

Real Property, Probate and Trust Journal
Fall 1997 Issue

**FOOD SERVICE LEASE USE AND
EXCLUSIVE CLAUSES**

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Editors' Synopsis: To effectively negotiate use and exclusive clauses in a food service lease, the lawyers for both landlord and tenant must understand the nature of the food service industry, the potential overlap between food sales and food service tenants and among various food service tenants, and the parties' purposes in entering into a food service lease. This Article examines various types of use clauses in the context of the food service industry and suggests factors to be considered during a lease negotiation. The author illustrates the need for careful drafting by surveying the historical and practical distinctions between the many different types of food service establishments.

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I. THE FUNCTION OF FOOD SERVICE USE AND
EXCLUSIVE CLAUSES

A. Introduction

The lease use clause is a convenient place to both confirm and limit a tenant's right to conduct specific business activities on the leased premises. The exclusive clause, a close relative of the use clause, protects the tenant from other tenants' potentially harmful activities by requiring the landlord to prevent such activities.

Like most other use clause negotiations, food service use clause negotiations are characterized by the landlord's push to keep the tenant's business operations limited and the tenant's pull for the right to expand or change its business operations. Conversely, food service exclusive clause negotiations are characterized by the tenant's push to keep cotenants' business operations limited and the landlord's pull for the right to expand or change those business operations. The push to restrict and the pull for flexibility produce the tensions that underlie all use and exclusive clause negotiations.

A lease negotiator should think twice before copying a food service¹ use or exclusive clause from a previously negotiated lease or form book. The mere presence of a clause in yesterday's lease does not mean the clause is appropriate, practical, or reasonable. Lease negotiators should not be impressed by a string of words merely because they see the words in a previously executed lease. The lawyers who negotiated the previous

¹ Food service businesses, such as restaurants, diners, luncheonettes, coffee shops, and cafeterias, prepare and package food on the premises and serve it to their patrons ready for consumption. They are different from food sales businesses such as supermarkets, grocery stores, convenience stores, and delicatessens. Food sales businesses prepare and sell food in the expectation that it will be eaten off premises. Snack bars do not feed their customers on premises. They prepare and sell food in the expectation that it will be eaten off premises. See *infra* text following note 3 and Part V.C.

lease may have had little knowledge about leases and may have been considerably less experienced than the task required. Clauses find their way into leases for many different reasons. The reasons are not always sensible.

Even a use clause that makes perfect sense in one lease may be completely absurd in another. A lease is a bundle of rules governing a landlord and tenant relationship with respect to space in a specific and perhaps unique environment. Each lease must reflect distinctions such as different landlords, different neighborhoods, different space, and different covenants.

Lease use and exclusive clauses for restaurants and other food service operations illustrate this principle. Food service establishments conduct business in many different buildings and environments. Further, the needs of food service landlords and their tenants vary considerably. These differences mandate that each use and exclusive clause for a food service lease be individually tailored to the specific needs of the parties involved.

B. Differences in Environment and Needs of the Parties

The environment in which one food service business functions is bound to be different, in some respects, from the environment in which another food service business functions. One building may be bigger than another building. Space available for one food service business may have ground floor frontage on a public street. Another might be on the fiftieth floor of a high-rise office building or in the basement. The food service business might be housed in a downtown, central business district or in the middle of a suburban, enclosed shopping center.² The

² A food service establishment may function in a variety of building environments. Some other examples include: the grade floor space of a downtown, central business district office building with a grand entrance to the sidewalk, in the lobby, or enclosed without direct exterior access; a concession at a ballpark, theme park, or limited access highway oasis, or operating in-house company food service facilities; a private eating club; a location fronting on an enclosed mall of a regional shopping center or the sidewalk of a small store strip; a free-standing building in a shopping center parking lot with vehicular access to an abutting highway; a food court; an airline terminal, railroad terminal, or other

expectations of landlords and food service tenants vary widely with the location of the leased premises.

Food service use and exclusive clauses should reflect both the landlord's and the tenant's needs. Consider the needs of the various kinds of building owners. Industrial park landlords have a keen interest in a food service tenancy. Leasing space for industrial use might be difficult or entirely futile unless tenants' patrons and workers can find a decent place to have lunch. An office building owner is also concerned about facilities needed to feed the tenants' executives and customers. In areas that lack dining establishments, appropriate on-site dining facilities can transform an office building from a white elephant to an attractive facility. A shopping center owner is concerned about having appropriate on-site facilities to feed shoppers. Avid shoppers hate to interrupt their favorite pastime, but they will call it a day if their hunger becomes overwhelming. Attractive on-site food service facilities will help to keep them in the shopping center.

The needs of food service tenants also vary considerably. The food industry is not a single industry. It is a group of related industries joined by only one common characteristic: all food service businesses feed people. Food service businesses differ in many ways including how they serve people, the type of food they serve, and where their patrons eat. These differences should be reflected in their use and exclusive clauses.

Given the frequency with which food service formats change, commercial tenants in general, and food service tenants in particular, need flexibility. They lease space to conduct a successful business—not to fulfill their landlords' needs. An overly restrictive use clause that impairs a food service tenant's ability to conduct business properly undermines the tenant's part of the bargain. If a sophisticated food service tenant commits to pay rent pursuant to a long-term lease, it should bargain for the right to conduct the food service business its own way. However, even that sort of protection is often not enough for a food service tenant. A food service tenant should have the right, albeit limited, to change its business format when the current format does not work well in the marketplace.

Multi-tenant building landlords, on the other hand, need to impose

transportation facility; or a free-standing highway location.

reasonable limits on their tenants' flexibility. They must coordinate tenants and avoid objectionable activities that might impair co-tenants' interests. Without reasonable limits, a food service tenant's activities might be harmful to the landlord or to the development. Without reasonable limits, a food service tenant might make drastic changes in its operations that could lead to unexpected and destructive results. A tenant might decide to conduct a different kind of business from the type of business the landlord expected when the lease was executed. Accordingly, a sloppily drafted food service use clause could open the door for the conversion of a full-service, tablecloth restaurant to a less sophisticated snack bar, pizza parlor, or luncheonette. Although the conversion would not reduce the food service tenant's rent, it might reduce the building's prestige. Hence, a landlord who neglects to impose reasonable limits on tenants could suddenly discover strange happenings in his or her building.

II. GENERALIZED FOOD SERVICE USE CLAUSES

Although some landlords do not care much about what a tenant does in the premises as long as the rent is paid, detailed limits on a food service tenant's use are important for most landlords and crucial for others. A food service lease use clause should answer some important questions. It should distinguish permitted food service operations from prohibited food service operations as clearly as possible. It should also distinguish between the normal activities of a food service tenant and those of a food sales tenant, such as a supermarket, grocery store, delicatessen, or convenience store.

A. A "One Size Fits All" Food Service Use Clause

A very popular "one size fits all" food service use clause does not distinguish food service operations from each other and does not adequately distinguish a food service business from a food sales business. This popular food service use clause typically requires that the demised premises be used "solely for the sale or purveyance of food and nonalcoholic beverages for on-premises consumption."

Although this "one size fits all" formula does not permit the tenant to

sell hats, ties, or panty hose, it does not limit the kind of food that may be served. Moreover, it does not prescribe how, or if, patrons will be seated or the type of plates on which the food will be served.

The “one size fits all” clause was adapted from a time-worn formula used in supermarket and other food sales tenant exclusive clauses. From the earliest days, supermarket tenants bargained for exclusive clauses that prohibited all other tenants from selling food and nonalcoholic beverages for off-premises consumption. As a result, food service lease drafters of an earlier day avoided violating that kind of supermarket exclusive clause by limiting food service tenants’ use to the sale of food for on-premises consumption. Although plausible, this solution is inadequate in today’s world.

B. The Need to Distinguish Food Service from Food Sales

A use clause that allows the sale or service of food and beverages only for on-premises consumption, without additional restrictions, is effective in only one respect—it prohibits a food service tenant from selling food and nonalcoholic beverages for off-premises consumption. To a degree, this type of use clause can work well for landlords of community and neighborhood shopping centers³ with only one food service business. The clause works well for such landlords because they usually execute supermarket leases long before they begin negotiations with food service tenants. However, such a clause is not good for food service tenants in community and neighborhood shopping centers. Most food service tenants cannot tolerate a use clause that prohibits all sales of

³ Neighborhood shopping centers are the smaller of the three principal shopping center size categories. Neighborhood shopping centers consist of a single anchor store, usually a food supermarket, and a group of small stores. The floor area of a neighborhood shopping center’s buildings is usually less than 100,000 square feet. Community shopping centers are usually larger than neighborhood shopping centers. The community shopping center has two anchor tenants rather than one. One of the anchor tenants is usually a food supermarket. Almost all neighborhood and community shopping center stores front on an open mall that leads to the shopping center’s parking lot. Regional shopping centers have two or more department store anchors. Although some regional shopping centers have as little as 200,000 square feet of leasable area, most have a good deal more.

food and nonalcoholic beverages for off-premises consumption because they routinely sell food that is likely to be eaten after customers leave the premises.

A stand-up snack bar is a good example of a food service establishment that routinely sells food and nonalcoholic beverages for off-premises consumption. Although some snack bar customers find room to eat on a snack bar's leased premises, few snack bar patrons choose to do so. Snack bars cater to people on the run. Because most snack bar food is sold with the expectation that it will be eaten off premises, a food service tenant contemplating a snack bar operation must be concerned about a possible conflict between its normal business operations and a use clause that limits it to selling food only for on-premises consumption.

Snack bars are not the only type of food service operation that routinely sells food for off-premises consumption. Fast food operations, popularly priced food service establishments, full-service, tablecloth restaurants, and ethnic restaurants all sell food with the expectation that some of it will be consumed off the premises. Although these sales are usually only a small percentage of an establishment's business, the practice is profitable and provides an important cog in the food service wheel. Usually, even a full-service restaurant that routinely discourages take-out service will gladly provide patrons with take-home food containers. A restaurant's willingness to provide doggy bags, thereby facilitating off-premises consumption, might technically violate a thoughtlessly drafted food service use clause that requires the tenant to sell food for on-premises consumption only.

Although supermarket tenants want to prevent cotenants from selling food and nonalcoholic beverages for off-premises consumption, the sale of prepared food for off-premises consumption does not usually adversely affect the supermarket tenants. The supermarket tenants' exclusive clauses might apply to food service cotenants, but food service tenants are not their targets. Their targets are competing supermarkets and smaller food sales operations such as groceries, produce stores, butchers, and on-premises bakeries. Supermarket tenants will also attempt to prevent department stores and other general merchandising stores from selling food and nonalcoholic beverages for off-premises consumption.

Food service landlords need not insist on use clauses limiting the tenant to the sale of food for on-premises consumption. Landlords can

avoid a potential conflict between their supermarket exclusive clauses and their food service use clauses by requesting an exception in the supermarket lease exclusive clause. The exception should permit premises used principally for the sale of cooked and uncooked food to sell food and nonalcoholic beverages for off-premises consumption if the food is prepared or packaged on the premises.

Negotiating for an exception to the exclusive clause in future supermarket leases is a good solution for a landlord who is not already bound by a supermarket lease prohibiting cotenants from selling food and non-alcoholic beverages for off-premises consumption. When a landlord and food service tenant are aware of a restriction in an existing supermarket lease, however, they should not ignore the possibility that the supermarket may enforce the exclusive clause in its lease. Under normal circumstances, a supermarket tenant might not be concerned about a food service cotenancy and may not notice a cotenant's violation of its exclusive clause. However, if a dispute developed between the supermarket tenant and the landlord, the exclusive provision could provide the supermarket with important leverage against the landlord. In these circumstances, it is better for a landlord and food service tenant to have approached the supermarket tenant before signing a new food service lease. They should request a waiver from the supermarket tenant while the relationship between the landlord and the supermarket tenant is still a happy one.

C. The Need to Distinguish Food Service Operations from Each Other

Because a generalized "one size fits all" food service use clause permits almost any kind of food service tenancy, it does not fulfill the needs of most food service landlords. Food service landlords need use clauses that distinguish one kind of food service operation from another. The range of activity encompassed by the lease language "food and nonalcoholic beverages for on-premises consumption" embraces everything from a take-out pizza operation or hot dog stand to an elaborate fine dining establishment complete with an arrogant maitre d'.

Once in a while, any food service establishment will suffice for a project, but most landlords need to target a specific category of food service operation that fits the building, its environment, and the existing tenants. The most important question is what kind of dining facility will be permitted. Landlords who go out of their way to attract a food service

operation in the first place might have a particular type of food service operation in mind. Thus, an office building developer about to open a brand new, first-class office complex might prefer a full-service, tablecloth restaurant. A landlord who pursues this type of tenant, with the expectation that the premises will be used as a full-service, tablecloth restaurant, should not settle for a use clause restriction that merely allows the tenant to sell food and nonalcoholic beverages for on-premises consumption. The use clause drafter should ensure a full-service operation. Otherwise, the landlord and the elegant corporate tenants may be standing in a line for pizza at lunch hour. Likewise, a landlord who wants a tenant that will operate a fast food restaurant should draft an appropriate use clause to achieve that goal.

A “one size fits all” formula is insufficient also for sophisticated food service tenants. Some food service establishments do more than just sell food for on-premises consumption. Sometimes these establishments entertain their guests with live or recorded music, drama, or movies. Occasionally, food service establishments sell souvenirs and novelty items, such as tee shirts, books, toys, or compact disks.⁴ Worse still, some even give away the same type of merchandise that their cotenants attempt to sell.

Food service use clauses must reflect the needs of chain and franchise operations. Many contemporary food service tenants conduct business on regional, national, and even international scales. For the most part, products are standardized throughout the chain. Most food service operations cannot conduct business one way in Kansas City and another way in Nashville. They need use clauses that permit a substantially uniform operation. These particular food service operators also need flexible use clauses that permit variation from the formula that allows only food for on-premises consumption.

⁴ For example, Starbucks Corporation’s coffee bars, famous for their high octane coffee and coffee-based beverages, sell compact discs. See Seanna Browder, *Starbucks Does Not Live by Coffee Alone*, BUSINESS WEEK, Aug. 5, 1996, at 76.

Landlords have less use clause flexibility when the project has room for more than one food service tenant. Both landlords and food service tenants prefer avoiding excessive duplication among cotenants' food service operations. Food service tenants dislike direct competition from cotenants as much as most retail tenants dislike direct competition from their neighbors. Two or three hamburger fast food operations rarely coexist in a single project. This is partly because they do not want to be together. Being together materially reduces their chance of profitable operations. Likewise, landlords should not want cotenants in direct competition for many reasons. One reason is that consistently unprofitable tenants usually become consistently delinquent tenants.

Nevertheless, both landlords and food service tenants recognize that many buildings and building complexes can, and should, support more than one food service operation. For a landlord to lease space to more than one food service tenant in a large building or building complex and still avoid destructive, direct competition for a limited market, food service lease negotiators must focus on characteristics that distinguish a prospective new food service tenant's business from the business operations of the existing food service tenants.

D. Generalized Use Clauses Ignore Most Landlord and Tenant Needs

Generalized use clauses ignore landlord and tenant motivations, differences among buildings, differences in neighborhood, and almost every other factor a thoughtful lease drafter should consider. They seldom work well for tenants. Usually, generalized use clauses satisfy only landlords with free-standing, single-occupancy buildings. These landlords may be interested only in the tenant's credit and rent obligation. Because these clauses do not work for any other type of landlord, they should be discarded. Food service use clauses must do much more than merely limit the tenant's activities to the sale of food and nonalcoholic beverages for on-premises consumption. Food service use clauses should carefully distinguish a permitted food service operation from a prohibited food service operation.

III. DRAFTING USE CLAUSES TO FIT THE PARTIES' GOALS

Where do food service lease negotiators go, after discarding the "food for on-premises consumption" limitation format? How can a food service tenant's rights be limited to achieve a landlord's goals? How can a food service tenant's rights be expanded to achieve the tenant's goals?

These questions can be answered only by exploring the food service industry, the significant economic and social factors that influence food service landlord needs, and the way food service tenants conduct their businesses.

Significant economic and social factors influence food service lease use clause negotiations. They include the needs of building projects and their respective geographic markets, variations in food service tenants' business methods, traditions of the food service industry and the individual companies comprising it, food service tenants' aversion to direct competition from neighbors, and exclusive use clauses in existing food service leases that prohibit landlords from leasing space to direct competitors.

IV. FULFILLING PROJECT NEEDS

A. Food Service Is Not Always Wanted

It is not unusual for a food service operator to outbid all other potential tenants for a busy location. Many landlords are principally interested in dealing with food service tenants because the landlords are tempted by the prospect of charging the food service operation more than a retail tenant would be willing to pay. Downtown central business district landlords are particularly susceptible to this kind of temptation. Many of these landlords deal with food service tenants reluctantly, and are willing to lease space to food service tenants only to maximize their rent roll. These landlords would prefer a nonfood occupant if there was one willing to pay as much rent as the food service operator.

