

American College of Real Estate Lawyers

Spring Meeting  
March 22-25, 2018  
Orlando, FL

by

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Unique Challenges of Restaurants in Shopping Centers

1. Common parking; valet parking
  - a. Typically restaurants need more than normal retail parking ratio, which is usually 4.5 to 5 parking spaces per 1,000 SF of retail space. Some zoning codes require restaurants to have a ratio of 7 to 10 spaces for each 1,000 SF of space.
  - b. If there is a parking deck, can the restaurant tenant get the right to validate parking tickets?
  - c. If valet parking, where is the parking area and can it be relocated if necessary? Many landlords will want the right to take over management of valet parking if it's not being managed properly and charge the tenant for its doing so.
  - d. Some tenants will want "to go" or "carry out" reserved parking spaces, and most REAs do not allow exclusive parking.
  - e. Designated employee parking areas in most shopping centers are remote, creating security issues for restaurants' employees who leave work in the dark. Some landlords will agree to have security personnel walk employees to their cars.
2. Common area landscaping
  - a. Landscaping managed by mall owners may not be "first class."
  - b. Up-scale restaurants will negotiate for better level.
3. Common utilities/utility lines
  - a. If a restaurant is being added to a shopping center on a newly-created outparcel (very common in redeveloping older centers) existing utility lines may need to be relocated or reconfigured.
  - b. Capacities of utilities may need to be upgraded (*e.g.*, restaurants, vs. non-food retailers, need gas in addition to electricity, more water, more HVAC capacity, etc.)
4. Grease traps, venting; apparel not next to food odors; daily deliveries and trash/refuse removal; dumpsters
  - a. All the "ugly" stuff is obnoxious to the clothing retailers
  - b. Deliveries of food and alcohol
  - c. Dirty waste and pests
5. Restrictions on use, site plan, hours of operation, signage
  - a. Existing centers with strong anchors typically have bound by REAs that govern all these elements

- b. Variations on these controls will surprise many restaurants and will kick off rounds of negotiations between the anchors, shopping center owner, and restaurant tenant
  - c. Target, for example, prohibits alcohol sales within X feet of its store entrances
6. Patio areas; music; trash
- a. Patio areas are popular but have to be managed
  - b. Music
  - c. Trash
  - d. Annoyances to neighboring tenants
  - e. See sample provisions on patios in Appendix following
7. Parking lot lighting
- a. Restaurants are often open earlier (breakfast) or later (dinner and bar) than other retail tenants
  - b. If “atypical” hours of parking lot lighting is required, the restaurant tenant may be charged a per-hour assessment to cover the expense
8. Notes about types
- a. Attached restaurants in large shopping centers
    - i. Open to the mall or not?
  - b. Outparcels
    - i. Stand alone or clustered?
  - c. In-line food uses in strip centers
  - d. Food courts and food halls
9. Notes about the growth patterns
10. Common area charges; these are not unique to restaurants and are very common but may be new to restaurants going into a shopping center for the first time
- a. Fixed or pro rata?
  - b. Capped?
  - c. Define what is included and what is excluded
  - d. Are there management fees?
11. Real estate taxes
- a. Is the restaurant a separate parcel with separate assessment?
  - b. Or, does the restaurant pay a pro rata share of taxes on a larger property? If so, how is it calculated and managed?
12. Liquor licenses
- a. Shopping center owner will have to give a contingency for the tenant to obtain a liquor license
  - b. Shopping center owner may have to get involved and/or may want the license to be assigned to it in the event of tenant’s default if permitted under local laws

A study by International Council of Shopping Centers and Jones Lang LaSalle indicates that food and beverage is growing in importance to retail real estate. In some areas in the US, Canada and the UK, the amount of space dedicated to food/beverage is expected to reach up to 20% or more of all space by 2025. That number could be higher in Asia. “The Successful Integration of Food & Beverage Within Retail Real Estate,” 62 pages, 2017.

