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USE AND EXCLUSIVE CLAUSES IN GASOLINE STATION LEASES

Landlords and tenants negotiate lease clauses from under the encumbrances of tradition and historical precedent.

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Some lease negotiators for tenants bargain hard for seemingly unrealistic or impractical lease advantages. Frustrated landlords attempt to cope with these demands using cogent logic and flawless arguments. If logic prevails and the lease is executed, all is well and good. But if logic doesn't prevail, and the landlord loses patience, the deal may be tabled—perhaps unnecessarily.

Sometimes the inflexible position of the tenant's negotiator stems from a long-standing company tradition or phobia. Rooted in company or industry history, these traditions and phobias might be well-known to company employees and consultants. But, outside landlords and their attorneys usually know little and care less about them. That's a big mistake.

The deal may depend on the landlord's ability to cope with the tenant's inflexible or puzzling stand. Mere awareness that the tenant's requests are unreasonable or incomprehensible doesn't solve the problem. However, the impasse might be solved and the deal saved if the landlord and its negotiators would learn a bit about the company's history and its industry's history. Events that took place a century ago can influence a company's current policies. Learning about them helps a lease negotiator understand these policies.

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The petroleum industry is a good example of this maxim. It's been around for a long time; a lot longer than the shopping center industry. Oil company executives were negotiating leases long before the first shopping center lease negotiator was born. Oil companies survived the Civil War and the two World Wars. They have survived challenges initiated by muckraking journalists, political reformers, religious fanatics, revolutionaries, terrorists, and class action lawyers.

Major oil companies have been large, integrated organizations for much of their history. Although some oil companies have concentrated only on the single process that begins with exploration and ends at the gas station pump, the major oil companies undertook broadly defined missions almost from the outset. Most major oil companies identified their missions as exploration, extraction, transportation, marketing, and distribution. Although real estate leasing negotiators are principally concerned with oil companies' distribution activities, they need to know more.

The filling or service station has been a cornerstone of the petroleum industry's distribution system for most, but not all, of the automobile era. However, the petroleum product distribution story predates the automobile era by half a century.

LOOKING BACK: EARLY OIL INDUSTRY YEARS

Gasoline was not the first petroleum product eagerly sought by the American public. What

> Before the advent of the automobile, gasoline was considered a useless by-product of the petroleum refining process.

spurred 1850s' oil industry entrepreneurs to risk their fortunes and reputations was the public's need for an inexpensive means of illumination. Before the invention of electric lighting, the foremost artificial illumination source was the oil lamp. Whale oil was the best of the oil lamp fuels. Its main drawback was its price: it cost too much for the average consumer. Turpentine was a less expensive alternative, but it was dangerously volatile, and had a nasty tendency to explode. Furthermore, during the Civil War, turpentine supplies in the Northern states were severely constricted because North Carolina, then a major turpentine source but a Confederate state, stopped shipping to Northern states.

When crude petroleum began to flow in quantity from Oil City, Pennsylvania wells in the early 1860s, oil companies concentrated on extracting kerosene from the crude. Kerosene was quickly recognized as a cheap and desirable alternate to the other illuminants in the market. Contemporaries hailed it as a boon to humankind because it lengthened the day for rural Americans. Farmers, at last, were able to stay up late and read by the light of their kerosene lamps.

Before the advent of automobiles, gasoline was thought to be a useless by-product of the petroleum refining process (unlike lubricating oils, asphalt, wax, and other products that were also extracted from petroleum). It wasn't that gasoline was completely useless. Gasoline was used as a solvent and, in gaseous form, it was used to illuminate entire buildings. However, the refining process extracted much more gasoline than anybody wanted. The oil companies had to get rid of the stuff they couldn't sell. They chose to get rid of it by burning it and dumping it in rivers. Oy!

By the turn of the twentieth century, the tables were turned. The demand for kerosene had waned, and gasoline was very much in demand.

What happened to make kerosene so much *less* interesting to American consumers was the invention of the electric light bulb. Electricity provided a steady source of light without the danger posed by a lamp's open flame. Thomas Edison had perfected his electric light vacuum bulb invention in 1879. Seizing the incredible opportunity that lay before him, he was generating electricity only three years later in a demonstration project. But, the demand for kerosene held on for a while. Only 250,000 light bulbs were illuminating American homes in 1885. However, by 1902, the number of electric light bulbs in use by Americans had grown to 18 million.

A parallel explosion occurred in the growth of gasoline use. Gasoline-powered internal combustion engines were first adapted to power American-made automobiles in the early 1890s and their use quickly proliferated. In 1895, America's total automobile inventory was 300. By 1910, the US automobile fleet numbered 459,000, and by 1914, the nation had more than 1.7 million automobiles.

Changing Modes of Gasoline Distribution

Consumers of the latter half of the nineteenth century purchased kerosene from grocery stores, drugstores, and specialized vendors like chandlers and blacksmiths. Kerosene was packaged for retail distribution in barrels, drums, and five gallon-tin cans.

Initially, the oil companies used the same channels for gasoline distribution. Thus, at first, grocery stores and drug stores were the major retail outlets for gasoline. And like kerosene consumers, early gasoline consumers bought their automobile fuel in barrels, drums, and five gallon-tin cans. But purchasing gasoline in bulky, heavy barrels, drums and cans was awkward and inconvenient. Moreover, transferring the gasoline from these containers to automobile gasoline tanks was messy and dangerous.