Why do some landlords find food service tenancies objectionable? Food service operations attract people, which is not always desirable for

a property owner. Although increased pedestrian and vehicular traffic is a boon for many kinds of property, particularly shopping centers, some landlords prefer less traffic. Downtown central business district landlords tend to believe that excessive public traffic makes an office building less desirable to prospective corporate tenants. As a result, these landlords prefer retail tenancies to food service tenancies for their grade floor space.

Restaurants and other food service operations also attract pests such as mice, rats, and cockroaches. Unfortunately, these unwanted guests do not recognize boundaries between one leased premises and another. The creatures tend to migrate to food service establishments in search of shelter, comfort, and sustenance. From there, it is only a hop, skip, and a crawl to the rest of the building. Consequently, some landlords fear that candidates for vacant leasable space might be repelled by a food service cotenant.

Other problems inherent with food service operations include the potential for unpleasant odors, increased garbage volume, and greater demand on sewage disposal systems. Despite these burdens, the prospect of a higher rent roll softens the hearts and soothes the fears of many downtown central business district landlords. It motivates some of them to overcome their concerns and look more favorably on food service tenancies. Even so, these landlords would not lose sleep if the food service tenant skipped town and, without skipping a monthly rent payment, assigned its leasehold estate to an elegant woman's apparel store. As a result, a use clause that rules out a conversion to retail operations would be inappropriate in these circumstances. Such a clause might provide the landlord with a reason to squeeze money out of the tenant if the tenant actually wanted to change the use of the premises, but it would not serve any legitimate business purpose. The landlord would, in effect, be using the clause to demand compensation for an event for which the landlord had fervently prayed since the lease execution.

B. Enhancing a Project's Value

Binding a tenant to pay a generous annual rental rate may be the landlord's principal goal for most lease negotiations, but it is not necessarily the landlord's only goal in food service negotiations. A landlord's goals for making a food service deal can be far more complex than getting an attractive monthly stipend from the tenant. Many landlords

are anxious to find prospective food service tenants, and some are willing to accept lower rental rates to attract food service tenants. They deliberately seek food service tenancies to achieve several goals.

One goal of these landlords is to enhance the value of their property. Although rent from food service providers can be very generous, for many landlords the benefits derived from an on-premises food service operation are more important than mere collection of rent from the food provider. For example, office and industrial building landlords want to accommodate their nonfood tenants' need to keep employees near the work place during lunch hour. Some landlords use in-house food service concessionaires to satisfy these needs. Also, while ballpark and theme park patrons spend heavily on food and drink, thus providing healthy profits for landlords and park operators alike, ballpark and theme park operators need food service as much as they need profits. Ballparks and theme parks would be much less attractive to their patrons without food service. Finally, limited access highway authorities love rental income as much as any landlord, but they also need to ensure that travelers have a place to eat without leaving the highway.

C. Reflecting Differences in Building Configuration

1. Food Service Leases in Office Buildings

Office building food service premises do not always have direct access to a public street. Some food service establishment customers enter an office building through its grade floor lobby. To reach the food service establishment, customers walk across the lobby, climb stairs, or ride an escalator or elevator. Some of these establishments cater only to employees who work in the building; others are open to the public. This arrangement prompts several questions. Do the parties expect the food service tenant to serve dinner? Is the food service tenant expected to serve the general public or to restrict service to people who work in the building?

Landlords providing on-site eating facilities for people who work in the building might also prefer to exclude the general public from using the facilities. These landlords should negotiate for a use clause restriction against serving the general public.

However, few office building landlords object to a food service tenant's

serving the general public. Nevertheless, a food service tenant who expects to serve the public without direct access to a public street has a problem. Although its interest in serving the general public may have the landlord's blessing, the general public might not be able to reach the food service facility in the evening. Most office buildings restrict public access by early evening. If the food service tenant expects to do business with the public after the building restricts public access, the use clause should expressly permit this business and provide special after-hours security arrangements for access to the premises.

2. *In-Line Food Service in Conventional Regional Shopping Centers*

Landlords of conventional shopping centers⁵ rent to restaurant and other food service establishments for many different reasons. These landlords are principally motivated by the rent they will receive. Usually, the need to provide food service for cotenants' customers and employees is a secondary consideration when the landlord leases a partitioned bloc of building space to a food service tenant. However, the extent of that need varies from center to center.

A regional shopping center landlord is more likely to be concerned with providing food service than a community or neighborhood shopping center landlord. Customers stay longer at regional shopping centers with their elaborate enclosed malls than at community and neighborhood shopping centers. Climate controlled, enclosed malls foster socializing and make browsing among stores appealing. In this respect, the enclosed mall simulates the town square's role of an earlier era. Although providing a place for people to meet and gossip does not directly put money in a landlord's pocket, people who browse and socialize in malls also buy merchandise. Providing an attractive gathering place is just another way of drawing traffic. It may not get the people into the stores, but it does get them close to the stores. It is up to the merchants to induce people to take an extra step or two into their stores.

Regional shopping center landlords should aim to induce casual visitors to stay at the center long enough to buy merchandise. Finding

⁵ In this context, conventional shopping centers include all shopping centers except factory outlet centers.

ways to induce casual visitors to stay longer is an extra reason to lease space to food service tenants. Mall patrons eventually get hungry and thirsty. With these needs satisfied, they may be ready to embark on some exhaustive shopping.

The food service use clause allows a shopping center landlord to make sure that the center can offer several different types of food service establishments. With different choices, hungry shoppers are more likely to eat at the center instead of leaving and ending the shopping day.

Occasionally, a food service tenant, or a group of food service tenants, can do more for a shopping center landlord than simply pay rent and satisfy shoppers' and employees' hunger and thirst. A special restaurant or an extensive cluster of food service establishments can serve as a mini-anchor in a community, neighborhood, or small regional center. Sometimes the prospect of choosing from an abundant list of convenient, wholesome, and reasonably priced food service establishments will draw people to a shopping center so consistently that many will get in the habit of staying after lunch to shop.

The landlord should negotiate for a use clause that limits the food service tenant to the specific type of service needed at the shopping center unless rent is the landlord's only motive. When rent is the landlord's main motive, the specifics of the use clause are not very important. If the shopping center has more food service facilities than it needs, the conversion of partitioned space from a restaurant to a type of retail activity not already taking place at the shopping center would not be a tragedy.

3. Regional Shopping Center Food Court Space

A shopping center food court consists of a series of complementary food service booths with common seating facilities. Its mission is to provide shoppers and store employees with a wide variety of wholesome, ready-to-eat food at affordable prices.

Food courts serve shoppers and store employees best when each food service booth specializes in a distinct food style or type. When a food court's service booths present a wide variety of food styles and types, there is a better chance that each member in a family of shoppers will be

satisfied. Families whose members have divergent food tastes can eat at the same table without forcing anyone to sacrifice a preference. A food court landlord would prefer to have different booths selling different types of food such as fish, hamburgers, Mexican food, delicatessen, and Chinese food.

Landlords should police the food court menus to ensure that the menus are different from each other. Merely signing a lease with a hamburger restaurant chain tenant does not insure that the hamburger restaurant will not sell fish and chips from the premises. However, landlords can prevent this from happening by limiting the tenant's menu in the use clause. A thoughtfully drafted use clause should allow a landlord to prohibit both the pizza booth tenant and the kosher delicatessen tenant from selling Mexican food. Conversely, loosely worded use clauses for food court tenants could result in six booths concentrating on chow mein and fried rice.

4. Conventional Community Shopping Center Food Service Establishments

Most neighborhood and community shopping center landlords are motivated by little more than rent when they lease food service space. They believe they do not need a food service establishment to enhance the desirability of their other leasable space. They also believe that providing a place for shoppers to eat will not induce them to stay and shop in the center's other stores. People do not usually remain at neighborhood and community shopping centers for a long time. A customer goes to these shopping centers with a mission. People want to buy something in particular, and they want to buy it right away. At a neighborhood or community shopping center, a customer has a good chance of parking near, or even right in front of, the store he or she intends to visit. When customers have purchased all they came to purchase, they would like to get back to their cars and drive home. For example, a shopper who buys groceries is in a hurry to get the frozen food and ice cream into the freezer. This shopper is much less likely to stay for lunch than is a shopper at a regional center. A shopper is very unlikely to stay for dinner at a

community or neighborhood shopping center restaurant.⁶

The community shopping center landlord's need to limit food service tenants' use is less critical than that of a regional landlord who needs a restaurant tenant to adequately feed the center's customers and employees. However, the use clause limitations in a food service lease are still very important for community shopping center landlords.

5. Factory Outlet Shopping Center Food Service Facilities

Some factory outlet shopping centers need food service tenants far more than food service tenants need factory outlet locations. Factory outlets differ from other kinds of shopping centers in many respects. Factory outlet shoppers do not necessarily go to the outlet center with the intention of buying specific merchandise. The mission of many factory outlet shoppers is to explore for bargains and special discoveries. They are out for a hunting expedition. A shopper might go to a factory outlet without a shopping list and return home with plenty of items she does not need and never dreamed of buying before the trip. Factory outlet shoppers are also willing to drive much longer distances than other shoppers. To them, shopping is a day's outing.

The average length of a shopper's visit is one of the most important ways in which factory outlets differ from other shopping centers. Shoppers stay at factory outlets much longer than they stay at conventional neighborhood, community, or regional shopping centers. People who remain at a shopping center for a long time get hungry and thirsty. Making sure that customers can find a decent place to eat is clearly in the factory outlet landlord's interest. Customers who cannot find a decent place to eat at the shopping center will be inclined to leave when they get hungry, perhaps not to return that day.

Consequently, a factory outlet landlord is highly motivated to encourage food service operators to lease space in the center. In addition, the landlord is highly motivated to make sure that the food

⁶ That is not to say that community and neighborhood shopping centers are bad restaurant locations. To the contrary, they can be excellent locations because of their greater visibility to highway traffic.

service operator's use clause restricts the tenant's activities appropriately. It is not enough for the use clause to restrict the use of the premises to the sale of food or nonalcoholic beverages for on-premises consumption; it should also define the type of food service and prescribe suitable rules governing food quality and service quality.

Although some kinds of food service might be completely unacceptable to the landlord, factory outlet landlords tend to tolerate more than one type of food service format. The tenant's original food service format might not work, and a different format might prove to be more successful. Thus, a factory outlet food service tenant also needs a degree of flexibility. Because any food service operation is a high-risk business, a food service tenant deserves the right to shift from an unprofitable format to a new format that gives the landlord the benefit of the original bargain while providing a decent place for the shoppers to eat, drink, and rest.

D. Geographic Markets in Which Building Projects Are Located

Food service lease negotiators are influenced by the geographic market in which the building is located and the targeted population market segments. Food service companies target specific population segments and geographic markets. A tenant leases space in a building project to attract one of these targeted segments in the building's geographic market. Sometimes the building is so large that its tenants' employees constitute a market by themselves. More often than not, however, a food service tenant targets a larger market than the population of the building in which it will be located.

Access to the targeted markets is crucial for a food service tenant. It is counterproductive for a tenant to execute a lease and agree to pay rent for the privilege of serving a market if lease provisions will frustrate access to that market. Consequently, if market conditions require the tenant to stay open for business twenty-four hours a day, the tenant cannot agree to a use clause that limits its hours of operation. When around-the-clock operations are necessary, the tenant would prefer the use clause to specifically permit twenty-four hour operations.

If the tenant is serving a market with volatile changes in food preferences, the tenant will need a limited right to change the way it does business to adapt to the demands of the market. Thus, a fast food chicken

specialist should avoid limiting cooking methods to deep frying even if deep-fat fried chicken is currently very popular. The day may come when the targeted market's preference changes. If the market does change, the right to broil, boil, or roast chicken may be the tenant's ticket to survival.

A landlord's interest in leasing space to a specific kind of food service tenant is influenced by the building's existing food services. Even if one place to eat is already conveniently situated in a landlord's building, the landlord might see the need for a second eatery. In these circumstances, the landlord might want the second eatery to be completely different from its first food service establishment.

A landlord's interest in leasing space to a specific kind of food service tenant is also influenced by the food services available in the neighborhood in which the building is situated. When full-service, tablecloth restaurants are plentiful in the neighborhood and the building is heavily populated with blue collar workers or low-wage, white collar workers, the landlord might have a desperate need to provide a fast food or popularly priced food service establishment. On the other hand, the neighborhood surrounding the building might be blessed with abundant, informal dining choices including a fast food restaurant on every corner, but full-service, tablecloth restaurants might be scarce. Then, the landlord might crave the prestige of leasing space to a first-class, full-service, tablecloth restaurant and cringe at the thought of a fast food operation as a new tenant.

What makes neighborhood facilities adequate or inadequate? Lunchtime convenience is of prime importance to office building and industrial building landlords. The landlord of a downtown central business district office building might conclude that the neighborhood's existing facilities are inadequate if there is not a fast food restaurant within four blocks of the building or if existing fast food restaurants are too busy during lunch hour to handle a large volume. On the other hand, checking walking distances and counting blocks to existing neighborhood food service facilities will not help owners of industrial buildings and office buildings located in suburban locations. People who work in these buildings usually drive to lunch time food service facilities. The distance that is relevant to these employees is driving time. Lunch breaks are short. They usually last one hour or less, and driving time must be only a small part of the allotted time because an employee has much else to

do.⁷ The shorter the driving time the better. A reasonable part of an employee's lunch hour must be allocated to eating.

Business conference facilities are also important. Business people make deals, sell products, and settle disputes over lunch. People get along better when they eat together. Lunch time business conferences are important cornerstones in business, and full service tablecloth restaurants are among the best sites for these conferences. Consequently, business people are frequently concerned about convenient access to full-service, tablecloth restaurants.

V. FOOD SERVICE CATEGORIES AND THE FOOD SERVICE INDUSTRY'S HISTORY AND TRADITIONS

A. Food Service Categories

Generally speaking, all food service establishments do the same things. They prepare food and feed people. On the other hand, it is obvious that food service establishments feed different people, in different ways, with different kinds of food. Differences among food service establishments are far more important than similarities to the lease drafter. The differences can be employed as building blocks in food service use and exclusive clauses to distinguish permitted activities from prohibited activities.

The contemporary food service business is not a single industry with

⁷ Frequently, the employee must punch out, get to the lobby floor on an elevator or by a staircase, walk from the lobby to a car, leave the work place parking lot, drive to the food service facility, park, take a seat, wait to be served, pay the check, eat, walk to the car, return to the job site, and punch in. With so much else to do, driving time from job to lunch should not exceed 10 minutes.

thousands of slightly different establishments competing for the favor of a monolithic market. To the contrary, it is a series of related industry categories. It functions like a tree with branches. Each food service category is a branch comprised of enterprises with common characteristics, but differing in some material respect from other categories. Each category takes a distinct approach to such food service techniques as menu policies, food preparation patron service, and seating arrangements. Additionally, each category serves one or more population segments defined by such characteristics as income, age, occupation, and gender.

Five major food service categories have emerged: (1) full-service, tablecloth restaurants; (2) popularly priced food service establishments; (3) fast food establishments; (4) ethnic food service establishments; and (5) snack bars. The major categories are not cast in rigid molds. They are generally distinct from each other with some overlapping characteristics. Despite the overlap, the differences between categories outweigh their similarities. Furthermore, food service establishments within a major category are not completely homogeneous. To the contrary, many differences exist among food service establishments within a major category, and all five major categories can be divided into subcategories.

The categories should be reviewed carefully because of their potential importance to lease drafters. What characteristics are common among categories? What characteristics distinguish categories from each other? How can categories be divided into subcategories?

Each major food service category, and most subcategories, emerged from the American food service industry's long and fascinating history. Accordingly, many of the common characteristics that distinguish these categories and subcategories are lodged in history. The characteristics that distinguish the major categories and subcategories were inspired by hardworking entrepreneurs to solve real social and economic problems. The distinctions grew from roots established over a three-hundred-year period, and they will continue to grow and evolve.

B. Food Service Category Details

1. *Full-Service, Tablecloth Restaurants*

a. *Characteristics*

Contemporary full-service, tablecloth restaurants are characterized by their service format, menu choices, seating, and dining arrangements. The service format ranges from very formal to informal. Some full-service restaurants are so elegant that a maitre d' greets patrons at the door and leads them to a host or hostess who, in turn, escorts them to a table. All full-service, tablecloth restaurants employ waiters and waitresses who bring the food to patrons seated at tables or booths.

Full-service restaurants offer complete meals and a wide variety of menu choices. Complete meals include appetizer, soup, salad, entree, dessert, and beverage. Patrons of full-service restaurants sit at tables or booths set with a tablecloth and napkins (usually white linen), order from printed menus, and eat with metal cutlery and porcelain serving plates.

b. *History*

Although the history of the American food service industry began soon after early colonial settlements were established, average Colonial Americans could not afford to dine out. On the other hand, many average Colonial American men could afford to visit taverns and other public houses for a drink. When colonial drinkers wanted something to eat,⁸ taverns and other public houses were prepared to accommodate them. Although they were principally dedicated to liquor service, taverns and other public houses fed people and provided overnight accommodations.⁹ In colonial days, drinkers tended to eat where they drank, and lodgers tended to eat where they slept.

