



## In the Spotlight

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By Ira Fierstein

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During lease negotiations with an anchor or other national tenant, it is customary for the tenant to slap on a laundry list of prohibited or “noxious” uses and to require the landlord to subject the shopping center to the restrictions contained therein. The landlord is generally agreeable to the prohibitions on the list, because the tenant is also bound by those restrictions and because the list generally contains uses which the landlord will not consider anyway — such as industrial or manufacturing uses, mortuary and funeral homes, places of worship, carnivals or circuses, gun and pawn shops, and everyone’s favorite throwback to the 1960’s — tattoo parlors and stores selling, distributing or displaying any drug paraphernalia primarily used in connection with the use or ingestion of illicit drugs. However, before the landlord concedes several other historically noxious uses, the owner of a modern-day lifestyle center or mixed-use center, particularly one still under development, should look carefully at these standard restrictions and consider softening the restrictions to allow certain types of uses which are finding their way into upscale and first-class shopping centers.

### Pitfall Number One

Particularly in mixed-use centers, but in many newer lifestyle centers as well, a landlord should be careful not to agree to *only* retail uses in the center. Although most tenants will agree to allow limited “retail office” uses, such as real estate offices, beauty salons, packaging stores and professional offices, many newer centers now have purely office uses. Often these are located on second floor stories or in separate multi-story office building locations in designated outparcels. Care should be taken to protect the retail tenants’ visibility; and parking issues are always going to factor into the amount of office space allowable. Hotel/motels are also beginning to appear as well, and these should be allowed up to a certain size. In certain situations, a landlord might additionally agree that any hotel be ranked “four star” or higher (or other equivalent ranking), but this raises a number of difficult issues, such as what ranking system to use and what happens if the ranking of an existing tenant happens to decline below the benchmark. Finally, medical or dental clinics should be allowed, provided that such clinics do not admit patients overnight.

### Pitfall Number Two

A further pitfall of agreeing to a tenant’s list can be seen in the recent evolution of views toward entertainment issues. Historically, entertainment users were forbidden in first-class shopping centers due to parking and patronage access. Today, these are among the most sought-after tenants, as customers are looking for a shopping center to provide a total lifestyle experience, a place where they can go to shop, eat and be entertained. Patrons of all ages are flocking to upscale movie theaters offering fine dining, luxury seating and amusement galleries. Bars are no longer incidental uses to restaurants, but are often the main attraction, particularly where the bars resemble upscale nightclubs, offering live entertainment and catering to young professionals. Previously prohibited operations such as bowling alleys and pool rooms are now common establishments in shopping centers, provided they are similar to certain national upscale chain establishments, again catering to the types of customers typically found in urban and suburban upscale centers. Older centers, which are trying to renovate or add lifestyle components, are often stymied by “noxious” use clauses in old leases.

Generally, the anchors and national tenants have come to accept these non-traditional uses. A list of restricted uses that may appear in a new lifestyle center follows this article. *Note that several previously absolute prohibitions now have carve-outs or are permitted in certain locations in the shopping center.*

### An Additional Concern

An additional concern must also be addressed to protect a landlord from lease restrictions that previously were commonly included in shopping center leases. Many anchor or national tenants insist that all parking areas be considered common areas that are available to all tenants on an equal basis, and that no tenant be allowed to use any portion of the common areas for its exclusive use. Typically, landlords are prepared for this lease requirement and have successfully negotiated carve-outs to allow limited sidewalk sales and very short seasonal use of specified parking areas (for sale of plants, or Christmas trees or pumpkins, for example). However, this type of protection will not be sufficient in new lifestyle centers. Frequently, restaurants and theaters will require valet parking, or “porte cochere” areas for their exclusive use, or will require permanent “pick up” areas or reserved spaces for limited time periods. These should be allowed and will often require close scrutiny of the site plan to design the layout that will

satisfy both the tenant requiring these special privileges as well as the rest of the tenants in the center.

Finally, with the increased number of restaurants in lifestyle centers, there is an increased need to allow outdoor seating areas. Again, these should be allowed, as they increase the traffic to the restaurant and to the shopping center as a whole. An issue will arise, however, because the restaurant will not want to pay rent or other expenses on the outdoor seating area. Landlords should try to get these tenants to pay for certain expenses, and possibly pay rent depending on whether the outdoor seating areas include permanent structures in common areas, are used year-round, contain roofs, etc. The more "permanent" the outdoor area appears, the stronger the argument for the tenant to pay for the use thereof. If the landlord is unable to prevail in getting rent or payment for these expenses, it is imperative that the denominator of the formula used to calculate other tenants' proportionate shares exclude such areas.

