



Shopping Center Legal Update

The legal journal of the shopping center industry



In Depth

When the Tenant Files for Bankruptcy: Protecting the Landlord's Right to Payment of Stub Rent	2
Is That Use Restriction Actually Enforceable?	4
Big Box Ordinances and Market Studies: How Local Governments Seek to Regulate (or Eliminate) Large-Format Retail Stores	7
Can a Shopping Center Owner Be Held Liable for a Tenant's Discrimination Against Its Customers?	10
Express Easements: A Primer	14
Site Plans: Does 'X' Mark the Spot?	17

Cases

Leases	19
Sales	20
Privacy	20
Reciprocal Easements	21

From Canada

The Landlord Threw Me Out— But I Am Not in Default!	23
Real Estate Deposits Held to Be Forfeit Without Proof of Damages	25

Site Plans: Does 'X' Mark the Spot?

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When landlords and tenants negotiate shopping center leases, they customarily utilize site plans to contemplate the location of buildings, tenants, parking, and ingress and egress. When such site plans are attached to and incorporated into the lease, tenants typically argue that the site plan, as depicted, is binding on the future development of the center. Landlords tend to argue that the site plans are preliminary and subject to changes. This article discusses how courts have dealt with the enforceability of site plans. The lesson, as typical with any contract, is to draft and negotiate carefully, as courts will bind parties to the site plans. However, if intended by the parties, landlords can minimize the effect of site plans and allow *themselves* to make changes to the center that typically does not materially affect the tenant.

Site Plans Are Generally Enforceable

If a site plan is attached to the lease, the courts will generally bind the parties to the depicted development. For example, in *Safeway, Inc. v. Plaza Company of Virginia*, the Virginia Supreme Court held that the tenant grocery store was entitled to terminate its lease where the landlord constructed a building adjacent to a rectangle labeled "future building area" rather than within it.¹ When the landlord revealed plans to construct a movie theater adjacent to the area on the site plan labeled "Future Building Area," the court agreed with the tenant that the reservation of "Future Building Area" did not allow the landlord to change the location of the later built theater, which eliminated parking spaces on the site plan.² In *Marc Glassman, Inc. v. Danbury-Newtown, LLC*, the Connecticut Superior Court granted a permanent injunction against the construction of a drive-in restaurant in a shopping center despite a substantial, years-long investment in the regulatory approval process because the tenant only agreed that a new building could be built so long as it was "constructed substantially where it was shown on an attached site plan" and "comprise[d] no more than approximately 2,000 square feet." The proposed drive-in restaurant breached the lease because it exceeded the 2,000 sf and the approved location differed from that shown on the lease's site plan.³

These cases demonstrate that courts will honor the parties' agreements as written. Courts will look to a site plan incorporated by reference into the lease to determine the parties' rights and obligations with respect to the shopping center development, including the location, size and quantity of buildings, ingress and egress, and other possible tenants.

The Impact of Site Plans Can Be Minimized

Even though a site plan is attached, courts will, however, honor limitations set forth on the site plan or in the lease that provide flexibility for the shopping center development. For example, in *Lowe's Home Centers, Inc. v. Fryman*, Lowe's sought to enforce a contract that allowed it to develop its store and retention ponds, including what Lowe's believed was an easement for access and drainage for the benefit of the county's retention pond.⁴ Lowe's relied on the site plan that depicted the easement to the county's pond and notes to the site plan that stated that the retention area was to be made available by the owner to the county for a regional retention pond.⁵ The Eleventh Circuit rejected reliance on the site plan: "However, the notes also state that the Site Plan details . . . are for the illustrative purposes only, and do not constitute binding commitments unless such commitments are otherwise set forth in the Agreement."⁶ The court therefore found that the site plan only provided a rough depiction of the easement and no such binding commitment to the county retention pond existed.⁷

In *Vineyard Village, Ltd. v. Univest Properties, Inc.*, Vineyard challenged the owner's planned development that contained a three-pad site—each with a different size and shape—instead of the four-pad sites as depicted on the site plan and not in compliance with the REA.⁸ The court allowed the owner flexibility to alter the pad sites, even though the site plan showed four pad sites that are each approximately 5,000 sf because the language in the REA allowed the owner to alter the site plan by creating three pad sites.⁹ The court stated: "If it had been *Vineyard's* intent . . . to restrict the size and shape of *Univest's* Ôpad site,' then *Vineyard* could have expressly included such a provision in the Agreement or the REA as it did for spacing, parking dumpsters, and height." However, the agreement provided that other than being two feet apart, the pad site "may be laid out differently so long as each pad site contains sufficient parking for it[s] use."¹⁰