The American economy grew after the Revolutionary War. As the economy grew, merchants prospered, and entrepreneurs established factories in urban areas. Factory owners needed workers; therefore, they

⁸ See JOHN MARIANI, AMERICA EATS OUT 15-21 (1991).

⁹ See KYM S. RICE, EARLY AMERICAN TAVERNS 23-31 (1983).

recruited previously home-based farmhands and craftsmen to move to the urban settings where the factories were located. These people needed a place to stay and eat. That need accelerated the growth of America's lodging and food service industries. Boarding houses helped fill both of these needs early on. They were doing business in America in about the same time period as taverns.¹⁰ Moreover, boarding houses were virtually as popular as taverns. For example, in 1799, Philadelphia had 248 taverns and 203 boarding houses.¹¹

Boarding-house food was served on a schedule set by the boarding-house keeper. Boarding-house lodgers had to be at meals on time or go hungry.¹² The sound of a bell let the lodgers know the meal was ready. Experience taught boarders to get to the dining room quickly because boarding-house food was usually served family style.¹³

Full-service, tablecloth restaurants emerged when lodging facilities, such as taverns, boarding houses, and hotels, began to sever links between their dining and lodging operations. The first public dining establishment to focus on food service, rather than serving food as an incident to alcoholic beverage or lodging operations, was probably Boston's Julien's Restarator.¹⁴ This establishment opened its doors for the first time in 1794. Its founder, Alfred Baptiste Julien, was a French émigré who had been employed in France by the Archbishop of Bordeaux. With his career of cooking for nobles and clerics disrupted by the French Revolution—and possibly in fear of losing his head to the guillotine—he sought refuge and opportunity in the United States.¹⁵

However, Julien's opening did not mark the beginning of the end for the bond between lodging and dining facilities. Dining remained closely aligned with lodging in Boston until Tremont House, an inn established in 1828, permitted its patrons to pay separately for meals and lodging.¹⁶

New York City was not far behind Boston in separating dining

¹⁰ See RICHARD PILLSBURY, *FROM BOARDING HOUSE TO BISTRO* 20 (1991).

¹¹ See *id.*

¹² See MARIANI, *supra* note 8, at 36-37.

¹³ See PILLSBURY, *supra* note 10, at 22.

¹⁴ See RICHARD J. HOOKER, *FOOD AND DRINK IN AMERICA* 78-79 (1981).

¹⁵ See *id.*

¹⁶ See MARIANI, *supra* note 8, at 27.

facilities from lodging facilities. Aside from taverns that focused on liquor service, New York City had approximately fifteen food service establishments in 1805 including coffee houses, oyster houses, and tea gardens. Forty-two combination taverns and boarding houses complemented this array. However, none of the foregoing was reported as a full-service, tablecloth dining establishment.¹⁷ The Tammany Hall Hotel is reputed to have been the first New York City hotel to permit guests to pay for meals and lodging separately. This policy came to be known in the United States as the “European plan.” The old policy of charging a combined price for meals and lodging was called the “American plan.” The Tammany Hall adopted the European plan in the 1830s.¹⁸ The New York Hotel followed suit in 1844.¹⁹

Because of the close ties between food service and lodging operations, a merchant or worker did not usually eat lunch at a food service establishment.²⁰ During that era, working people tended to eat lunch at home or in a tavern.²¹ They also ate lunch on the street. Food service vendors operated on New York City streets in the early nineteenth century. Instead of the frankfurters and knishes they sell now, street vendors’ early nineteenth century offerings were roast pork and oysters.

Fine dining in full-service, tablecloth restaurants at lunch hour sprouted in the 1830s. Delmonico’s restaurant, which opened for business in 1831 on William Street in New York’s Wall Street area, is said to have been the innovator of full service. Delmonico’s extensive menu offered many choices of meats, fish, crustaceans, and vegetables. The food was good, the service was graceful, and the decor was well-appointed. People who could afford to eat there were enchanted, and the William Street establishment was a success.²²

The Delmonico family soon had the best kind of problem a business person can have—they could not feed all their potential customers.

¹⁷ *Id.* at 26-27.

¹⁸ *See id.* at 56.

¹⁹ *See* HOOKER, *supra* note 14, at 143.

²⁰ *See* MARIANI, *supra* note 8, at 24.

²¹ *See generally* RICE, *supra* note 9, at 69-83 (describing the general clientele of taverns and the importance of taverns to travelers).

²² *See* MARIANI, *supra* note 8, at 24-31.

Consequently, they decided to start a second restaurant.²³ However, the Delmonicos were not destined to keep New York City's tablecloth restaurant business to themselves. Wealthy New Yorkers of the late nineteenth century loved dining in lavish surroundings. Many fortunes were made by restaurateurs who catered to these patrons. Prominent rivals for New York's wealthy diners included Rector's, Louis Sherry's, Luchow's, and the Waldorf-Astoria.²⁴

In the 1830s, two New Orleans hotels also offered dining facilities that were independent of lodging. However, they were soon surpassed in quality and fame by Restaurant Antoine in 1840. Antoine's, also founded by a French émigré, became a culinary landmark and meeting place for New Orleans' elite. Other early and highly regarded New Orleans restaurants included Moreau's, Victor's, and Miguel's.²⁵ Tujague's, another significant early New Orleans restaurant, was founded in 1856. It was followed, in 1863, by Dutrey's.²⁶

As western cities grew, so did the restaurant business. The Poule d'Or and the Tadich Grill began serving San Franciscans in 1849, and the Irving House started doing business in San Francisco in 1851.²⁷ In this era, restaurants were opened in many cities and boom towns, such as Virginia City, Nevada. Virginia City residents could choose from among nine restaurants and twenty-five saloons in 1860.²⁸

2. Feeding Travelers

The completion of the intercontinental railway system in 1869 was a catalyst for new food service operations in western cities. The legendary Fred Harvey was among the entrepreneurs who sought their fortunes by

²³ Their second establishment opened in 1832. *See id.* Others followed in 1837, 1855, 1860, 1876, and 1897. *See id.*

²⁴ *See id.*

²⁵ *See* HOOKER, *supra* note 14, at 144.

²⁶ *See* MARIANI, *supra* note 8, at 33.

²⁷ *See id.* at 41.

²⁸ *See id.* at 40-41.

feeding Americans as they traveled west.²⁹ Fred Harvey's first restaurant opened for business in 1876 above the Atchison, Topeka & Santa Fe Railway depot in Topeka, Kansas. Encouraged by the Topeka restaurant's success, Harvey planned to expand. His site location strategy was simple: follow the railroad.³⁰ In that era, railroads did not serve food. Instead, trains stopped periodically to allow passengers to leave their cars and find a place to eat. In this respect, railroad stops resembled contemporary turnpike rest areas.

Harvey Houses maintained consistently high standards for food, service, and decor. Their menus changed frequently and offered many choices. These standards would become models for the many waves of food service chains to come.

3. *Equipment and Product Innovations*

Technology played a big role in the growth of the food service business. Each technological advance in food preparation equipment improved food service efficiency and increased employee productivity. The food was better, the service was faster, and the cost of providing food service maintained a reasonable relationship to the value of the dollar.

As a result of technological innovations, food could be preserved economically, ingredients could be obtained easily, and employees could spend less time preparing the food. These factors made it easier for full-service, tablecloth restaurants and ethnic restaurants to function and be more profitable.

²⁹ See generally LESLEY POLING-KEMPES, *THE HARVEY GIRLS, WOMEN WHO OPENED THE WEST 1* (1989) (discussing Fred Harvey's achievements and his impact on the American food service industry); JUDDI MORRIS, *THE HARVEY GIRLS, THE WOMEN WHO CIVILIZED THE WEST 1* (1994) (discussing Fred Harvey's achievements in a shorter version suitable for children); *THE HARVEY GIRLS* (Metro-Goldwyn-Mayer 1946) (with a cast including Judy Garland, John Hodiak, Ray Bolger, Angela Lansbury, and Preston Foster).

³⁰ Following the railroad, Fred Harvey soon opened Harvey House restaurants in Newton, Kansas; Hutchinson, Kansas; Dodge City, Kansas; La Junta, Colorado; Trinidad, Colorado; and Albuquerque, New Mexico. The list continued to grow.

More importantly, the technological innovations made it possible to standardize recipes and portions, to maintain consistent product quality, and to conduct business on a massive scale. These innovations were preludes to the birth of the popularly priced food service and the fast food industries.

4. *Popularly Priced Food Service Establishments*

a. *Characteristics*

The popularly priced food branch of the American food service industry includes diners, luncheonettes, coffee shops, cafeterias, and casual restaurants. Popularly priced food service establishments are characterized by their informal service format, menu choices, seating, and table settings. Although informality is a common characteristic of all popularly priced food service formats, how popularly priced restaurants approach informality varies considerably. Some restaurants have employees bring food to tables or booths; others serve patrons from a counter or tray rail. Generally, cafeterias do not bring the food to the patrons' table.

Except for cafeterias, popularly priced food service establishments offer only a limited menu dominated by sandwiches. Patrons sit at tables or booths or on stools facing counters. Some establishments offer a choice of table seating or counter service. Although some popularly priced food service establishments provide tablecloths, they do not provide formal table settings with linen cloths and napkins. Tables are usually set with paper mats, paper napkins, and, occasionally, printed menus. Popularly priced food service establishments customarily furnish metal cutlery and washable dishes, but they do not furnish fancy silverware or fine china.

b. *History*

(1) *The Bonds Between Liquor Service and Food Service.* Despite the birth and growth of the homegrown, full-service, tablecloth restaurant industry, nineteenth and early twentieth century America had yet to solve many significant food service problems. Perhaps the most important of these problems was finding a way to serve wholesome meals to middle

and working class people without promoting alcoholic beverages at the same time.

Drinking liquor while eating had been common from the earliest Colonial times. Although the close bonds between alcohol service and food service for wealthy classes were eased by the growth of full-service, tablecloth restaurants, it was not easy for the nineteenth century middle and working class to buy a nutritious, prepared meal without also buying liquor.

Seventeenth century American Colonials did not mind the ties between food and alcohol. They took their beer and liquor drinking seriously, and taverns sprouted quickly to help them accomplish their goal. Although tavern keepers were principally interested in beer and liquor service, they also served food to keep the hungry drinkers satisfied.

Coffee and chocolate houses, transplanted to North America from their English roots, also served meals to their guests. The first coffee house is reputed to have opened in Boston in 1670.³¹ Although coffee houses served alcoholic beverages as well as coffee and tea, they also served food. They appealed to merchants and became gathering places for the business community. Coffee and chocolate houses became fashionable before the turn of the eighteenth century. In 1670, two coffee houses were established—one in Boston and another in New York.³² It was not until 1794 that the Tontine House, “the finest coffee house in early America,” was completed in New York City.³³

Early tavern and coffee house owners did not offer extensive food menus, especially in rural areas. The owners served what they felt like serving, and their patrons had little choice.³⁴ Tavern and coffee house food ranged from barely edible to very good.

(2) Severing the Bonds Between Liquor Service and Food Service.

³¹ See HOOKER, *supra* note 14, at 92.

³² See MARIANI, *supra* note 8, at 17.

³³ RICE, *supra* note 9, at 39. The Tontine House was once the site of the New York Stock Exchange.

³⁴ See MARIANI, *supra* note 8, at 16.

The powerful bonds that linked food service to alcoholic beverage service were repugnant to social and religious societies campaigning for morally uplifting institutions. Eighteenth century taverns did not tend to be morally uplifting. They attracted laborers and seamen and were criticized for rowdiness and violence. Gambling and prostitution flowered in many taverns.³⁵ Other taverns, however, were respectable and well appointed. Some housed government entities and commercial exchanges in Colonial times.³⁶

Conditions did not improve as the eighteenth century yielded to the nineteenth century. The early bonds between drinking and eating in taverns continued as America evolved from its original agricultural base to an industrial society. As migration from the farm to the cities increased, and industrial employment accelerated, eating lunch at home became increasingly impractical for workers. As cities grew, the distance between a worker's home and job site increased. For workers who traveled long distances between home and work, the lunch hour was not long enough to get home, eat, and return to work on time. Workers who lived in boarding houses had similar problems. Even if the commute between the boarding house and the job was short, the lunch hour designated by the boss did not necessarily coincide with the rigid meal schedule set by the boarding-house keeper.

Some workers coped with the lunch time dilemma by carrying lunch to work.³⁷ Other workers sought a place where they could buy a decent lunch at a reasonable price and get back to work on time. Tavern keepers were eager to meet this need. They encouraged workers to drop by during their lunch hour by offering inexpensive, easily accessed food. Unfortunately, patrons were also expected to drink; the customers obliged.³⁸

³⁵ See RICE, *supra* note 9, at 33.

³⁶ See *id.* at 34, 35-38.

³⁷ See PILLSBURY, *supra* note 10, at 31.

³⁸ Tavern lunches were usually cheap. By 1837, tavern owners were offering free lunches to their patrons. Free lunch deals spread rapidly, after reportedly starting at New Orleans' St. Louis Hotel. One tavern offered choices of crab gumbo and rice, jambalaya, roast beef, baked beans, shallots, salads, fried tripe, fried hominy, and succotash. The food was free to patrons who ordered a fifteen cent glass of wine. See HOOKER, *supra*

Tavern lunches were quick. It is reported that fifteen minutes is all the time a late nineteenth century New Yorker needed for lunch.³⁹ Church groups and their allies yearned for new kinds of food service establishments that were not primarily dedicated to alcoholic beverage service; a place where workers and tradesmen could purchase a good meal. Full-service, tablecloth restaurants were not efficient enough to serve a good meal within the time constraints of a worker's lunch hour. They were also much too expensive for middle and working class patrons.

Early attempts to provide quick, reasonably priced food service, without ties to alcoholic beverages, included such popularly priced establishments as lunchrooms, dairy lunch establishments, and buffet lunch establishments. They were early precursors of the cafeteria movement. A New York City food service establishment called the Plate House was serving quick lunches as early as the 1820s. In approximately ten minutes,⁴⁰ the Plate House customers were served lunch and willingly yielded their seats to a new wave of customers. New York's Exchange Buffet's patrons served themselves from buffet tables in the 1880s. Self-service lunchrooms soon spread to Chicago and Indianapolis.⁴¹ Lunch counters were operating in railway stations as early as 1884.⁴²

Chain lunchroom operators kept costs down by using mass production techniques that were popularized by contemporary industrial companies. As careful as they may have been to purchase sanitary and nutritious ingredients, they did not hire master chefs. By standardizing the food preparation process, they were able to entrust a large part of that process to unskilled, modestly compensated employees.

In 1893, the Church Temperance Society, an organization principally supported by Episcopal Church clergy and laymen, also took direct steps

note 14, at 261-62.

³⁹ See HOOKER, *supra* note 14, at 259.

⁴⁰ See *id.* at 145 (citing FRANCIS HALL, TRAVELS IN CANADA AND THE UNITED STATES IN 1816 AND 1817 (1818)). See MARIANI, *supra* note 8, at 116.

⁴¹ See Jane Stern & Michael Stern, *A Reporter At Large: Cafeteria*, THE NEW YORKER, Aug. 1, 1988, at 40.

⁴² HARVEY LEVENSTEIN, REVOLUTION AT THE TABLE: THE TRANSFORMATION OF THE AMERICAN DIET 185 (1988).

to advance the separation of popularly priced food service from alcoholic beverage service. The society stocked a horse drawn wagon with food, dispatched it to midtown Manhattan in New York City, and began serving lunch to factory and office workers.⁴³

The first lunch wagon's success encouraged the temperance people, and they expanded. They were operating eight lunch wagons in New York City by 1898.⁴⁴ Some of the wagons grew to be large and elaborate contraptions. The success of the lunch wagon soon attracted private entrepreneurs. They served late night workers at industrial plants and stayed open late into the morning.

The hours of operation for lunch wagons eventually irritated authorities. Village and town officials complained that undesirable characters congregated at lunch wagons late at night. Moreover, the authorities wanted the wagons off the street before the morning traffic. Municipal governments soon restricted hours of operation for lunch wagons, allowing them to be open from dusk to dawn, but closed before the morning traffic. Some wagon operators refused to abide by the restrictions.⁴⁵

To deal with the situation, some municipalities made sure that lunch wagons closed before 10:00 a.m. However, stationary eating places were allowed to remain open after 10:00 a.m. The lunch wagon operators planned and executed countermeasures. Their first countermeasure was to unhitch the horses from their wagons and continue doing business in off-street, stationary facilities. As off-street, stationary facilities, they were no longer subject to municipal restrictions on the hours of operation for lunch wagons.⁴⁶ Stationary lunch wagons increased their menu choices and stayed open all day and all night.

⁴³ See RICHARD GUTMAN, *AMERICAN DINER* 11 (1979). Despite its principal focus on moral and religious issues, the temperance organization had a good feel for site location. Its first location was Herald Square, located at 34th Street and Broadway. Several decades later, Nedick's, a chain luncheonette operation, lodged at that intersection and sold a dazzling number of frankfurters and hamburgers. Nedick's executives called 34th Street and Broadway the best food service location in the world. *See id.*

⁴⁴ *See id.* at 28-29.

