as "Mediterranean cuisine", offering seafood, it breached exclusives clause of neighboring restaurant and bar with exclusive as "a table cloth restaurant operation serving only so-called 'Middle Eastern' and/or seafood menu and, at Tenant's sole option, including liquor and/or beer and wine service.")

5. **Assume You Don't Need a Waiver because a Tenant Won't Object to a Neighbor's Incidental Use**. *Hussein Environment, Inc. v. Roxborough Apartments Corp.* 92 A.D.3d 426 (N.Y. App. Div. 2012) (exclusive for same Middle Eastern restaurant and bar above did not prevent pizzeria from getting a liquor license where pizzeria's bar business was only incidental while Middle Eastern restaurant's bar business was an integral part of its business).

6. **Assume You Don't Need a Waiver because a Tenant can Only Restrict its Own Sort of Use**. *Mabros v. Donuts-R-Us, Inc.*, 536 S.E.2d 215 (Ga. Ct. App. 2000) (Although tenant donut restaurant made its donuts in shop on landlord's property, its exclusive could restrict sale of donuts made anywhere on competitor's premises, including adjoining lot that landlord had never owned)

7. **Assume You Don't Need to Answer a Waiver Request because a Landlord Wouldn't Knowingly Violate an Exclusive**. *Reichert v. Rubloff Hammond, LLC*, 645 N.W.2d 519 (Neb. 2002) (Tenant was induced to extend lease at higher rent on two jewelry stores in development by landlord's grant of exclusive. Landlord subsequently brought in third jewelry store. Tenant presented evidence that market would not support a third store, still not entitled to injunctive relief).

8. **Sign an Estoppel Certificate After Actual Notice of the Violation, then Claim the Exclusive Wasn't Waived**. *Office Depot Inc. v. District at Howell Mill, LLC*, 710 S.E.2d 685 (Ga. Ct. App. 2011)

9. **Accept Landlord's Verbal Promise About the Competition that Tenant is Consenting to Without Getting it in Writing**. *Vu, Inc. v. Pacific Ocean Marketplace, Inc.*, 36 P.3d 165 (Colo. 2001); *Sports World, Inc. v. Neil's Sporting Goods, Inc.*, 507 So.2d 480 (Ala. 1987).

10. **Try to Make the Waiver Someone Else's Problem by Selling Part of the Center**. *Parkway Dental Associates, P.A. v. Ho & Huang Properties, L.P.*, 391 S.W.3d 596 (Tex. App. 2012) (where original landlord was bound by exclusive in whole center, and then sold part of the center to a third party that was not bound to the exclusive, original landlord could still be liable to tenant for exclusive violation in part of the center it no longer owned); *M.G.A., Inc. v. Amelia Station, Ltd.*, 2002 WL 31127518 (Ohio Ct. App.).

11. **Pretend not to Understand the Meaning of a Lease Term Rather than Seek a Waiver**. *2800 Chamblee Diamond, LLC v. Fitsum*, --- S.E.2d ---, 2021 WL 2100402 (Ga. Ct. App.) (violating tenant took position that "in the retail center" was ambiguous; court of appeals took a dim view of argument).

12. **Wait Until Deep into Negotiations with a New Tenant to Seek a Waiver**. *Landry's Seafood Restaurants, Inc. v. Waterfront Cafe, Inc.*, 49 S.W.3d 544 (Tex. App. 2001) (Landlord started negotiating to bring in a crab shack restaurant without first seeking waiver from original "nautical-themed" restaurant with exclusive. Arbitrators held that proposed new use was a violation, whereupon proposed new crab shack sued in tort for interference with a business relationship).

13. **Take Silence for Consent**. *Dave & Buster's, Inc. v. White Flint Mall, LLP*, 616 Fed. Appx. 552 (4th Cir. 2015) (Tenant opened up location within restricted radius without seeking waiver. Landlord sent letter reserving rights but did not seek enforcement for six years. Held that landlord had not waived enforcement rights).

14. **Fool Around and Find Out**. Some exclusive clauses are only applicable where tenant is not in default. What happens if landlord relies on this in bringing in a competitor without a waiver and original tenant subsequently cures the default? We are not aware of any case law, and suspect the original tenant's recourse against the newcomer is going to come down to notice. But does the original tenant still have a remedy against the landlord?