The Minnesota Court of Appeals allowed a landlord to develop a hotel on the property over a big box tenant's objection and despite an express prohibition against having "lodging quarters" in the shopping center.¹¹ In the lease, other than the restricted area delineated on the site plan, the landlord reserved the "absolute right . . . at the time and from time to time (a) to make changes or revisions in the site plan" including "subtractions from . . . the building area and parking areas."¹² Because the landlord subtracted the hotel from the shopping center tract, the lease's other language prohibiting lodging quarters did not limit the landlord's broad ability to make changes or revisions to the site plan.¹³

Lastly, the Georgia Court of Appeals prevented an anchor department store from using its veto on any building not shown on the site plan or permitted by the lease for the construction of another department store that was larger than the

contemplated square footage.¹⁴ The court recognized that the site plan expressly provided that “the actual size and configuration of a future store may vary and places no limit on the variance,” and therefore would not insert words to limit the variance.¹⁵

These cases demonstrate that landlords/owners can provide themselves flexibility in the development of or alterations to the shopping center despite attaching a site plan to the lease. However, the language sometimes backfires, so it is essential to draft the flexibility carefully.

For example, in *Chesterfield Exchange, LLC v. Sportsman’s Warehouse, Inc.*, the court found that the term “proposed” in reference to a big box anchor tenant depicted on the site plan attached to the lease meant “intended,” which the tenant relied on in the negotiations as a representation that a specific warehouse store would be the anchor tenant. Therefore, the lessee had a right to rescind the lease.¹⁶ And, in *Craven v. TRG-Boynton Beach, Ltd.*, the ice cream store tenant was allowed to proceed on a damages claim, but not specific performance, for the landlord’s changes to the site plan and relocation of the tenant.¹⁷ The lease provided that the site plan “sets forth the general layout of the project and shall not be deemed a warranty on the part of the Landlord that the project is or will be exactly as indicated on such diagram. Landlord may increase, reduce, or change the owner, dimensions, and locations of roadways, walled buildings, and parking areas as landlord from time to time deems proper.”¹⁸ Despite the landlord’s flexibility, the court relied on the language providing that the landlord’s modifications will not “adversely affect the ingress, egress, visibility or ability of tenant to operate Tenant’s business.”¹⁹

Best Leasing Practices

The lesson learned from these cases is that the court will enforce the leases as written and bind the parties to the site plan unless the parties have included in the site plan or the lease flexibility to modify the shopping center or language that the site plan is for general illustrative purposes and not to be relied on, and that the site plan only depicts approximate locations, boundaries, dimensions and common area that are subject to modification. There are many variations of language that could be added to the site plan and lease; the key is clarity and, therefore, it is recommended that if either the landlord or tenant would want to limit the binding effect of the site plan, then the site plan should include a conspicuous disclaimer and the language in the lease should likewise contain a similar disclaimer to avoid any ambiguity.

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¹ 444 S.E.2d 544.

² *Id.* at 545–46. See also *Leggett of Va., Inc., v. Crown Am. Corp.*, 1994 WL 16197511 (W.D. Va. 1994) (citing *Safeway* and holding that tenant’s consent is required to build outside of the designated areas on the site plan—despite language that the site plan shows only the approximate location of the demised premises and that the lessor reserves the right to change the name and location of other tenants as well as parking).

³ 2012 WL 527646 at *2, *3 and *7 (Conn. Sup. Ct. Jan. 26, 2012).

⁴ 390 Fed. Appx. 883, 884 (11th Cir. 2010).

⁵ *Id.* at 886.

⁶ *Id.*

⁷ *Id.*

⁸ 2009 WL 3153269, at *1 (Ct. App. TX 2009).

⁹ *Id.* at *5.

¹⁰ *Id.*

¹¹ *Barnes & Noble, Inc. v. Gabbert & Gabbert Co., L.P.*, 2008 WL 467429 (Minn. Ct. App. 2008).

¹² *Id.* at *1.

¹³ *Id.* at *4.

¹⁴ *Belk, Inc. v. Warner Robins Zamias Ltd. Partnership*, 555 S.E.2d 19, 20–21 (Ga. Ct. App. 2001).

¹⁵ *Id.* at 21.

¹⁶ 572 F. Supp. 2d 858, 867 (E.D. Mich., 2008).

¹⁷ 925 So.2d 476 (Fla. Ct. App. 2006).

¹⁸ *Id.* at 478.

¹⁹ *Id.* at 478, 480–81.