⁴⁵ *See id.* at 12.

⁴⁶ *See id.*

Although the lunch wagons qualified as stationary facilities, they were not stationary buildings. The wheels remained and could still be used to tow the lunch wagon to another site. The ability to move made selling a lunch wagon business, or simply the wagon, much easier.

As the number of lunch wagons expanded, other popularly priced food service operations sprouted including lunchrooms, frozen dessert stands, tearooms, coffee shops, luncheonettes, and cafeterias.

Popularly priced food service establishments mushroomed during the prohibition era. Taverns, saloons, and bars could not legally do business then. These operators had three choices: go out of business; operate illegally; or, if their use clause permitted, convert to a food service establishment. Many taverns, saloons, and bars went out of business.

Some full-service, tablecloth establishments emphasized food service, but also profited handsomely from liquor service. Although they were not taverns, prohibition also caused them to suffer because their highly profitable liquor service had subsidized unprofitable or marginally profitable food service operations. Because many of these tablecloth establishments could not survive without profits from alcohol, they closed their doors. Such victims included Louis Sherry's and Delmonico's.⁴⁷

The real estate industry was now faced with the need to recycle many vacant taverns, saloons, bars and first-class restaurants. Conversion to popularly priced food service establishments was one solution. Even elegant hotel bars were converted to luncheonettes, ice-cream parlors, and soda fountains. The mirrored bar in Chicago's elegant Palmer House became a luncheonette.⁴⁸ A soda fountain replaced the bar in Aspen, Colorado's Hotel Jerome.⁴⁹

In 1933, the end of prohibition helped revive the full-service, tablecloth restaurant business, but it did not reverse the growth of popularly priced food service. In the Great Depression, the need for popularly priced food service was greater than ever.

⁴⁷ See HOOKER, *supra* note 14, at 303.

⁴⁸ See LEVENSTEIN, *supra* note 42, at 187.

⁴⁹ See MARIANI, *supra* note 8, at 94.

(3) *Popularly Priced Food Service Comes of Age.* In the nineteenth century, America's economy shifted to an industrial base from its earlier agricultural base. As the economic base changed, the migration from rural to urban areas accelerated. America's industrialization sparked many changes in living patterns, habits, and consumer preferences. People traveled even longer distances to work. Traveling longer distances for recreational purposes also became popular. Women entered the work force in increasing numbers. Eating lunch at home became increasingly impractical for shopkeepers and working people, but they could not afford to eat lunch in full-service, tablecloth restaurants. Although men could usually afford to eat lunch in taverns, saloons, and bars, women were not welcome. These circumstances increased the need for practical, affordable, public food service establishments.

Moreover, combining food and liquor service continued to concern employers, churches, and social groups. Employers opposed the tavern lunch because too many workers were returning to work in a euphoric state generated by a lunch hour visit with Johnny Walker, Jack Daniels, John Barleycorn, and similar mythic figures. Powerful religious and social organizations continued their opposition to tavern lunches for moral reasons. These forces campaigned to sever the bond between liquor service and food service for working men and women. They slowly succeeded in loosening the bond.

The bond between liquor service and food service eroded as the need for popularly priced food establishments increased. Enterprising business people understood the need and moved to fill it. They established diners, luncheonettes, cafeterias, lunchrooms, and tearooms. They also started casual restaurants, drive-ins, and other popularly priced food establishments. Some of these enterprises prospered for a brief period, filled a temporary need, and then perished. Others thrive to this day despite wars, depressions, recessions, inflation, rock and roll, and other calamities.

c. Diners Evolve from Lunch Wagons

Diners evolved from the horse-drawn lunch wagon movement. Contrary to a popular misconception, diners have no direct ties to railroad dining. Diners began as lunch wagons designed to look like

railroad dining cars. The design was a marketing device to exploit the railroad dining car's reputation for serving good food.

The first diners appeared between 1922 and 1924. The Jerry O'Mahoney company, an important lunch wagon manufacturer, sensed the name "lunch wagon" had lost its fizz. Manufacturing the contraptions was still profitable, but calling them lunch wagons was bad merchandising. Moreover, its new lunch wagon models were much larger than the original lunch wagons, and they could seat many more patrons. Outfitted with efficient furniture, fixtures, and equipment, the new wave of prefabricated lunch wagon facilities could offer an expanded menu and serve its customers all day and night.

The O'Mahoney Company then hit on a new gimmick. The new models would be called "dining cars" or "diners." It was a stroke of genius. The new name evoked images of railroad dining cars. They had good reputations for food and service in the early decades of the twentieth century.⁵⁰ Other lunch wagon manufacturers were quick to follow suit, and the new name stuck. As a result, most new diners were designed to look like railroad dining cars.⁵¹

A prefabricated diner was usually shipped to a point near the site on which it would conduct business. Starting its journey by railroad flat car or boat, the diner was unloaded and towed to the site on its own wheels.⁵² The diner's mobility encouraged the development of a brisk secondary market for used and reconditioned diners.

The secondary market influenced diner tenant lease negotiations. For example, diner tenants tended to propose that their moveable buildings be considered personal property and demanded the right to remove them when the lease term expired. In fact, some contemporary diner tenants and other popularly priced food service tenants continue to demand this right. They do so even when their buildings are firmly affixed to the land and despite the absence of a secondary market for moveable facilities. Apparently, tenants make these proposals because of their lawyers'

⁵⁰ See GUTMAN, *supra* note 43, at 58-61.

⁵¹ See *id.* at 70.

⁵² See *id.* at 78-82.

reverence for lease clauses drafted by an earlier generation of lawyers.

Diners flourished through the 1950s, but they declined in the 1960s and 1970s, only to be revived in the 1980s.⁵³ Diner operators inherited the policy of lunch wagon operators to remain open late at night. Many diner operators still stay open all day and night. Diners that do close, close late and open early. Few other popularly priced fast food establishments keep such long hours.

Contemporary diner menus are usually more extensive than menus of most other popularly priced food service establishments, but they are not always as extensive as the menus of full-service, tablecloth restaurants. Unlike most other popularly priced food service establishments, diners offer complete meals consisting of an appetizer, soup, salad, and entree. However, unlike full-service, tablecloth restaurants, complete meals are not emphasized. In addition, diners do not set formal tables with fancy linen tablecloths and napkins. The flatware is modest, and the dishes are unassuming. Moreover, diners do not employ expensive chefs or offer a fancy wine list as do most of the full-service, tablecloth restaurants.

d. Luncheonettes and Coffee Shops

It is easy to distinguish luncheonettes and coffee shops from cafeterias. Luncheonettes and coffee shops usually provide a counter or informally set booths and tables for their patrons. Service is provided by waiters and waitresses. Cafeterias serve patrons across cold buffet and steam tables. Their patrons line up along a tray rail and select from an array of hot and cold dishes within reach of the rail. Cafeteria patrons select their own cold dishes, and counter personnel pass hot dishes to them.

Luncheonettes and coffee shops are distinguished from full-service, tablecloth restaurants because of the former's informal seating characteristics and limited menus. In addition, menu offerings distinguish luncheonettes and coffee shops from casual restaurants. Luncheonette and coffee shop menus concentrate on sandwiches and snacks. The

⁵³ See MARIANI, *supra* note 8, at 110.

menus are also less ambitious than those of casual restaurants, which are better suited to complete meal service.

Distinguishing a luncheonette from a diner may be difficult because of the similar seating arrangements, service formats, and table settings. Menu policy distinguishes luncheonettes and coffee shops from diners. Luncheonettes and coffee shops concentrate on sandwiches, but diners offer many more menu choices and are prepared to serve complete meals. Diners are also distinguished from luncheonettes and coffee shops by their long hours. Luncheonette and coffee shop owners get up early for the breakfast crowd and work steadily through lunch time. However, the evenings are not as exciting, and many of them close as the day continues.

Luncheonettes and coffee shops evolved from the soda fountain counter movement. Early soda fountains, dispensing a likable mixture of carbonated water and syrup, were installed in drugstores soon after the Civil War.⁵⁴ Philadelphia's Broad Street Pharmacy is reputed to have been the progenitor of the soda fountain counter industry. In 1903, Broad Street's management reconfigured the store and placed the soda fountain behind a separate counter.⁵⁵ Although soda fountains were profitable for drugstore operators before then, the fountains had been placed against walls and did not get the attention they deserved.⁵⁶ With the fountain placed behind a separate counter, an attendant could prepare soda and ice cream dishes in full view of thirsty patrons. The experimental new arrangement proved profitable, and other drugstores joined the party.

Soda fountain counter installations spread to many drugstores and variety stores. By 1908, 75,000 soda fountain counters were operating in

⁵⁴ The soda fountain's public acceptance was furthered in 1874 by a concessionaire at Philadelphia's Franklin Institute Exposition. After running out of syrup, the operator put ice cream in his still plentiful carbonated water. He called the concoction an "ice-cream soda." Ice-cream sodas were such a big hit that they paved the way for the inauguration of the soda fountain counter. See PHILIP LANGDON, *ORANGE ROOFS, GOLDEN ARCHES* 9 (1986).

⁵⁵ See MARIANI, *supra* note 8, at 110.

⁵⁶ See HOOKER, *supra* note 14, at 330.

the United States.⁵⁷ Drugstores with soda fountain counters came to be known as “wet drugstores.” Those without were called “dry drugstores.” Soda fountain counters became an increasingly important profit center for wet drugstores. Sixty-one percent of all drugstore sales were estimated to have been derived from the counters in 1929.⁵⁸

Business was good, and entrepreneurs wanted business to get better. As a result, many soda fountain counters set up shop in well-appointed rooms featuring gilded mirrors, marble counters, and tiled floors. Soda fountain counter menus were destined to expand. The invention of the ice-cream cone in 1904 was a big boost to the business. Counter menus also expanded as soda fountain counter installations proliferated. In addition to sodas and ice-cream cones, the counters began to serve a whole range of dessert and beverage items including malts, sundaes, and banana splits. Soda fountain counter menus were later expanded to include coffee, cake, and sandwiches.⁵⁹

When still more items were added to the menu, counter operators began to call their stores luncheonettes and coffee shops, instead of soda fountain counters.⁶⁰ Thus, these operations were transformed into luncheonettes and coffee shops as they shifted their menu emphasis from satisfying the lust for snacks to also providing reasonably adequate breakfasts and lunches.

As luncheonettes and coffee shops emerged from their soda fountain origins, Americans were especially concerned about food adulteration and unsanitary food service conditions. Popularly priced food service establishments needed to demonstrate that their food was pure and that the premises were scrupulously clean.

Luncheonette and coffee shop operators wisely emphasized their commitment to unadulterated food and cleanliness. They used efficient, modern equipment including steel utensils, and they installed floor tile and enameled table tops.⁶¹ Preparing food and beverages in full view of

⁵⁷ See LANGDON, *supra* note 54, at 9.

⁵⁸ See LEVENSTEIN, *supra* note 42, at 189.

⁵⁹ See LANGDON, *supra* note 54, at 9.

⁶⁰ See *id.*

⁶¹ See LEVENSTEIN, *supra* note 42, at 186.

consumers seated at counters also helped to convince them that the food was clean and wholesome. A Greek immigrant, John Raklios, was an early, successful luncheonette entrepreneur. He owned nineteen Chicago area units, promoting the luncheonettes as paragons of cleanliness and affordable prices.⁶²

e. Lunchrooms

Cleanliness and affordable prices were also emphasized by lunchrooms, another branch of the popularly priced food service movement.⁶³ Lunchrooms were usually located in downtown central business districts. They occupied the ground floor of high-rise office buildings. Because the available space did not usually provide ideal layouts, lunchrooms did what they could with the space available. Unlike luncheonette, coffee shop, and diner food preparation, lunchroom food preparation was not usually visible. Lunchroom kitchens were separated from the dining rooms by partitioning walls.

Many lunchroom patrons were seated on chairs with built-in tray extensions. These lunchrooms were called one-armed lunch shops. Other lunchrooms provided tables and chairs; still others served customers seated on stools from a long counter. Lunchrooms are no longer a distinct popularly priced food service subcategory. For the most part, the lunchroom movement folded into the cafeteria movement. Lunchrooms that did not adopt the cafeteria format either perished or were transformed to luncheonettes or coffee shops.

f. Tearooms

Women who entered the work force in the early part of the twentieth century were not presented with many acceptable food service choices. They could not patronize taverns or saloons, and they were uncomfortable with other, male-dominated and liquor-associated, food service formats.

⁶² *See id.*

⁶³ *See id.* at 186.

Tearooms responded to women's needs and provided a respectable place for them to eat. Moreover, the tearoom was all the more comfortable for a woman because the owner was usually a woman.⁶⁴ Tearoom operators converted old homes, stables, and their own living rooms into tearooms for food service use. They chose quaint furniture and frilly furnishings.⁶⁵

Initially, tearooms offered three and four-course lunches and dinners. Main dishes included roast beef or roast lamb. Later menus were characterized by salad, sandwich, chicken pie, and cake offerings.

The tearoom business expanded rapidly in the prohibition years. It prospered by soothing a public deprived of its thirst quenching and anxiety easing liquids. Seeking a way to cope with their deprivation, male customers discovered tearooms. This phenomenon, combined with an increase in the female work force, spurred the tearoom's popularity. As taverns and saloons vacated valuable space, the vacant space was converted to tearoom operations. Store fronts and old houses were also converted to tearooms.⁶⁶

Enterprising tearoom operators did not limit themselves to urban sites. The operators were attracted to quaint buildings in the countryside. They bought or leased barns, gristmills, inns, and country houses and converted them to tearooms. Sites along resort highways were among their favorites.⁶⁷

g. Cafeterias

Cafeterias are different from all other popularly priced food service establishments. Patrons of luncheonettes, coffee shops, and casual restaurants select food from a menu and sit while ordering food from a waiter, waitress, or counter person. Cafeteria patrons select their food from a buffet table, steam table, or other facility as they pass by along a

⁶⁴ See HOOKER, *supra* note 14, at 326.

⁶⁵ See LEVENSTEIN, *supra* note 42, at 187.

⁶⁶ *See id.*

⁶⁷ CHESTER H. LIEBS, MAIN STREET TO MIRACLE MILE 197 (1985).

tray rail. Cafeterias also usually offer a wide variety of menu items⁶⁸ as opposed to luncheonettes, coffee shops, and casual restaurants, which offer limited menu selections.

Retail business and cafeteria operations were united in 1918 when A.W.B. Johnson opened a cafeteria in a Birmingham, Alabama, department store.⁶⁹ Morrison's, a Mobile, Alabama food service, took the cafeteria business to a new level in 1924 by providing waiter service. After a patron selected his or her food items, gathered them on a tray, and paid the bill, a waiter would carry the tray to a table. Other cafeteria chains followed suit. Cafeterias were born in the city, and many of them died in the city because of urban decay and aggressive competition from fast food establishments. However, some cafeterias thrived by following the consumer shift to suburban shopping centers and free-standing highway locations. Morrison's Cafeteria, among the small band of survivors, kept in step with changing times by signing shopping center leases. The company adapted its food service operations to the shopping center environment, as most of their competitors faced dwindling volume due to the decline of the urban districts in which they were located. To survive, other chains followed Morrison's lead.

h. Roadside Restaurants

The massive, World War II migration to the suburbs had a profound effect on the popularly priced food service industry. Some popularly priced dining establishments in urban settings were unable to survive the monumental changes in urban life. However, others managed to survive

⁶⁸ A New York court distinguished between a fast food operation and a cafeteria. The court held that a cafeteria is different from a fast food operation in that the former has a full menu and customers usually select their food at a central place and take it to tables. The court perceived of a fast food operation as a food operation with limited menus in which a substantial part of the clientele leaves the restaurant with their food. The court also noted that cafeterias use metal utensils and dinnerware and that fast food operations do not. *See Horn & Hardart Co. v. Junior Bldg., Inc.*, 366 N.Y.S.2d 272 (N.Y. Sup. Ct. 1975), *modified*, 371 N.Y.S.2d 8 (N.Y. App. Div. 1975) (denying summary judgment because issue of fact exists as to intended meaning of "cafeteria"), *aff'd*, 358 N.E.2d 514 (N.Y. 1976) (granting summary judgment because language in context showed intended meaning of "cafeteria").

⁶⁹ *See* MARIANI, *supra* note 8, at 119.

by migrating to suburban highway, free-standing locations and shopping centers.

Of course, some popularly priced dining establishments were doing business on highway sites before the post-World War II shift in our transportation patterns. Inns and taverns had prospered there even before the automobile was invented. However, fewer people traveled along highways before the motor vehicle became a common possession and the public highway system expanded.

As automobile ownership proliferated, Americans traveled more. They drove to visit relatives and vacation spots; they drove to shop and to work; people even drove for recreation. Eventually, they got hungry and thirsty. Food service entrepreneurs mobilized to satisfy this hunger and thirst. Because new highway construction accelerated in the early post-World War II period, new highway and shopping center food service establishments accelerated as well.

i. Drive-ins

Food service establishments catered to drive-up customers even before the automobile became our principal mode of transportation. Early in the twentieth century, pharmacy and soda fountain counter employees brought food orders to drive-up customers who waited outside in horse-drawn buggies.⁷⁰

Motorist-oriented drive-in restaurants proliferated in the early 1920s. Drive-in restaurants were organized to serve customers willing to eat in their automobiles. Restaurant staff members brought food to the automobiles and passed it to a patron through an open window. Patrons merely ordered, ate in their automobiles, and drove away.