V. Sample Provisions

A. Exclusive Use Provision

From and after the Execution Date, Landlord shall not use or permit any other space in the Center to be used as a grocery store, or for the sale of the following products: meat, fish, poultry, dairy products, canned goods, bakery goods, packaged food, produce, packaged beverages, snacks, beer, wine, or spirits (collectively, "Tenant's Exclusive Uses"). The exclusivity provisions of this **Section __** shall not be applicable to any use being undertaken by any other tenant in the Center as permitted pursuant to a lease which is in effect as of the Execution Date ("Existing Lease"); provided, however, that Landlord hereby warrants and represents that: (i) only the following leases for space in the Center allow a use which would conflict with the exclusive use rights set forth in this **Section __**; (ii) all future leases and extensions of existing or future leases will specifically prohibit such uses; and (iii) Landlord will diligently take all actions necessary to stop any violation of Tenant's Exclusive Uses (including, without limitation, pursuing legal proceedings to resolution). Notwithstanding the exclusivity provisions of this **Section __**, Landlord may lease up to two thousand (2,000) square feet of space in the Center for a bakery. The term "Center" for purposes of this **Section __** shall include any expansions to the Center. In the event that there is any violation of the exclusivity provisions of this **Section __**, then after Tenant gives notice of such violation to Landlord ("Tenant's Exclusive Violation Notice") there shall be a partial abatement of Monthly Rent, while such violation continues, such that Tenant shall pay as Monthly Rent an amount equal to fifty percent (50%) of the amount of Monthly Rent otherwise payable under this Lease for a period of two (2) years following Tenant's giving Tenant's Exclusive Violation Notice, and seventy-five percent (75%) of the amount of Monthly Rent otherwise payable under this Lease thereafter. If such violation remains in effect on the date that is one (1) year after Landlord's receipt of Tenant's Exclusive Violation Notice, then Tenant shall also have the right to terminate this Lease by giving notice (a "Termination Notice") to Landlord at any time prior to the date the violation is no longer in effect. In the event Tenant gives a Termination Notice to Landlord, the termination of this Lease shall be effective ninety (90) days following a Termination Notice given between one (1) and three (3) years following the date of Tenant's Exclusive Violation Notice, and one hundred eighty (180) days following a Termination Notice given after three (3) years following the date of Tenant's Exclusive Violation Notice. Anything to the contrary notwithstanding, in the event of a violation of this **Section __** by a Rogue Tenant (as defined below), Tenant's rental abatement and termination rights set forth above shall not commence while Landlord is using reasonable efforts to stop such violation of Tenant's Exclusive Uses (including, without limitation, pursuing legal proceedings to resolution). A "Rogue Tenant" shall mean and refer to any tenant or occupant in the Center who is prohibited and/or not permitted by its lease or other occupancy agreement or by recorded covenants and restrictions upon the property leased to or occupied by the Rogue Tenant to use or occupy its premises in violation of this **Section __**. In the event Tenant terminates this Lease pursuant to this **Section __**, Landlord shall promptly pay Tenant an amount equal to the unamortized portion of the total amount of the costs for the Tenant Improvements paid by Tenant less the amount of the Tenant Improvement Allowance previously paid by Landlord, calculated as of the date of Tenant's termination notice based on a straight line amortization over the initial Term. In addition to Tenant's rights and remedies pursuant to this Lease, Landlord shall indemnify, protect, defend and hold harmless Tenant from and against any and all liabilities, losses, damages,

judgments, fines, demands, claims, recoveries, deficiencies, costs and expenses (including, but not limited to, reasonable attorneys' fees and court costs) arising out of any violation of rights under this **Section __**.

B. Prohibited Use Provision

Landlord shall not use any portion of the Center, nor allow any portion of the Center to be used, for any of the following:

- Any use which emits an obnoxious odor, noise or sound which can be heard or smelled outside of any Building in the Center.

- An operation primarily used as a storage warehouse operation and any assembling, manufacturing, distilling, refining, smelting, agricultural or mining operation.

- Any "second hand" store, "Surplus" store or pawn shop.

- Any mobile home park, trailer court, labor camp, junkyard or stockyard; provided, however, this prohibition shall not be applicable to the temporary use of construction trailers during periods of construction, reconstruction or maintenance.

- Any dumping, disposing, incineration or reduction of garbage; provided, however, this prohibition shall not be applicable to garbage compactors located near the rear of any Building.

- Any fire sale, bankruptcy sale (unless pursuant to a court order) or auction house operation.

- Any automobile, truck, trailer or recreational vehicle sales, leasing, display or body shop repair operation.

- Any bowling alley or skating rink.

- Any movie theater or live performance theater.

- Any hotel, motel, short or long term residential use, including but not limited to: single family dwellings, townhouses, condominiums, other multi-family units, and other forms of living quarters, sleeping apartments or lodging rooms. The hotel tract will be excluded from this clause.

- Any veterinary hospital or animal raising or boarding facility; provided, however, this prohibition shall not be applicable to pet shops. Notwithstanding the foregoing exception, any veterinary or boarding services provided in connection with the operation of a pet shop shall only be incidental to such operation; the boarding of pets as a separate customer service shall be prohibited; all kennels, runs and pens shall be located inside the Building; and the combined incidental veterinary and boarding facilities shall occupy no more than 15% of the Floor Area of the pet shop.

- Any mortuary or funeral home.