## Appendix

### Sample provisions: Patios

#### Landlord provision

Notwithstanding anything to the contrary contained herein, Tenant may, at its sole cost and for no additional Rent, provide outdoor seating for its customers' exclusive use on the patio area immediately in front of the Premises as depicted on the site plan attached hereto as Exhibit ("Patio Area"). Tenant's use of the Patio Area shall be subject to the following: (i) Tenant's receipt of Landlord's prior written approval, which approval shall not be unreasonably withheld, conditioned, or delayed, of the layout of the Patio Area and the types of tables, chairs, umbrellas, outdoor heaters and any other furniture or planters to be placed in the Patio Area (collectively, "**Outdoor Furniture**"); (ii) Tenant's use of the Patio Area shall comply with all Legal Requirements (defined below) and shall not unreasonably interfere with the business of any other tenants or customers of the Shopping Center, nor with the safe and easy flow of pedestrian and other traffic in the Shopping Center; (iii) the Patio Area shall only be used when Tenant's Premises are open for business; (iv) Tenant shall maintain the Outdoor Furniture thereon in good order condition and repair at Tenant's sole cost and expense; (v) Tenant may not (A) place any fixtures or equipment other than the Outdoor Furniture on the Patio Area, or (B) make any alterations to the Patio Area without Landlord's prior written consent; (vi) the use of the Patio Area shall not increase the insurance premiums or invalidate any insurance relating to the Shopping Center; and (vii) Tenant's use of the Patio Area shall not cause any nuisances or disturbances, including but not limited to, excess noise, loitering, etc. If Tenant has a speaker for playing music on the Patio Area such music shall be at a reasonable level so that it will not disturb other businesses or patrons and, upon request of Landlord, Tenant shall lower the level if Landlord determines that the music level is too loud. Tenant shall, at Tenant's sole cost and expense, keep the Patio Area neat, clean and free of rubbish and maintain the Patio Area in good condition and repair. If Tenant fails to comply with its maintenance obligations as set forth herein, Landlord, upon twenty four (24) hours written notice (except in the case of emergency or where Landlord reasonably determines that failure to act more quickly will have an adverse impact on the Shopping Center), may clean or repair the Patio Area in which case Tenant shall, upon receipt of written demand therefor from Landlord, reimburse Landlord for all reasonable out-of-pocket costs incurred plus a 10% administrative fee. If Landlord determines at any time that Tenant's use of the Patio Area is in violation of Legal Requirements, Landlord may terminate Tenant's right to use the Patio Area by giving five (5) days prior written notice to Tenant (unless applicable law or other circumstances require a shorter notice period). If Tenant's right to use the Patio Area is terminated for any reason under the terms of this Lease, Tenant's obligations under this Lease shall not be reduced. If this Lease is terminated for any reason or Tenant vacates or abandons the Premises for reasons other than Force Majeure or casualty damage, Tenant's right to use the Patio Area shall terminate. Tenant shall be responsible for any injury to any person or damage to any property which occurs within the Patio Area or in connection with the Patio Area, except for injury or damage caused by Landlord's gross negligence or willful misconduct. Except to the extent of gross negligence or willful misconduct of Landlord, its agents, contractors, property managers or employees, Tenant shall indemnify, defend and hold harmless Landlord from and against any and all claims, liabilities, obligations, penalties, causes of action, liens, damages, costs and expenses (including, without limitation, attorneys' fees and expenses) arising from or in connection with Tenant's or its invitees use of the Patio Area. Tenant's commercial general liability insurance coverage required under this Lease shall include Tenant's operation and use of the Patio Area.

### **Tenant provision**

Subject to compliance with Legal Requirements, Tenant shall be allowed to create a patio area adjacent to the Premises for Tenant's exclusive use, with speakers, tables, chairs, awning, lights, and railings, at Tenant's sole cost and expense of not less than 400 square feet in the location designated on Exhibit A and Tenant has the right to play music on such area (at reasonable levels), subject to local code. The patio area shall be used solely in connection with the operation of Tenant's restaurant business in the Premises, and for no other use. Tenant shall not be obligated to pay additional rent for the use of the patio area, provided that the patio area shall be operated by Tenant at Tenant's sole cost and expense, and Tenant shall be required to maintain the patio areas at Tenant's sole cost and expense and shall clean the patio area on a daily and weekly basis. Landlord shall have the right to require Tenant to discontinue the use of the patio area if, in Landlord's reasonable judgment, the use of the patio area is creating a nuisance and/or disrupting the operation of business by other tenants of the building within which the Premises is located and Tenant has failed to cure the same within ten (10) days following written notice thereof from Landlord, accompanied by written evidence that another tenant has complained to Landlord about Tenant's operation of its business on the patio.