Drive-ins prepared food in buildings surrounded by a curbed sidewalk and parking area. Motorists drove through the parking area to the curbed sidewalk and formed a line at the curb. The building's many windows opened to the sidewalk. Uniformed carhops took patrons' food orders to

⁷⁰ Fortune's Drug Store in Memphis, Tennessee, was among them.

the windows and picked up prepared dishes from the windows.

J.G. Kirby's Pig Stand, located on the highway between Dallas and Fort Worth, Texas, which opened for business in 1921, is reputed to have been the first of the drive-in restaurant genre.⁷¹ The success of the first Pig Stand led to more openings, which were noticed by potential competitors. Drive-in food service establishments flourished for four decades. By 1964, there were more than 35,000 drive-in food service establishments in America.

As the 1950s yielded to the 1960s, drive-ins acquired a reputation for rowdiness, much like the accusation thrust on the taverns in the 1890s. Potential voters complained about violence, noise, and litter. Soon, local governments passed laws restricting drive-in operations just as they had done with respect to night lunch wagons a half-century earlier.⁷²

j. Casual Restaurants

Howard D. Johnson originated many of the concepts that have become integral strands of the fabric in America's casual restaurant chain. Fast food establishments also adopted many practices he invented. Johnson opened his first food service operation in 1925, when he took over an unprofitable wet drugstore in Quincy, Massachusetts. He was convinced that the store could make money if the quality of the ice cream served at its soda fountain counter could be materially improved. Ice cream was the star of the show. Johnson attracted many customers by adding flavors that most patrons could not get in their own neighborhood. He also added hot dogs and hamburgers to the menu. The drugstore soda fountain counter was thus transformed to a luncheonette.⁷³ A second

⁷¹ See PILLSBURY, *supra* note 10, at 75.

⁷² See LIEBS, *supra* note 67, at 208-13. Two brothers, whose surname now sits on countless food service establishments around the world, started a drive-in business in San Bernardino, California in 1939. They did well until shortly after World War II, when they became disillusioned with the drive-in business. Sensing that employee caliber was decreasing while carhop wages were increasing, Maurice and Richard McDonald decided in 1948 to make some changes. These changes altered the food service business forever. See *infra* Part V.B.6.c.

⁷³ See Joseph Monninger, *Fast Food*, AMERICAN HERITAGE, April 1988, at 68, 72.

Howard Johnson unit opened in Quincy in 1929. Its success prompted grandiose plans to develop and operate a huge casual restaurant chain. As with many plans laid by budding capitalists in 1929, Johnson's thought of owning and operating a huge chain of casual restaurants was severely altered by the Great Depression.

Franchising was the most important of Johnson's contributions to American food service. Because financing new company-owned units was impractical for him, Johnson concentrated on expansion by franchising. He instinctively understood that franchising would be successful only if the product and serving techniques could be uniform, the building space standardized, and food quality consistent. He planned to achieve this by: (1) marketing the food himself and selling it to the franchises to ensure food quality; (2) promulgating standard operating procedures to maintain service quality; (3) requiring franchises to use his recipes; and (4) designing a prototype building with a unique architectural style.⁷⁴

Partly to overcome zoning restrictions on advertising signs, Johnson decided on a prototype building that combined a white colonial motif, a cupola, and a seemingly incongruous orange roof.⁷⁵ Anyone who saw a Howard Johnson's building knew what it was; a sign was unnecessary.

Howard Johnson's interiors combined two seating patterns that had become associated with other popularly priced food service formats: the luncheonette and the tearoom. One side of the building, reminiscent of the tearoom, was allocated to a quaintly decorated dining room with tables and chairs. Patrons who preferred to eat in the dining room were served by uniformed waitresses and ordered from a limited menu. The other side of the building contained a long counter and row of stools. It mimicked a luncheonette, coffee shop, or diner. As in a luncheonette, coffee shop, or diner, counter patrons were served by counter personnel.⁷⁶

New casual restaurant chains adopted techniques pioneered by

⁷⁴ See *id.*

⁷⁵ See LIEBS, *supra* note 67, at 202.

⁷⁶ See *id.*

Johnson. Patrons could choose between counter service and table or booth service. Menu choices were more limited than at full-service, tablecloth restaurants, but less limited than in luncheonettes and coffee shops. Casual restaurant chains served dinner as well as lunch. Tables were set informally with mats and paper napkins.

Decades later, Howard Johnson's declined, but Johnson's techniques were adopted by a new wave of casual restaurants. Unlike Howard Johnson's, the new wave of casual restaurants spoke to a younger audience, served alcoholic beverages, and expanded menu choices.

Howard Johnson's techniques were also adopted by the newer, revolutionary food service format of fast food. His contributions changed the food service business forever.

5. *The Path to Fast Food*

Howard Johnson built his organization on a foundation of limited menus, franchising, standardization, consistency, and quality control. However, Johnson was not the only pre-World War II entrepreneur to experiment with the techniques that led to the fast food industry's birth and growth.

a. *White Castle Steam Fried Hamburger Fortresses*

White Castle's steam fried hamburgers embellished with chopped onions were first offered to the general public in Wichita, Kansas in 1921.⁷⁷ One founder, Walter Anderson, had been a lunch wagon proprietor. His partner, Edgar Ingram, had been an insurance executive. Ingram later bought Anderson's interest in White Castle.

Efficient operation was critical to Ingram. He kept White Castle's labor costs low. Units were staffed by only two employees at a time. They cooked, cleaned, and served. Ingram wanted White Castle units to project a wholesome image and to be pristinely clean. He conceived of a

⁷⁷ See MARIANI, *supra* note 8, at 123.

distinct and uniform architectural style for new White Castle buildings, and he established stringent guidelines governing employee cleanliness, dress, and behavior. Ingram also employed and trained inspectors who made sure that local managers adhered to his guidelines.⁷⁸ The buildings, furniture, equipment, dishes, and utensils were uniform. Food and beverages were prepared in accordance with the same recipes.

Ingram was creative in other ways too. He originated folding paper hats for food handling employees and a heat resistant carton for take-out orders.⁷⁹ Success breeds competition, and White Castle's success inspired many others to try a similar format.

b. Frozen Dessert Stands

Although the fast food industry is principally a post-World War II phenomenon, frozen dessert stands used methods before the war that were later associated with fast food. Frozen dessert industry pioneers fostered consistent product quality. They promoted uniform menus, equipment, and building styles. They formulated successful franchising systems and developed sophisticated cost control systems.

Service was fast and efficient. Just as fast food patrons do today, early frozen dessert stand patrons willingly stood in line and waited to be served by counter personnel. A patron would select from a very limited menu upon reaching the front of the line. Then a counter attendant would rapidly fill the order by pressing a button on a machine. On-premises dessert manufacturing is still the centerpiece of the frozen dessert stand format. Manufacturing the product on the premises projects freshness and wholesomeness.

⁷⁸ See MARIANI, *supra* note 8, at 123-26.

⁷⁹ See *id.*

6. *Growth and Development of Fast Food Service*

a. *The Post-World War II Movement to Increase Food Service Efficiency*

Although popularly priced food service establishments fulfilled their mission to provide convenient, wholesome, and reasonably priced food for working and middle class families, the food service industry's entrepreneurs kept trying to do the job better and more profitably. Reducing costs, such as labor and materials, was one priority. Increasing sales volume was another priority.

Like any other business, food service establishments could stimulate sales by advertising. Although advertising meant spending more money, food service people knew that they could keep advertising expenses to a reasonable fraction of sales volume by spreading the expenses over many units.

Another way of increasing volume was to serve customers faster than popularly priced food service establishments. Customers at most popularly priced food service establishments left the premises soon after they finished their meals. However, some customers lingered in their seats for a cigarette, coffee, good conversation, or a juke box tune. Others lounged in the restaurant for hours. Aggressive food service people mused that sales volume could be increased materially if they could feed customers quickly and have them finished faster.

Standardization was another cornerstone of fast food. Fast food establishments standardized their menus, food preparation procedures, and recipes. With a number of significant exceptions, a contemporary fast food chain legitimately expects that its patrons anticipate a menu item served in one part of the world to be virtually the same as in every other part of the world.

Most successful fast food operations succeeded in large measure by catering to children. They successfully promoted the idea that eating wrapped, precooked meat and fish dishes on cramped tables in a crowded and noisy atmosphere was fun. Popularly priced food service establishments were not able to excite children similarly with the prospect of bland meat loaf and mashed potatoes served by a waitress at a casual restau-

rant's booth or a luncheonette's counter.

b. Distinguishing Popularly Priced Food Service from Fast Food

Although they have many common characteristics, popularly priced food service and fast food service⁸⁰ are very different from each other in certain respects. Popularly priced food service establishments use metal utensils and usually serve food on washable plates. Fast food is not served on a washable plate. It may be wrapped in a thin piece of paper and handed to patrons in paper bags or on plastic trays. Fast food service patrons eat from paper wrappings or disposable dishes and use disposable utensils. Popularly priced food establishments usually serve beverages in washable cups, while fast food establishments use disposable containers.

Fast food service is much faster than popularly priced food service. Fast food operators fill an order in less than a minute after the order is received. Popularly priced food service patrons are willing to wait a little longer for their food. Luncheonette patrons and some casual restaurant and diner patrons sit at counters where they are served by counter personnel. Other diner and casual restaurant patrons are served by waitresses or waiters and are willing to wait a while for service.

⁸⁰In *M.H.L. Fast Service Sandwich Shop, Inc. v. 1499-1501 Broadway Co.*, N.Y.L. J., Mar. 27, 1975, at 13, Justice Korn was called on to interpret a restriction against a "fast-food operation of the type operated by Tenant." The landlord had entered into a lease with a tenant named Starlight Foods, Inc. The lease prohibited the landlord from renting any other space for use as a "fast-food operation of the type operated by the Tenant," but made an exception for luncheonettes, coffee shops, restaurants, and candy stores. After the Starlight lease was executed, the landlord entered into another lease with a tenant named Foffacroe. Foffacroe's lease permitted Foffacroe to use the premises as a "restaurant . . . luncheonette and coffee shop. . . ." Foffacroe assigned its leasehold estate to M.H.L. Fast Service Sandwich Shop, Inc., a Blimpie franchise. Blimpie claimed that its fast food operation was not of the type operated by Starlight. Blimpie argued that its menu "does not appeal to the same food taste as plaintiffs" and "that a potential customer for plaintiff's 'delicatessen style sandwiches' would not be confused by the presence of a restaurant serving Italian-style heroes." The court held that "the description of the permitted use in plaintiff's lease equally describes the 'Blimpie' operation, which would be barred by the noncompetition covenant. *Id.* Essentially, the court ruled that a sandwich is a sandwich and thus the sale of heroes by Blimpie was barred, based on the landlord's agreement not to rent space to a tenant with an operation similar to that of the plaintiff. *Id.*

Cafeteria patrons line up along a tray rail to select their food and stand in a second, presumably smaller, line to pay. On the other hand, fast food patrons line up to have their food quickly filled by a counter person.

Although popularly priced food service establishments usually offer limited menu choices, fast food choices are even more limited. An efficient diner or luncheonette prepares food quickly, serves its patrons quickly, and does not expect patrons to linger over food and beverages as long as they might linger in a full-service, tablecloth restaurant. Fast food patrons usually do not linger. Fast food operators want you to eat, enjoy what you eat, and get out, making room for the next wave of patrons. Thus, they make sure their patrons do not get comfortable by providing hard surfaced chairs and tables that usually do not seat more than four people.

c. McDonald's

Despite the pre-World War II success of the frozen dessert stand format, fast food did not become a major force until the end of the war. It was the hamburger, rather than frozen desserts, that proved to be the industry's most durable product. Richard and Maurice McDonald launched a successful, but conventional, drive-in restaurant in San Bernardino, California in 1939. As in other drive-in food service operations, carhops served customers in their automobiles. The menu listed approximately twenty-five items. Although the business was successful enough to provide a comfortable living, the brothers worried about operating problems and rising expenses.

The brothers began to reduce expenses by eliminating plates, flatware, and tumblers. That step reduced the cost of carrying a dining tool inventory, and it led to the need for less staff. The dishwashers were eliminated. Then, the brothers discontinued car side service and encouraged customers to leave their cars and stand in line for their food; this abolished the need for carhops.

Next, the McDonalds shrunk their menu. The number of menu items was reduced from approximately twenty-five to nine. The new menu offered hamburgers, cheeseburgers, milk, coffee, three types of soft drinks, potato chips, and pie.

The time for food preparation was also reduced. Efficiency became critical. Even the cooking procedures reflected the labor saving theme. Food was prepared before customers arrived. Hamburgers and cheeseburgers were precooked on a specially fabricated grill in assembly line fashion. The burgers were placed on a toasted bun and embellished with a special sauce. Anticipating a quick sale, the McDonalds wrapped the food in paper and placed it next to other food items in a neat, military row. French fried potatoes were deep fried before they were ordered. Heat lamps were used to keep hamburgers, cheeseburgers, and french fries warm. The time needed to prepare milk shakes was materially reduced by filling disposable cups with milk shake mix and storing the cups in refrigerated cabinets. When a milk shake was ordered, counter personnel placed the cup in the mixer, and a milk shake emerged just seconds after it was ordered. The result of Richard and Maurice McDonald's efforts was that patrons could get simple meals in twenty seconds once they reached the head of the line.⁸¹

Finally, the McDonald brothers passed the cost savings onto their customers by drastically reducing their prices. They charged fifteen cents for a thirty cent hamburger.⁸² Although success did not come immediately, business improved, and they began to capitalize on the unanticipated effects of their drastic changes. Children were fascinated by the grilling technique of the assembly line. A trip to see this phenomenon and eat its products became an adventure. The adventure was economical at fifteen cents per hamburger.

In 1952, the McDonald brothers announced that they were selling one million hamburgers a year.⁸³ It was time for a great leap forward. The next step was to start a franchise program and design a prototype building. The plan was to define a distinctive architectural prototype and incorporate the McDonald brothers' labor saving procedures into the prototype.⁸⁴ The McDonald Brothers sold out to Ray Kroc in 1961.⁸⁵ He

⁸¹ See LIEBS, *supra* note 67, at 213.

⁸² See Monninger, *supra* note 73, at 71.

⁸³ See MARIANI, *supra* note 8, at 166.

⁸⁴ Although an architect conceived of the original prototype building with its overhanging slanted roof, Richard McDonald concocted its most distinctive feature, the golden arches, now embedded as the chain's omnipresent logo. A gasoline retailer named Neil Fox was the first McDonald's franchisee. His unit opened in Phoenix, Arizona, in

expanded the menu and introduced indoor seating and drive-through windows.

d. Wendy's

Wendy's founder, David Thomas, opened his first hamburger restaurant in Columbus, Ohio and named it Wendy's after one of his daughters.⁸⁶ Thomas championed many techniques that characterize the fast food business today including fast service, limited menus, and regional franchising. Wendy's franchised its business name and business methods. Its franchise system focused on regional franchises covering broad geographical areas. Regional franchisees sub-franchised units in their own territories. The franchisees' financial ability fostered rapid growth.

Thomas was repelled by fast food hamburger facilities. He wanted his customers to be more comfortable and installed bentwood chairs. Most fast food restaurants provided no seating at all then and were considered eyesores. Wendy's stores were carpeted and decorated with Tiffany style lamps.

Changing times affected Wendy's. The menu expanded despite Thomas' belief in limited menus. Salad bars were added to the existing offerings,⁸⁷ and Wendy's restaurants began breakfast service.

7. Ethnic Food Service

Despite their vast differences, use and exclusive clause negotiators often look at the ethnic food service establishment as a single and separate food service format category. This is beneficial, in one sense, because sometimes it is much easier for sophisticated negotiators to deal with people who think in such a simplistic way. On the other hand, lumping a

1953. See LIEBS, *supra* note 67, at 213.

⁸⁵ See *id.* at 169.

⁸⁶ See *id.* at 173.

⁸⁷ See CHARLES BERNSTEIN, GREAT RESTAURANT INNOVATORS 5-20 (1981).

widely diverse band of food service establishments into the same group can be troublesome for landlords. Some landlord negotiators are willing to agree to a use clause permitting the tenant to conduct an ethnic food service business without adding details about the tenant's food service practices. Some landlords also fail to check their other food service leases carefully to see whether an existing food service establishment's lease bars an ethnic restaurant because of food service techniques that are common among the whole industry.

Some tenant negotiators also fail to consider the impact of ethnic food service on their own use and exclusive clauses. For their part, some popularly priced and fast food service tenant negotiators agree to exempt ethnic restaurants from restraints imposed by landlords without realizing that the phrase "ethnic restaurant" applies to many different kinds of food service establishments. Some of these types of food service establishments are direct competitors.

a. Ethnic Restaurants Get Started

Immigrants who came to the United States before World War II were prodded to assimilate and discard their culture. Some of them acquiesced by adopting the homogenized cultural values of American pre-War society while others did not. Many of those who did not assimilate retained their food traditions. They organized their own food service establishments and concocted new food products, thereby enriching America.