- Any establishment selling or exhibiting pornographic materials; drug-related paraphernalia (exclusive of pharmacies); any establishment which exhibits either live or by other means to any degree, nude or partially clothed dancers or wait staff; and/or massage parlors or similar establishments.

- Any bar, tavern, restaurant or other establishment whose reasonably projected annual gross revenues from the sale of alcoholic beverages for on-premises consumption exceeds 40% of the gross revenues of such business.

- Any flea market, amusement or video arcade, pool or billiard hall, car wash or dance hall.

- Any training or educational facility, including but not limited to: beauty schools, barber colleges, reading rooms, places of instruction or other operations catering primarily to students or trainees rather than to customers.

VI. Relevant Cases

A. *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 746 F.3d 1008 (11th Cir. 2014). Found that the exclusive provision on the Winn-Dixie Lease limiting grocery sales by other tenant was broad enough to include food and "many household supplies (such as soap, matches, paper napkins)."

B. *Bruegger's Enterprises, Inc. v. Middleburg Towne Square Ltd. Partnership*, 233 F.R.D 504 (N.D. Ohio, 2005). Upholds clear definition of an incidental use.

C. *Norwood Shopping Ctr., Inc. v. MKR Corp.*, 135 so.2d 448 (Fla . Dist. Ct. App. 1961). Found that the operation of a bakery in a supermarket was incidental.

D. *Thrifty-Payless Inc. v. Ennen Food Stores, Inc.*, 113 Fed.Appx 797 (2004 WL 2453036) Addresses supermarket pharmacies, construed items customarily sold in supermarkets to be limited to what was customary at the time the Lease was executed.

E. *Addison County Automotive, Inc. v. Church*, 144 Vt. 553 (Vt. SC 1984). Court refused to imply an incidental exception, where exclusive language was clear.

F. *J. C. Penney Co. v. Giant Eagle, Inc.*, 813 F. Supp. 360 (Penn. Dist. Ct. 1992) Another supermarket opening pharmacy where another tenant held exclusive; preliminary injunction granted.

G. *Elca of New Hampshire, Inc. v. McIntyre*, 129 N.H 114 (N.H. SC 1987). Court found that language authorizing the sale of nonalcoholic beverages gave rise to implied restriction on alcoholic beverages.

H. *Providence Square Associates LLC v. G.D.F., Inc.*, 211 F. 3d 846 (4th Cir. 2000). Also addresses the phenomenon of supermarket pharmacies, and the violation in this case of a Rite Aid exclusive.

I. *Trawood, LLC, v. A/H Prot Crossing Associates, LLC and Purple Dawg Enterprises Inc.*, 51 Va. Cir. 293 (Va CC 2000). Good analysis of intention and construction of exclusive use provision.

J. *2000 Clements Bridge, LLC v OfficeMax N. Am.*, No. 11-57 (JEI/KMW), 2012 U.S. Dist. LEXIS 117940 (D.N.J. Aug 21, 2012) Demonstrates the risk of listing examples of prohibited competitors, and not using "including but not limited to" language.

K. *Hermel. Inc. v. Wig Chalet Boutique, Inc.*, 527 S.W.2d 734 (Mo. App. 1975). The court determined what was "incidental" when the Lease language did not elaborate.

L. *Fab'Rik Boutique, Inc. v Shops Around Lenox, Inc.*, 329 Ga.App 21 (Ga Dist. Ct. App 2014). Court found that 5-mile radius clause was not overly broad.

M. *Dave & Buster's, Inc. v White Flint Mall*, LLLP 616 Fed.Appx 552 (4th Cir. Ct. App 2015). Court found that ongoing violation of radius clause was a continuous breach, and thus not time-barred by statute of limitations.

N. *Ernie Otto Corporation v Inland Southeast Thompson Monticello, LLC*, 91 A.D. 3d 1155 (N.Y. Sup Ct. App. Div 2012). The court limited the application of greeting-card exclusive.

O. *Hussein Environment, Inc. v Roxborough Apartments Corp.*, 92 AD 3d 426 (N.Y Sup Ct. App. Div 2012). Good discussion of restrictive use covenant.

P. *Jacobs Pharmacy Company, Inc. v Richard & Associates, Inc.*, 229 Ga. 156 (Ga Sup Ct. 1972). Exclusive use provision not applied to later-acquired adjoining property.

Q. *Market Place Shopping Center v Basic Business Alternatives, Inc.*, 213 Ga.App. 722 (GA Ct App. 1994) Bakery/deli exclusive use provision upheld, excused tenant's duty to pay rent.

R. *Parkside Center, Ltd. et al. v Chicagoland Vending, Inc.*, 250 Ga. App 607 (Ga Ct of App. 2001). Court found exclusive use provision was valid, and a reasonable restraint on competition.

S. *Penn Mart Supermarkets, Inc. v New Castle Shopping LLC*, 2005 WL 3502054 (Del Ct of Chan. 2005). Court upheld limited permanent injunction prohibiting the sale of select grocery items.