Lifestyle and mixed-use centers are continuing to push the envelope in keeping up with the demands of a changing society. Landlords and tenants must be willing to abandon their preconceived notions of the limited types of tenants that should be allowed in their centers, and be willing to allow creative drafting of the prohibited use clause to enable the shopping center of today to succeed, and in doing so, they will create a win-win situation for all parties.

### **Sample 'PROHIBITED USES' Provisions**

Neither landlord nor tenant shall permit the following uses in the Shopping Center (including the Premises):

- Manufacturing or industrial purposes (except for those functions that are incidental to the conduct of retail businesses);
- The sale, distribution or display of any drug paraphernalia primarily used in the use or ingestion of illicit drugs;
- Any purpose prohibited by law;
- A "second hand" store, including as examples those operated by Goodwill Industries or the Salvation Army but "second hand store" shall not include antique stores or nationally recognized re-sellers of electronic games or sporting equipment;
- A bowling alley other than in Buildings A, B and C as noted on Exhibit 1;
- A skating rink other than a seasonal outdoor use;
- A bar, nightclub or discotheque other than upgrade establishments located in Buildings A, B and C as noted on Exhibit 1;
- A pool room other than in Buildings A, B and C as noted on Exhibit 1;
- A massage parlor (except as part of the regular services offered by a doctor, chiropractor, health club, day spa or beauty salon);
- A tattoo or piercing parlor;
- Any live sporting event, sports or game facility except in Buildings A, B and C as noted on Exhibit 1 and except for an amusement gallery in conjunction with a restaurant or theatre operation;
- Any off-track betting club or facility;
- Any operation primarily used as a storage facility;
- Any assembling, manufacturing, distilling, refining, smelting, agricultural, or mining operation;
- A mobile home park, trailer court, labor camp, junkyard or stockyard (except that this provision shall not prohibit the temporary use of construction trailers during periods of construction, reconstruction or maintenance);
- Any dumping, disposing, incineration or reduction of garbage (exclusive of garbage compactors located near the rear of any building);
- An auction house or similar operation;
- A central laundry dry cleaning plant or laundromat (except that a dry cleaner that performs all dry cleaning outside the center shall be permitted);
- Any living quarters, sleeping apartments or lodging rooms;
- Any mortuary or funeral home;
- An adult bookstore or facility selling or displaying pornographic books, literature or videotapes (materials shall be considered "adult" or "pornographic" for such purpose if the same are not available for sale or rental to children under 18 years old because they explicitly deal with or depict human sexuality); the parties acknowledge and agree that the sale of books, magazines and other publications by a national bookstore (or its local equivalent) of the type normally located in first-class shopping centers in the state or the operation of a full-line video store shall not be deemed a "pornographic use";
- Any training or educational facility that exceeds the permissible square footage at the end of this exhibit, 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; provided, however, this prohibition shall not be applicable to nationally recognized educational learning centers or to training facilities not occupying any ground floor space nor to on-site employee training by any tenant or occupant incidental to the conduct of its business at the center;
- A pawn shop;
- A gun shop;
- A church or other place of religious worship or meeting hall (which shall not include a movie theater which is used occasionally for meetings);
- A carnival, amusement park or circus;

- A hotel/motel except a “four star” ranked hotel or higher (or other equivalent ranking);
- A day care center other than in Building A on Exhibit 1;
- A so-called “fast food” establishment, which shall not include so-called “quick casual” or “quick service” restaurants, except such “fast food” establishments may be located in an enclosed food court;
- An automotive repair shop;
- A liquor store other than so-called upscale gourmet wine stores; or
- A check-cashing operation other than a bank which is not otherwise a prohibited use hereunder.

The following activities shall not be deemed “non-retail” and shall be allowed in the center (but not in the Premises without landlord’s consent); provided, however, that such activities shall not exceed 20% of the gross leasable area of the ground floor portions of the buildings in the center:

- Offices;
- Banks;
- Travel agencies;
- Insurance agencies;
- Medical and dental clinics (provided that such clinics do not admit patients overnight);
- Barber shops;
- Beauty salons;
- Real estate sales offices;
- Stock brokerage offices;
- Optometrist offices;
- Post offices; or
- Packaging or packaging stores.

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**Ira Fierstein** is a partner in the Chicago office of Seyfarth & Shaw, LLP. He has more than 30 years of experience counseling national developers, shopping center owners, limited liability companies, partnerships and other clients regarding significant investments in office, retail, industrial, telecommunications, residential and mixed-use properties throughout the United States, Canada and in several European countries.