Immigrants did not necessarily jump into food service businesses as soon as they arrived in this country.⁸⁸ After struggling with menial jobs, some of them chose to use meager savings to invest in a small business. Usually, this first investment was in a grocery store, off-premises delicatessen, or saloon.

Some grocery stores evolved into food service establishments when the proprietors decided to make a few extra dollars by offering cooked food and table service from a corner of the store. If food service proved

⁸⁸ See Monninger, *supra* note 73, at 70.

to be more profitable than grocery sales, the proprietor would expand the food service space at the expense of the original operation.

Beyond grocery stores, first generation immigrants also favored investing in saloons. Saloon investments were modest, and entry was easy. Prospective saloon keepers had to invest in liquor, tumblers, a bar, chairs, tables, and little else. Unlike other food sales and food service businesses, only a small part of the saloon inventory was perishable.

With initial success under their belts, and some additional money in their pockets, some saloon owners decided to try their hand at food service. Converting a saloon to a restaurant was substantially easier than converting a grocery store to a restaurant. With tables and chairs already in place, the conversion was merely a shift of emphasis. Instead of offering food to attract potential drinkers, the new food service proprietor served beer, wine, and liquor to complement good food.

The immigrant influence on food culture has become permanently ingrained in the diet of mainstream America. For example, countless breakfasts are centered around bagels. Many people, however, who eat bagels daily are unaware of their association with earlier Jewish dairy restaurants and stores. Although pizza has Italian roots, contemporary Americans do not consider pizza an alien, cross-cultural food. Americans eat pizza in quantities never imagined by the Italian immigrants who adapted their regional specialty to its current Americanized format. Chow mein and chop suey, once considered exotic oriental cuisine by Americans of occidental origin, are commonplace lunch items today.

b. Classifying Ethnic Restaurants

Only one characteristic is common to all ethnic food establishments: all carry on the food traditions of an immigrant group's country of origin. In all other respects, ethnic food service establishments do not fit comfortably into a single mold. Each serves, seats, and provides for customers in many different ways.

Ethnic food service operators have adopted almost all the techniques that typify the other major types of food service formats. For example, a considerable number of ethnic food service establishments are full-

service, tablecloth restaurants. Some ethnic restaurants are so elegant that a maitre d' greets you at the door and leads you to a host or hostess who escorts you to your table. Several of these restaurants retain their authenticity by dressing their waiters and waitresses in formal outfits or ethnic costumes.

Other ethnic food service operations are popularly priced establishments with a foreign accent. Some focus on the lunch hour trade and skip table menus, table service, and tablecloths. Others adopt cafeteria techniques and ask patrons to make their selections from a buffet or steam table along a tray rail. Still other ethnic establishments operate like casual restaurants and employ waiters and waitresses to serve patrons sitting at tables without tablecloths.

Ethnic food service establishments also have a range of menu types. Some offer full menus with a wide variety of choices. Others offer strictly limited menu choices. Some ethnic food establishments, such as Pizza Hut and Taco Bell, also fit well into the fast food category.

c. Chinese-American Food Service

Chinese restaurants maintain a more attractive environment than most other food service establishments, catering to working and middle class patrons. Most have adopted the full-service, tablecloth format, but their price structure is low enough to compete with popularly priced food service establishments. Waiters and waitresses generally serve the meals. Patrons sit on comfortable chairs at tables usually covered with white linen tablecloths. Usually, each table is offered a complimentary pot of Chinese tea and fortune cookies.

Early in their establishment, Chinese food service entrepreneurs catered to all their customers' special needs. To this end, they were willing to feed people when nobody else would. They remained open late in the evening and on holidays. They were also among the first restaurant operators to popularize take-out service. To exploit their foothold among Americans who were not of Chinese origin, they adopted the label of Chinese-American restaurant. Recipes of Chinese origin were modified to please the occidental palate. To avoid losing their identity and their Chinese patrons, many offered a separate, authentic

Chinese menu, seasoned their dishes in a more traditional way, and served them in accordance with Chinese customs.

d. Italian Restaurants

Although many contemporary Italian restaurants are as upscale as any other restaurant in America, their precursors were in poor immigrant neighborhoods. Eighteenth and early nineteenth century Italian immigrants may not have been as impoverished as their Chinese contemporaries, but most of them were very poor. A large proportion of this country's Italian immigrants came to America from Sicily and southern Italy, both less prosperous than northern Italian regions.

Clearly, the Italian immigrant community was a ready market for entrepreneurs who were willing and able to provide food service for a hardworking, low-income immigrant community. The early ristorante and trattoria were designed to satisfy the market. Many restaurants adapted their cuisine to the preferences of the huge number of Sicilian and southern Italian immigrants. The proprietors provided home style cooking and abundant portions.

The early ristorante and trattoria did not spring into being immediately. Most Italian immigrants could not scrape together enough capital to start any business. When they had finally saved the money, they were more likely to try their hands at a grocery store rather than a restaurant. However, these early Italian grocery stores provided a pathway for enterprising Italian immigrants to make the transition from food sales to food service. Putting a table or two in a corner of the store was often the first move. If business was good, they began adding more tables.

The general public soon discovered the home style cooking and abundant portions. As patronage increased, Italian restaurants further modified their cuisine to cater to new customers. Aiming to please the broader market, they originated new dishes that had never been served in any Italian region.

G. Lombardi's, which opened its doors in New York City's Little

Italy in 1905, is reputed to have been America's first pizzeria.⁸⁹ However, Gennaro Lombardi's pizza might not have looked much like the pizza we eat in the United States today. Our beloved, contemporary pizza is attributed to Pizzeria Uno, which was established in Chicago in 1943.⁹⁰ Pizzerias bloomed after World War II. Armed service personnel who served in Italy returned with good memories of pizza. Returning servicemen and women who served in Italy were a market niche just waiting to be tapped. Entrepreneurial veterans had the ambition and foresight to cater to their former comrades in arms.

Contemporary Italian food service establishments can be found among all of the major food service formats. Some of the finest are among the most formal, expensive, full-service, tablecloth restaurants in the world. Although some use fine white linen table cloths, others provide no tablecloths at all. While elegant waiters work in some Italian restaurants, others require patrons to stand in line. Some Italian restaurant patrons use exquisite cutlery and eat on fine china. Others are asked to use disposable, plastic flatware. Some pizza and hero sandwich eaters do not bother with cutlery at all. The point is that the phrase Italian restaurant does not fully describe the characteristics of a food service tenant. It says nothing about the ambiance or service and little about the menu. It tells you only that the cuisine either originated somewhere in Italy or people think that it did.

e. Jewish Restaurants and Delicatessens

Eastern European Jewish immigrants were also attracted to the grocery business. Food was not plentiful in the old country and poor Eastern European Jews often went hungry. With food deprivation still part of their psychological make-up, running a grocery store was a logical job choice. A grocer might not make much money, but at least he had continuous access to food.

The more venturesome of this group also experimented with serving

⁸⁹ See MARIANI, *supra* note 8, at 66. Gennaro Lombardi's namesake and grandson revived the family business. His recipes and techniques live on at Lombardi's Restaurant.

⁹⁰ See *id.* The current chain claims to be a direct descendant of the original.

cooked food for on-premises consumption. The risk was small, the investment was modest, and a successful transition to food service meant a big jump in profits. The grocer was already paying for his space, and the store was full of food. All he needed were tables, chairs, cooking facilities, and family members who would cook and serve.

Grocers who concentrated on delicatessen and appetizing products were particularly successful at converting their operations from selling food for off-premises consumption to serving food for on-premises consumption. Some delicatessen-oriented grocers made a conscious effort to treat customers well. In so doing, the proprietors created huge sandwiches to please their patrons. The mere sight of these monstrous combinations of meat and bread could satisfy the emotional hunger of a customer base with painful memories of their Eastern European poverty and struggles.

Like its Italian counterpart, Eastern European ethnic food service does not fit comfortably into a separate category. America has at least one fast food operation with a Jewish accent. Nathan's, which adopted the fast food format in the post-World War II period, descended from a boardwalk snack bar on New York's Coney Island. It served kosher style frankfurters and other Eastern European Jewish food long before the vast changes brought by World War II.

Most Jewish delicatessens serving food for on-premises consumption qualify as a subcategory of the popularly priced category. Most of the delicatessens seat patrons at tables and employ waiters and waitresses to serve them. They do not use linen tablecloths, their menus are limited, and their prices are modest.

Other Jewish delicatessens kept improving their service and ambiance, expanding their menus, and increasing their prices. Several giant steps later they became full-service, tablecloth restaurants. As full-service restaurants, they offered a wide variety of Eastern European Jewish specialties including meat, fish, potato, and vegetable dishes. Patrons could order complete meals from a full menu. They could choose soup, salad, appetizers, entrees, and desserts from a long list.

f. German Restaurants

Early German immigrants were drawn to the beer garden business. Beer gardens were even less capital intensive than grocery stores. Entrepreneurs needed only to lease land, often in lovely settings, and purchase outdoor tables, chairs, and kegs of beer. The open air beer gardens were terrific places to spend hot summer nights, and they attracted an extensive following.

Beer gardens slowly began the transformation to the food service business by offering a few German specialty dishes to beer drinkers. Patrons could order tasty dishes such as bratwurst and sauerbraten.

The beer garden business thrived in summer, leaving beer garden operators unhappy in the winter. They ultimately decided on a new course of action to overcome the seasonal limitations. The operators built and occupied enclosed beer halls. Some of these halls were huge. The new beer halls also served German specialty food and gradually increased menu choices.

Despite a modest price structure, most German restaurants fit well in the full-service, tablecloth category. They tend to offer a diverse menu, white linen table cloths, and good service. However, some restaurants, particularly Luchow's in New York City, became expensive first-class establishments, catering to wealthy people and tourists. German food also adapted to the popularly priced food service format at Zum Zum, a chain featuring reasonably priced meals built around German sausages. Patrons sat on stools in front of a counter and were served by uniformed counter personnel, many speaking with German accents. Although its appeal to the general public declined during World Wars I and II, the German restaurant prospers in America to this day and contributes to our cosmopolitan taste buds.

g. Japanese Restaurants

Japanese restaurants are reported to have been doing business in America since the 1930s. The first American sushi bar is reputed to be the Saito, which made its debut in New York City in 1957. Benihana of Tokyo, a strictly American creation with Japanese waiters, chefs, and

atmosphere, started serving customers in 1964.

Contemporary Japanese restaurants in America present many faces. Therefore, a use clause drafter should not limit the description of the permitted activity to a Japanese restaurant. The restaurants range from the most expensive and elegant full-service, tablecloth establishments to modestly priced, informal establishments. They differ from each other in price structure, table top arrangements, and ambiance. Some excellent full-service and full-menu Japanese restaurants are inexpensive, while some informal Japanese restaurants, particularly sushi bars, are expensive. Some Japanese restaurant patrons are seated at European tables, while others sit on low cushions in front of low Japanese tables after removing their shoes. Still others sit on stools in front of a counter. Menu choices and service methods differ extensively. Several Japanese restaurants offer a wide variety of menu items and full-course meals. In some Japanese restaurants, waiters or waitresses dressed in ethnic costumes take orders and serve the food graciously. Other Japanese restaurants, such as sushi bars and noodle shops, truncate their menus severely and serve quite informally from counters or bars.

h. Mexican Restaurants

Mexican restaurants are also difficult to classify into one of the five major food service categories.⁹¹ Most Mexican restaurants in the United States owe as much, if not more, to the Southwest American Tex-Mex culture as they do to Mexican culture. Tex-Mex based Mexican restaurants have been transplanted all over this country and have attracted a broad market. Although many of these restaurants now serve patrons in a luxuriant setting, they are the grandchildren of early taco vending operations in Texas, Arizona, New Mexico, and California. Also increasing in numbers are the more authentic Mexican restaurants. They seek to replicate authentic regional Mexican cooking.

Of course, origins and fidelity to the ethnic tradition are not the only

⁹¹ The five major food service categories, as discussed in this Article, are: (1) full-service, tablecloth restaurants, (2) popularly priced food service establishments, (3) fast food establishments, (4) ethnic food service establishments, and (5) snack bars.

factors that distinguish Mexican restaurants from each other. They differ in many ways, including ambiance, menu, service format, and price structure. Lease negotiators should be aware of these differences and, when relevant, reflect these differences in their use and exclusive clause discussions.

i. Greek Restaurants

An even larger percentage of Greek immigrants were attracted to the food service business than Chinese, Italian, Jewish, German, Japanese, or Mexican immigrants. Although Greek immigrants operated, and continue to operate, Greek restaurants, they did not limit themselves to Greek restaurants. A Greek-owned restaurant is not the same thing as a Greek restaurant. Greek immigrants founded all types of food service establishments including restaurants, luncheonettes, coffee houses, pizzerias, and diners. Greek-owned restaurants feature food traditions of other ethnic groups including Italian restaurants. Some Greek immigrants own diners. There is usually a Greek dish listed somewhere on a Greek-owned diner's menu.

Price and food tradition are two respects in which most Greek restaurants are similar. Their food style is derived from traditional Greek dishes, and they tend to be modestly priced. Differences among them include menu, service format, seating arrangements, and table settings. These differences make it impossible to aggregate Greek restaurants into a single food service category. A use clause permitting the tenant to conduct a Greek restaurant business will exclude an Italian restaurant, but it will not stop the tenant from shifting operations from a full-service, tablecloth format to a fast food format.

C. Snack Bars

Snack bars share a few common characteristics and, therefore, are easily distinguished from most other food service categories.⁹² A snack

⁹² For a court's description of a snack bar, see *Carousel Snack Bars, Inc. v. Crown Construction Co.*, 439 F.2d 280 (3d Cir. 1971).

bar operation serves cooked food for off-premises consumption. It also sells uncooked food that is prepared or packaged on the premises for off-premises consumption. Snack bars have no waiters and no tablecloths. Their menus are very limited. They sell ready-to-eat food that patrons can hold in their hands and eat while they stand. However, snack bars do not usually provide a place for patrons to stand.

Because of their peculiar characteristics, snack bars might inadvertently violate some of the typical restrictive covenants contained in supermarket and other food sales leases. Supermarkets seek to prohibit all other tenants from selling food for off-premises consumption. That is precisely what snack bars sell. On the other hand, snack bars may be allowed under exclusive clauses that were intended to bar other food service operations. A restriction against the sale of food for on-premises consumption usually does not apply to a snack bar because people usually do not eat the food at the snack bar. Snack bar patrons usually eat elsewhere. Enclosed mall shopping center snack bar patrons eat as they traipse around the mall.

Restrictions aimed specifically against popularly priced food service operations or fast food operations might not apply to snack bars. For example, a luncheonette or coffee shop lease negotiator usually wants the right to prohibit snack bars and other luncheonettes or coffee shops. After all, snack bar menu items compete with luncheonette and coffee shop menu items. However, restrictions against luncheonettes and coffee shops may not apply to a snack bar; luncheonettes and coffee shops provide seats for their customers, while snack bars do not.

Distinguishing snack bars from fast food operations is not always easy. Fast food operations and snack bars are similar in many ways. They are similar in that customers stand in line and are served from a counter. Snack bars and fast food establishments are also alike in that neither serves food on washable dishes nor provides washable cutlery or tumblers. However, the two differ principally in that snack bar menus concentrate on snacks rather than on meals. Another difference is that a traditional fast food operation is in a free-standing building with a drive-up window, while snack bars are always in-line stores.

Surprisingly, food service use and exclusive clause drafters also need to distinguish snack bars from food supermarkets. Although food

supermarkets and snack bars are as different from each other as elephants and monkeys, their similarities can cause trouble. Potential trouble stems from supermarket exclusive clauses that bar the landlord from leasing other space for the sale of food for off-premises consumption. Snack bars and food supermarkets are similar in that both sell food for off-premises consumption.

The time to avoid potential conflicts between a supermarket exclusive clause and a snack bar use clause is when the supermarket lease is being negotiated. Landlords' attorneys should be conscious of this problem when they negotiate supermarket leases. They should provide for an exemption to the supermarket exclusive clause that will permit the landlord to execute a snack bar lease without fear of breaching the supermarket's lease. The exemption should focus on the differences between food supermarkets and snack bars.

Of course, snack bars do not do what supermarkets do, therefore, snack bar covenants are no threat to supermarkets. Snack bars typically use their premises principally for the sale of cooked food and uncooked food that is prepared or packaged on the premises. The snack bar's emphasis on cooked food is the principal distinction. Although supermarkets sell some cooked food for off-premises consumption, it is only a small portion of the store's merchandise. Moreover, supermarkets tend not to be bothered by small store covenants that specialize in selling cooked food in small quantities.

Although it is a bit harder to convince supermarket executives that snack bar operators should also have the right to sell some uncooked food for off-premises consumption, supermarket executives tend to be accommodating on this issue as well. The reason for this affability is that snack bar sales of uncooked food products are not likely to impact a supermarket's sales volume. For example, both snack bars and supermarkets sell ice cream. However, the ice cream sold by snack bars is scooped from large tubs. Although snack bar ice cream is not necessarily manufactured by the snack bar operator, snack bar employees change its shape and utility by drawing small quantities from large tubs and placing them in cones or small cups appropriate for single servings. Supermarkets do not sell ice cream in this manner. They sell ice cream in prepackaged quantities larger than the single serving cones and cups sold by snack bars. As a result, the two food service categories are not

in direct competition.

VI. RESTAURANT AND FOOD SERVICE LEASE EXCLUSIVE CLAUSES

Food service exclusive clauses resemble use clauses in some respects. Both clauses regulate food service business operations and distinguish one kind of business activity from another. To perform this function, both clauses use the same basic building blocks. They must define types of permitted and forbidden business activities and the clauses must carefully distinguish the activities from each other. The clauses differ in that the use clause governs the tenant's business operations, while the exclusive clause limits the degree to which the landlord can permit other tenants to conduct business.

Use and exclusive clauses play a significant role in promoting diversity. Food service diversity is important for almost any kind of building project. When a project is large enough to host more than one food service operation, the project is better served by leasing space to different kinds of food establishments.

Food service diversity is particularly important for shopping center projects. Shopping centers depend on diversity among their food service establishments as well as diversity among their retail establishments. Shopping center shopping is interesting to potential customers so long as they encounter different types of shops and food service establishments on their journey. Customers get bored when they visit store after store with the same merchandise, the same ambiance, and the same sales techniques. Conscious of this issue, sophisticated landlords bargain for use and exclusive clauses to promote diversity.

Diversity is also important for food service tenants. Although a shopping center may be large enough to support more than one food service operation, it may not be able to support two food operations of the same category. For this reason, some food service tenants negotiate adamantly for favorable exclusive clauses. Tenants are just as interested as landlords in avoiding duplication. They want to know that they will not be confronted with direct competition from a cotenant with the same

business format. Tenants want an exclusive clause that bars the landlord from leasing space to direct competitors or from leasing too much space to competitors of any kind.

Food service exclusive clauses are especially useful for large projects. If a project is large enough to accommodate two or more food service operations, the tenant's exclusive clause should allow the landlord some flexibility. The clause should bar direct competition by a rival with the same food service format, but should leave room for competition by a cotenant with a different food service format. A landlord who wants to make two, three, or even ten food service deals cannot agree to an overly broad exclusive clause in an early food service lease. Overly broad exclusive clauses in early leases plague landlords for many years. Conversely, a landlord's negotiator should be careful to avoid conflicts between an exclusive clause proposed by a new prospective tenant and use clauses in previously executed leases.

To avoid losing future leasing opportunities, a landlord should negotiate to limit the scope of a tenant's exclusive clause. What might seem like a deal breaking impasse in an exclusive clause negotiation can often be settled by limiting the tenant's exclusivity to one category of food service operation and allowing the landlord to lease space for a limited number of other kinds of food service operations. To make a food service exclusive clause work well for a shopping center landlord, the landlord should request exemptions for food service formats that promote the shopping center's diversity. If the market is large enough, competition for the dollar from a food service operator with a different format should not frighten the tenant.

Obviously, landlords should not lease space for a use already prohibited by an exclusive clause in a previously executed lease. However, a surprisingly large number of landlords do. Although most landlords quickly understand the principle once problems arise, too many landlords are neglectful when they negotiate exclusive clauses. They are so distracted by the prospect of signing a new tenant that they neglect to check their previously executed leases for potentially conflicting exclusive clauses. Few landlords take the time to catalog exclusive clauses or create exclusive and use clause data bases.

A. Food Court Exclusives

Drafting an exclusive clause for a food court kiosk tenant's lease is the converse of drafting the other food court kiosk tenants' use clauses. Obviously, the tenant's principal goal for its exclusive clause is to prohibit cotenants from selling or serving the same, primary menu specialties. The landlord's goal for the use clause is to bar the tenant from serving the same kind of food another food court tenant is serving.

From the regional shopping center landlord's point of view, stopping food court tenants from competing directly with each other usually is more important than regulating competition in other parts of the shopping center. Excessive competition among food court tenants undermines the landlord's effort to promote an attractive and viable food court. However, even though competition among food service tenants of separate stores in regional, enclosed malls can be destructive to the food operations involved, it usually will not subvert the shopping center itself. Regional shopping centers are too large to be severely damaged by such a situation.

A food court's charm depends on the tenants' diversity in offerings, but most aspects of food court kiosk operations are homogeneous. Almost all food court kiosks have very limited menus and serve patrons in the same way. The two most important characteristics that distinguish one food court kiosk from another are the menu emphasis and the style of the menu items. If a shopping center owner were to allow all food court kiosk tenants to offer the same menu items, the food court would lose all of its charm and many of its customers. The food court would become nothing more than a big, interior, fast food restaurant. Thus, the landlord should look to the use clause for help in avoiding a bland uniformity among the food court kiosks.

Heterogeneity among food court kiosks is also crucial for the kiosk tenants. The tenants serve a very limited market and pay dearly for that privilege. Although some office and industrial workers show up at lunch time in a nearby shopping center's food court, food court kiosk tenants agree to pay the heavy rental rates charged by regional shopping center owners because they want to profit by feeding shoppers. They view customers of a regional shopping center as a captive market.

A kiosk food tenant with something special to offer expects to capture a reasonable segment of the market. However, if two or more food court kiosk tenants offer the same menu items and prepare them in the same style, both will struggle to attract the same market segment, and at least one will perish in the struggle. A food court tenant's potential reward is too small and its rent burden too great to assume the risk of direct competition. Like every other tenant concerned about excessive competition in a limited marketplace, food court kiosk tenants look to the exclusive clause for protection.

Food court exclusive clauses exist to exclude potential, direct competition. This is accomplished in two steps. First, the exclusive clause defines the competitive activity the tenant wants to prohibit. Second, the clause states that the landlord cannot use any space in the food court for that activity or allow any other space in the food court to be used by another person for that activity. Defining the prohibited competitive activity is the tough part. For help, drafters can turn to food service format categories.

With food court kiosk leases, distinctions between ethnic food subcategories play a great role in defining prohibited activities. Food court kiosks cannot be distinguished by their service formats. Kiosk personnel do not bring food to tables or provide tablecloths or table settings. However, kiosks can be distinguished by their ethnic style. For example, neither a Mexican restaurant tenant nor an enclosed mall shopping center landlord wants five Mexican food kiosks in the same food court. The Mexican food service tenant's opportunity to capture its target market is increased if its neighbors serve Italian, Greek, Chinese, and Japanese food.

Food court exclusive clauses should not be based on ethnic food style alone because there are many other relevant distinctions, and product emphasis is the foremost among them.⁹³ Drafters of food court exclusive clauses draw on these characteristics to define the prohibited competitive activities.

⁹³ Accordingly, some food court operations are distinguishable from others by their focus on such menu items as fish and chips, hamburgers, chicken, roast beef, coffee, and frozen desserts.

When drafting use clauses for prospective tenants, drafters should make sure the distinguishing characteristics drawn upon for one lease do not overlap with those in existing exclusive clauses. For example, consider a landlord who grants the exclusive right to sell seafood to a fish and chips food service operator and then grants the exclusive right to sell Japanese food to a Japanese food service operator. If the Japanese food tenant sells Japanese style fish, the fish and chips tenant can complain that the landlord has failed to comply with the exclusive clause of the first lease.

A drafter of a food court kiosk lease should also be aware that ethnic food styles can overlap. An exclusive clause is more effective when it addresses these potential overlaps. For example, a food court's Mexican food tenant should not be forced to contend with a kosher food service tenant's sudden inspiration to perk up the menu with kosher fajitas.

Most exclusive clauses work best if they prohibit tenants from using their space principally for the sale of a competing product, rather than prohibiting all sales of the competing product. This allows a buffer for the landlord and cotenants. Although the principle works well for retail stores and food service tenants in partitioned space fronting on an enclosed walkway, it does not work well in a food court. To this end, some food court tenant exclusive clauses should prohibit specific competitive products and the use of other kiosks principally for the same type of food style or menu item specialization. Thus, an Italian food court kiosk that seeks to bar the landlord from leasing any other food court space for use as an Italian specialties operation should also ask for the exclusive right to sell pizza in the food court.

Do not push product restrictions too far. Although french fries are a very important profit center for a hamburger specialist, they are just as important for many other food court tenants. Kiosk operators should be willing to compete in the sale of french fries.

Whether a food court exclusive clause should apply to the food court only or to the entire shopping center depends on the size of the shopping center. Extending a food court tenant's restriction to an entire regional shopping center is usually inappropriate. A large regional shopping center has room for many restaurants and food service operations. On the other hand, a small or medium shopping center may not generate

enough traffic to support individual restaurants and other food service operations in addition to a food court.

B. Exclusives for Individual Restaurants and Other Food Service Tenants of Partitioned Mall or Strip Space

Unlike food court kiosk space, partitioned space along a shopping center's walkways appeals to potential restaurant and food service tenants because of the potential, expanded market. There, the tenant has the chance of serving the shopping center's customers and employees as well as a better chance of serving the inhabitants of the neighborhood in which the shopping center is located.

If doing business with a center's customers and employees is the most important reason for signing a lease, the food service entrepreneur should bargain for a more stringent restriction on competition from cotenants. If doing business with a shopping center's customers and employees is less important than gaining access to people who live and work in the shopping center's neighborhood, the prospective food service tenant's negotiators can relax a bit when the lease negotiation turns to the exclusive clause. Because the market is much larger, the tenant is better positioned to withstand competition.

In this respect, prospective food service tenants of a regional shopping center are subject to different pressures from pressures to which prospective tenants of community and neighborhood shopping centers are subjected. Regional shopping centers have more stores than community and neighborhood shopping centers and attract many more customers. Consequently, a regional shopping center may have more than enough customers and store employees to constitute an attractive market for a group of food service operators. Because food service establishments fronting a regional shopping center's interior walkways are not usually visible from the outside, attracting anyone other than a shopper or store employee may be difficult. For most regional shopping center food service tenants, the shopping center's customers and employees are the primary market. However, that axiom does not apply to every food service tenant without exterior visibility. Some full-service, tablecloth restaurants lodged in regional shopping centers serve such good meals and provide such an attractive atmosphere that patrons are willing to

travel long distances to eat at the shopping center without having any shopping plans.

Community and neighborhood shopping center food service establishments are quite visible. Consequently, they attract patronage from beyond the shopping center's boundaries. In fact, many community and neighborhood shopping center food service establishments have such high visibility that they are noticed by highway traffic. Even a food service establishment that cannot be seen from the highway can attract highway business with effective signage. A food service establishment can also attract patrons from the neighboring business and residential communities by serving good food, providing good service, and advertising in local publications.

On the other hand, while serving a community or neighborhood shopping center's customers and employees makes the location more interesting than a stand-alone location, a shopping center's customers and employees comprise a relatively small market. A community or neighborhood shopping center food service establishment tenant might be willing to pay a few dollars more in rent for the opportunity to serve the shopping center community, but it is unlikely that a small shopping center food service tenant can survive on the patronage of shoppers and store employees alone. A food service operator who targets neighboring business and residential communities is far less concerned about competition within the shopping center than one who is dependent on the patronage of shopping center's customers and employees. Accordingly, in the case of a community or neighborhood shopping center food service establishment, an exclusive clause is not often a crucial issue for the landlord, but a bargaining tool to induce the tenant to pay a little more rent for the privilege of serving the shopping center's customers and store employees.

Early shopping center food tenants bargained diligently for exclusive clauses that contained extensive restrictions against competition from cotenants. Usually the tenants adapted a popular supermarket exclusive clause to their own exclusive clauses.

Typical supermarket exclusive clauses of the 1950s, 1960s, and 1970s forbade landlords from leasing other space in the shopping center to be used principally for the sale of food or nonalcoholic beverages for off-

premises consumption. This led alert landlords of the time to bargain for food service use clauses that would not conflict with the supermarket exclusive clause. The easiest, but hardly the best, way to avoid this conflict was to permit the food service premises to be used principally for the on-premises consumption of food or nonalcoholic beverages. Landlords who contracted this way believed they acted in accordance with their supermarket exclusive clause because on-premises is the opposite of off-premises.

If a food service tenant's use was limited to selling food principally for on-premises consumption, food service tenants naturally began proposing exclusive clauses based on the same principle. Thus, many 1950s, 1960s, and 1970s food service tenants bargained for exclusive clauses that barred any other tenant from selling food or nonalcoholic beverages unless the other tenant conducted a business listed as an exempt operation. Although food service tenants frequently convinced landlords to accede to the restrictions, the restrictions were not exceptionally burdensome for landlords. The exclusive clause provided that important cotenants who routinely served food on the premises were exempt from the restrictions.

Several types of operations were routinely exempted from food service exclusive clauses. Conventional department stores were exempt because they frequently operated in-house, sit down, tablecloth restaurants. Discount department stores were exempt because they routinely featured snack bars and coffee shops. Supermarkets were exempt because they had snack bars or vending machines offering sandwiches and coffee. Variety stores were exempt because they had traditional lunch counter operations. Some wet drugstores still offered their traditional soda fountain counter service and were, therefore, exempt.

Business conditions have changed since the 1970s, but the changes have not affected the need for restaurant and other food service tenants of individually partitioned mall and strip center space to limit competition.

Limiting the portion of a shopping center's leaseable space that can be used principally for the sale of food or nonalcoholic beverages for on-premises consumption does not offer enough protection for some shopping center food service operators. For example, an ice-cream shop tenant depends on the patronage of ice-cream craving shoppers. Even

with a restriction against the sale of food and nonalcoholic beverages for on-premises consumption, an ice-cream store tenant is vulnerable to direct competition from a cotenant. One possible competitor is a shopping center candy store. A restriction against selling food for on-premises consumption probably will not stop a candy store from offering ice cream as long as customers are not allowed to eat the ice cream in the candy store.

Each food service tenant leasing partitioned shopping center space facing a walkway should compose an exclusive clause that addresses its specific needs. Using the scooped ice-cream store as an example, the store tenant should negotiate for an exclusive clause that, subject to a list of exemptions, prohibits other tenants from selling scooped frozen desserts and frozen desserts manufactured on the premises. Of course, a scooped ice-cream store exclusive clause needs exceptions to make it attractive to the landlord. If the market is big enough to support an on-premises, frozen dessert stand as well as a scooped ice cream store, the exclusive clause should exempt frozen desserts made on the premises from its restrictions.

To avoid conflicts with frozen desserts sold by supermarkets and drugstores, a food service exclusive clause should distinguish scooped frozen desserts sold by ice-cream stores from prepackaged frozen desserts sold by supermarkets and drugstores. The clause should also provide exemptions for general merchandise retailers that have food service departments. General merchandise retailers, such as department stores and wet drug stores, also run profitable scooped frozen dessert operations. They will not and should not yield the right to sell scooped frozen desserts. Because many food service establishments that principally serve meals also serve ice cream, a scooped ice-cream store exclusive clause should also exempt these food service establishments.

Food service tenants need to anticipate destructive competition from unexpected sources and reflect their concerns about such competition in their exclusive clauses. For example, a luncheonette may complain that a neighboring candy store operator in a shopping center serves coffee. To make matters worse, a shoe store in the center may serve free coffee. Shoppers are only willing to drink a limited amount of coffee on a given day. If every tenant decides to sell coffee or give it away, a shopping center luncheonette merchant might lose a market segment it expected to

capture completely.

An enclosed mall food service tenant has only a limited opportunity to do business with external potential customers. Therefore, the tenant should not discount the opportunity to serve the shopping center's patrons and employees. Negotiating to limit or eliminate competition is a crucial element of such a tenant's survival strategy and its ability to realize the benefit of the bargain. Of course, demands by enclosed mall food service tenants for exclusives face greater opposition than similar demands made by community or neighborhood shopping center food service tenants. Many regional enclosed mall landlords feel that their bargaining power is great enough to completely deny the tenant's demands. Moreover, without the restraints of an exclusive clause, many retail, theater, and banking tenants of the shopping center might feed hungry shoppers and store employees in one way or another and dissipate the benefits of a food service tenant's lease.

C. Tenants That Lease Shopping Center Pads for Freestanding Buildings

Restaurants lodged in free-standing buildings near the main road abutting a shopping center are positioned to serve the neighborhood and highway traffic. They do not depend on the shopping center's customers or employees for survival. In this situation, a restriction against competition is not a survival issue. However, it might be a financial issue. A free-standing restaurant tenant may decide that the opportunity to serve the shopping center's customers and employees makes the shopping center location worth more rent than a comparable location away from a shopping center. A tenant that consciously chooses shopping center locations for this reason is also well advised to bargain for restrictions against excessive competition from its cotenants.

D. Fast Food Operation Exclusives

Fast food establishments evolved from drive-in restaurants. The earliest fast food establishments were lodged in free-standing buildings with drive-up windows. The buildings were perched on parking areas. No other tenant shared use of the parking areas, and the common areas did not provide access to any other building. To this day, a free-

standing, fast food building with drive-up windows, perched on an independent parking area, is called a traditional fast food restaurant.

When negotiating leases for traditional locations, fast food lease negotiators had no need to exclude potential competitors. The mere execution of the lease excluded all competition. With relatively little experience in negotiating exclusive clauses for food service establishments in the early 1960s, fast food lease negotiators embarked on an ambitious program to lease parcels carved out from shopping center parking lots. Despite their lack of specific experience, they knew exclusive clauses would be needed in the new environment. The new environment would be shared with many other kinds of tenants, some of whom would be in the food service business.

The fast food negotiators knew they needed an exclusive clause because they had been site locators before they went to work for fast food organizations. Quite a few had previously worked for oil companies, which routinely demanded exclusives from their landlords. It was only natural for the negotiators to propose that all other food service businesses be excluded from the entire shopping center. After all, the oil companies had demanded that the sale of all petroleum products be completely prohibited from the balance of the landlord's property.

Many landlords of community and neighborhood shopping centers of the early 1960s were eager to execute leases for fast food parcels. Early community shopping center developers focused on the potential income stream from department store and supermarket anchors with a strip of small stores between them. The popular, early configuration planned by shopping center developers was a long strip of stores parallel to, but set back from, the main highway. An only slightly less popular method was to build an "L" shaped building partly parallel and partly perpendicular to, but set back from, the main highway. Leasing space near the highway for any reason or amount was unexpected. A generous stream of income from vacant land near the highway with no investment and no responsibility was almost too good to be true. Developers could take the profit without effort, or they could bargain a while to tone down the tenant's exclusive clause. Quite a few developers chose to take the money and run.

Alert shopping center owners controlled their euphoria and bargained

for exemptions from the proposed exclusive clause. They were able to negotiate exemptions for department stores and general merchandise retailers, supermarkets, and drugstores. These retail tenants did not accept use restrictions without question. They routinely insisted on preserving the right to provide food service from their stores.

Few early shopping center landlords could conceive of the possibility that more than one food service tenant could function profitably from a single shopping center. Landlords were surprised when leasing space to more than one fast food operation in the same shopping center became commonplace. Fast food operators had grown to accept fast food cotenancies as long as the cotenant was not a direct competitor for the same target market. Landlords could convince fast food tenants to coexist because the landlords would demonstrate that the tenants were different from each other in a material respect. Distinguishing a fast food tenant's operations from a competing cotenant's operations became the strategy of fast food lease exclusive clause drafters.

Distinctions between fast food operations can be based on menu emphasis. Most fast food operators concentrate their menu on items such as hamburgers, roast beef sandwiches, frankfurters, chicken, pizza, or fish. A fast food hamburger specialist will bargain tenaciously to exclude another fast food hamburger specialist, but is less inclined to object if the landlord insists on the right to lease space to a chicken specialist.

VII. DISTINGUISHING FOOD SERVICE OPERATIONS BY LISTING THEIR CHARACTERISTICS

The major food service format categories described in this Article are useful tools for food service lease negotiators. Usually, the distinctions can be understood easily by the real estate and food service industry.

However, the lines that separate food service categories are not always crystal clear. It is easy to classify McDonald's and Burger King as fast food operations. They serve precooked food from a line, have very limited menus, and do not use washable dishes or metal utensils. On the other hand, Wendy's does not fit as comfortably in either the fast food

or popularly priced food category. Although the aroma of fast food prevails in a Wendy's, precooking is one of fast food's basic elements, but Wendy's does not precook its hamburgers.

However, if precooking is a basic element of fast food, why are cafeterias not considered fast food establishments? Although they precook their food, cafeterias are classified as popularly priced food service establishments because they have the predominant characteristics of popularly priced food establishments. Cafeterias serve food on washable plates, serve beverages in washable tumblers and cups, and provide metal utensils.

As illustrated by the above examples, a food service category reference may not be enough to describe accurately the activities that the parties intend to either prohibit in the exclusive clause or permit in the use clause. The permitted or prohibited uses can be defined by describing the specific characteristics a landlord or tenant seeks to prohibit or permit. Thus, a landlord who wants to prohibit a food service operation that precooks its food should bargain for a use clause that prohibits precooking food instead of prohibiting fast food operations in general.

Food service format elements can also be combined to pinpoint a group of permitted or prohibited food service characteristics. In distinguishing food service formats from one another, the following elements are the most significant: (1) seating arrangements, (2) table service, (3) table settings, (4) menu limitations, (5) menu emphasis and food style, (6) long day menus, (7) cooking and heating policy, (8) takeout service, (9) liquor service, and (10) drive up windows.

A. Seating Patrons

Whether a prospective food service tenant provides seating for its patrons is important. A landlord whose main concern is to exclude a stand-up snack bar might be content with simply requiring the tenant to provide seating for its patrons. Conversely, a landlord who will be satisfied with nothing but a stand-up snack bar should try to prohibit seating. The type of seating provided is also of some concern to the landlord. Most landlords are not satisfied with the mere knowledge that a patron will be able to eat his or her food sitting down. Many landlords

want to know how and where the patrons will be seated. Some landlords want to know whether the seats will be chairs, stools, or benches. Some landlords may even demand that patrons be seated at tables and may prohibit the service of patrons seated at stools in front of a counter.

B. Table Service

The question whether the tenant will provide table service for its patrons is another significant characteristic of food service use and exclusive clauses. Full-service restaurants and casual restaurants always provide table service. Usually diners, luncheonettes, and coffee shops do, too. However, fast food operations do not provide for this service, nor do most cafeterias. When a cafeteria does provide table service, the patrons first choose their food from a line along a tray rail. A waiter then carries the tray to the table and helps to seat the patron.

Lease drafters who want to permit a full-service restaurant business can encourage the service by providing that the tenant's activities will not be considered a full-service restaurant operation unless the tenant provides table service. Conversely, a lease drafter who wants to bar a full-service restaurant operation can better ensure compliance with his other wishes by prohibiting the tenant from providing table service.

C. Table Settings

Food service establishments set their tables in many different ways. These differences can serve as additional distinguishing characteristics for use and exclusive clause drafters. Patrons remember table settings and are influenced by them. Consciously or unconsciously, patrons consider the table's look and feel when they decide where to eat. For example, customers desiring a meal in a formal setting will make reservations at a full-service restaurant complete with all the usual amenities.

Almost all full-service restaurants cover tables with linen tablecloths and provide napkins, candles, and flowers. The china and cutlery are likely to be at least as good as those used by patrons at home. The restaurants also usually provide printed menus for their patrons.

A waiter from Brooklyn with a convincing French, Italian, or Greek accent might recite a long list of the evening's specials, as well as explain the menu choices. Of course, the relationship between full-service restaurants and printed menus is not based on a transcendental principle. Some terrific full-service restaurants do not use printed menus. In these circumstances, patrons select food items from posters or bulletin boards or the serving staff recites the entire list of menu items. Nevertheless, there are few full-service restaurants without printed menus.

A landlord negotiator who wants to be sure that a tenant's use will be limited to a full-service restaurant can require that the tenant set its tables with linen tablecloths and napkins, provide fine china serving plates and fancy cutlery, and furnish printed menus. The converse is also true. Prohibiting these items will help to ensure that a full-service restaurant is excluded from the premises.

D. Menu Limitations

The limited menus of luncheonettes and coffee shops distinguish them from restaurants and diners. Whereas sandwiches constitute a large proportion of luncheonette and coffee shop main dishes, such orders in restaurants are unusual. Similarly, diner menus are typically expansive.

E. Menu Emphasis and Food Style

In addition to differentiating food service establishments by seating arrangements, table service, table settings, and menu limitations, lease drafters may distinguish establishments by food product emphasis and food style. Drafters should focus on menu emphasis and food style as distinguishing characteristics when (1) an office building landlord anticipates that a project will need more than one full-service restaurant; (2) a regional shopping center landlord or a large community shopping center landlord negotiates with a fast food service establishment and decides the center can support at least one more fast food establishment; or (3) a regional shopping center landlord is planning a food court.

A landlord who can attract more than one full-service restaurant to a project is at a greater advantage if the restaurants are easily distinguish-

able by significant positive characteristics. Two restaurants with the same form and substance will speak to the same demographic audience and target the same geographic market. Each restaurant's chance of success is diminished by its proximity to the other.

Patrons' dining preferences vary from outing to outing. Many persistent, full-service restaurant devotees enjoy shifting back and forth among food styles. Combining two similar full-service restaurants in the same project diminishes this market. A project's full-service restaurants have a greater likelihood of success if their food styles offer patrons variety.

The most important difference among full-service restaurants is ethnic style. Ethnic restaurants differ enough from each other to coexist in almost any project that is large enough to support more than one full-service restaurant. The possibilities are virtually endless.⁹⁴

Menu emphasis and food style distinctions among full-service restaurants are not all based on ethnic differences. Some full-service restaurants are distinguished from others by their emphasis on a single menu item or a group of menu items. For example, steak houses have different audiences from fish, vegetarian, seafood, kosher, and halal restaurants. A patron is not likely to drive to a steak house if he has a fish dinner in mind. Additionally, a customer probably will not try to order steak in a vegetarian restaurant or pork in a kosher or halal restaurant.

Landlords of both regional and community shopping centers large enough to support more than one fast food operation need a good way to distinguish fast food business operations. The way to distinguish between covenants is to concentrate on each tenant's dominant menu theme. Ethnic style is only one way these menu themes differ from each other.

Limited menus are common to all fast food chains. Fast food chains are forced to make difficult choices among possible menu offerings. The limited menu policy persuades them to focus on one, or a few, dominant

⁹⁴ Potential tenants include Chinese, Italian, Greek, French, Spanish, Thai, Lebanese, Turkish, Indian, Korean, Vietnamese, Brazilian, and Mexican restaurants.

menu items. However, they will prepare and serve other food. Some fast food chains focus on a single type of meat or fish. Landlord negotiators do not typically prohibit a fast food tenant's dominant menu item because fast food chains cannot afford to redo menu choices just to sign one lease. If a chain serves hamburgers in one thousand existing units, it will obtain the right to serve hamburgers in the next unit, or the chain will not execute the lease.

F. Cooking and Heating Policy

Fast food tenants may not want to rely on an exclusive clause that generally bars another fast food establishment from the project. The definition of fast food is not necessarily consistent. A lot of food is served quickly, though not all quickly served food is fast food. Existing tenants may be interested in excluding a competitor by defining the competitor's individual attributes.

Precooking is one attribute shared by most fast food establishments. Although a covenant against food service establishments that precook their food will not, by itself, necessarily exclude all potential direct competitors, it will exclude most of them. Moreover, precooking is only one fast food characteristic. The exclusive clause can be drafted to bar any food service operation with any number of listed attributes. Conversely, excluding all food service businesses that do not precook their principal menu items would effectively bar most food service cotenants other than fast food operations and cafeterias.

A landlord has a much better chance of convincing a fast food operator to agree to restrict future sales of items not already on its menu than of restricting an existing menu item. Even if a fast food chain insists on the right to serve new products in the future, it may agree that the new products will not become dominant menu items. For example, a fast food tenant should be willing to agree that hamburgers will be its dominant menu item as long as it has the right to sell other menu items. The formula would permit a hamburger oriented tenant to sell roast beef and chicken from the premises as long as hamburger sales dominate. The landlord's principal goal is to get the tenant to agree that one item will be emphasized and others will be de-emphasized.

Distinguishing food service operations by their menu emphasis and food style has so many variations that it is useless to try to discuss them all. What is important is the principle. If a community shopping center landlord does not want a roast beef fast food restaurant tenant to change its colors and compete directly with the center's hamburger fast food restaurant, the landlord needs to pay special attention to the use clause.

The same is true of landlords concerned about competition between popularly priced food establishments. Merely leasing one space to a Jewish delicatessen operator and another space to a pizza parlor operator provides little protection against a drastic use change. The delicatessen operator might decide to change the menu to hamburgers if the market for typical, Jewish delicatessen food items recedes. If the pizza establishment is losing money, but might do well with hamburgers, the establishment's owner may decide to trade his ovens for a hamburger grill. Alternatively, both tenants might assign their leasehold estates or sublet their premises to hamburger- oriented luncheonette operators. The result would be a shopping center that has a little less pizzazz and cash flow and that draws from the market for one food item instead of two. Limiting the potential customer base might not be such a terrible thing, but it could easily undermine a center that is already under pressure.

Menu emphasis and food style are clearly the most important, distinguishing characteristics in food court leases. Food court tenants are quite similar in every other respect. Accordingly, a food court landlord may insist that a hamburger concessionaire refrain from selling roast beef, chicken, or fish. Similarly, the landlord may also insist that a chicken concessionaire refrain from selling hamburgers, roast beef, or fish.

Some generic food service concessionaires may accept the restrictions. However, national brand chains cannot be as accommodating. A national brand company spends a fortune on advertising and has an enormous stake in uniformity. Although some units of national brand companies may carry different menu items than other units in the same company, the flexibility of the negotiator for a national brand is quite limited in this respect.

G. Long Day Menus

Full-service restaurant patrons do not usually expect to order breakfast at 5:00 p.m. That is atypical even in a hotel dining room. Nevertheless, some people crave orange juice, oatmeal, and scrambled eggs long after noon. These customers can often find what they want at a diner or some fast food restaurants that function like diners.

Afternoon breakfasts are not the only unusual meals served at diners. Lunch and dinner items are also available at odd hours at diners and other food service establishments that adopt the long hours principle. Most diners stay open all day and night. Diners are busy long after the last full-service restaurant closes for the evening.

H. Takeout Service

Full-service restaurant, fast food establishment, and snack bar negotiators must be wary of use clauses that effectively prohibit take-out service. An exclusive clause restriction against the sale of food or nonalcoholic beverages for off-premises consumption prohibits take-out service.

Prohibiting take-out service effectively bans snack bars, Chinese restaurants, and even most full-service, tablecloth restaurants. Full-service, tablecloth restaurants usually do not push take-out service, but they willingly help patrons take home leftovers, and they might be willing to fill an occasional request for a take-out meal.

Full-service restaurants usually do not encourage telephone orders or print special take-out menus, but Chinese restaurants usually do both. These practices distinguish Chinese restaurants from full-service restaurants. Prohibiting the practices should effectively exclude a Chinese restaurant from the project.

I. Liquor License

Because taverns served food, alcoholic beverages were associated with food service in America long before the Declaration of Independ-

ence. The taverns served food to entice patrons who would also undoubtedly purchase liquor. Sometimes, the food was free.

Only a minority of contemporary American food service establishments sell alcohol. Those that do sell wine, beer, and liquor do so for many reasons. One reason is that alcohol sales are associated with fine, full-service restaurant dining. Another notable reason is that selling wine, beer, and liquor by the drink can be far more profitable than selling a steak and asparagus dinner. Full-service restaurant patrons want and expect alcohol to be served. Many full service restaurant patrons would be disappointed if they were deprived of a cocktail before dinner, beer or wine during dinner, or an aperitif after dinner.

Full-service restaurants are not alone among food service establishments in offering wine, beer, and liquor service. Alcoholic beverages are also offered by some popularly priced, casual restaurants and food serving, contemporary taverns. Contemporary taverns serve food for the same reason as their colonial predecessors; it is a way to get drinkers in the door. On the other hand, patrons should not count on buying an alcoholic beverage in a luncheonette, coffee shop, or fast food establishment. They usually do not sell or serve alcoholic beverages.

J. Drive up Windows

When fast food restaurants began their campaign to lease shopping center space, some landlords were concerned about restaurant patrons eating in the shopping center parking lot. The concern was often justified. Early fast food restaurants did not provide the ample seating that is commonplace among their 1990s counterparts. With no comfortable place to eat inside the fast food establishment, patrons had three choices. They could drive home with their meals and eat in their own kitchens or dining rooms. They could eat while driving. They could stay in the fast food establishment's parking lot and eat in their cars.

Eating in cars was the natural choice in the early McDonald's days. McDonald's had been a carhop drive-in before the McDonald brothers converted to fast food operations. Remaining in the shopping center parking lot until the meal was consumed made sense. The food was still hot, and the car, with a radio and a measure of privacy, was fairly

comfortable.

On the other hand, some people who ate in cars discarded leftovers and wrappings by dropping them from the car window onto the shopping center parking lot. Consequently, many 1960s fast food restaurant parking lots became so unaesthetic that sophisticated shopping center landlords proceeded cautiously when a prospective fast food tenant came around.

VIII. CONCLUSION

The negotiation of effective use and exclusive clauses in food service leases requires familiarity with the specific expectations of both parties and with the nature of their business interests. The failure to adequately consider the specific characteristics of the business that the landlord and tenant want for the location can result in an inadequate or ambiguous use clause that serves one or both of the parties poorly. Similarly, a failure to appreciate the specific nature and character of potential competitor tenants can result in an exclusive clause that also fails to meet expectations. To avoid the undesirable consequences illustrated by examples throughout this Article, it may be necessary during lease negotiations to consider matters as detailed as the contents of menus, potential seating arrangements, and even the type of amenities that are to be found on the leased premises.