Motorists needed a safer and more convenient alternative. Attempts to bring gasoline directly to the consumer's car in barrels mounted on wheels or to make house calls with horse-drawn tanks did not solve the problems.

Some motorists tried to purchase gasoline directly from local petroleum distributors. And distributors were glad to accommodate them. They elevated 50-gallon drums and dispensed gasoline into the consumers' automobiles with garden hoses. Later, they learned to draw the gasoline from 500 gallon underground tanks with hand pumps.

These primitive methods were supplanted when Sylvanus F. Bowser invented a *self-measuring gasoline tank* in 1885. He sold his pump to grocers who installed gasoline containers in front of their stores. Motorists filled their tanks at curbside without having to mess with difficult-to-lift and awkward-to-pour barrels, drums, and cans. The new technique made life easier for motorists and removed a fire hazard from grocery store premises. On the other hand, pumping fuel at curbside caused traffic safety hazards and congestion.

The world needed efficient off-street drive-in gasoline fueling facilities. So were born the predecessors of the modern gasoline station.

Gas stations did not begin to dominate gasoline retailing until the 1920s.

Who's On First?

Nobody knows for sure where the first gasoline station was opened. A public filling station is reported to have opened in 1901 in New York City. Other first stations are reported to have opened that year in Boston. In 1903, the Oriental Oil Company installed a curbside pump in Dallas; and, in 1905, the American Gasoline Company opened a drive-in station in St. Louis. A man named John McClean is said to have opened a drive-through station in Seattle in 1907. The Central Oil Company claimed to have opened the first gasoline station in Detroit in 1911. In 1912, Gulf opened its first gasoline station in Pittsburgh, and Standard Oil of Ohio opened its first gasoline station in Cincinnati.

The early gasoline stations were small facilities with room for only about six cars. They consisted of underground tanks, pumps, and a small building. Ironically, like many contemporary gasoline stations, the early stations sold gasoline and nothing else.

The Golden Age of Full Service Stations

Gasoline stations did not begin to dominate gasoline retailing until the 1920s. Until then, general-type stores still sold as much gasoline as did gasoline stations. By 1929, the story had changed dramatically. In that year, gasoline stations sold 92% of all US gasoline, and filling stations had evolved into gasoline service stations. Motorists were treated to free maps, free compressed air, and free rest rooms. Attendants checked their oil, filled their radiators, and cleaned their windshields. In addition to selling gasoline, service stations sold tires, batteries, and automotive equipment. Some of them had car wash facilities.

The popularity of stations with free services for motorists and the offering of a wide range of automotive products receded in the 1970s after the trauma of the Arab oil boycott. Self-service gasoline stations became popular and proliferated. Although self-service stations' sales were only 16% of the total in 1969, the percentage increased to 35% in 1975, 72% in 1982 and 85% in 1991.

BACK TO THE ROOTS: COMBINING GASOLINE WITH GROCERIES

Sometime during this period, the 7-Eleven convenience store chain realized that all it needed to create a self-service gasoline facility was an underground tank, some pumps, and an attendant to collect money. The chain's executives reasoned that they already employed attendants to collect money. They concluded that the same person who collected the money from grocery purchasers could collect money from gasoline purchasers, and they began to install self-service gasoline pumps in front of their store buildings. After filling the tank, motorists would have to enter the store to pay for the gasoline. Once in the store, motorists would be tempted by snacks, soft drinks, cookies, and other junk food that driving often causes people to crave.

Combining gasoline pumps with convenience food made sense. The driver could be fueled when the car was fueled, and the merchant could make money on both transactions. To the current generation, combining food and gasoline was a new and exciting idea. Actually, it was the recycling of an old idea. Grocers were among the first retailers to sell gasoline in the 1900s. Their decision to do the very same thing in the 1970s was considered a brilliant innovation.

New or old, the idea was good, and it was not ignored by the oil companies. They reasoned that if convenience store operators can sell gasoline, gasoline stations can sell groceries. Moreover, if gasoline stations can sell groceries, why can't they sell flowers and offer dry-cleaning services? So, 1990s gasoline stations run the gamut from the once universally accepted fuel service station to self-service stations, and to other operations that combine gasoline sales with many different forms of retailing.

One symbiotic arrangement combines a gasoline station with a fast food restaurant. Some gasoline stations transmit faxes. Others sell flowers, pick up packages for private delivery companies, rent video tapes, and send money orders. Motorists are even able to order hamburgers at the gasoline pump at some stations and pick the burgers up when they pay for the fuel.

Ironically, many 1990s gasoline stations have abandoned the kinds of services motorists once expected from their predecessors. Gasoline stations that change tires, check oil, and clean windshields are harder to find than they once were. Also harder to find are gasoline stations that sell tires, batteries, and automobile accessories. Nevertheless, the gasoline service station that provides services isn't obsolete. Some new stations employ hosts or hostesses to greet drivers. They are equipped with vacuum cleaners and air hoses, and they offer their customers free paper towels and the use of a squeegee.

Despite their common roots, at first there were relatively few marriages between gas stations and shopping centers.

GASOLINE STATIONS MEET THE SHOPPING CENTERS

Oil companies didn't rush to sign shopping center leases in the early years of the post-World War II shopping center boom. Nor did shopping center developers go out of their way to enlist oil company tenancies. At first glance, this mutual indifference seems to defy logic. The gasoline distribution industry and shopping center industry both owe their very existence to the same phenomenon, the rise of the gasoline-powered automobile.

Factors that Discourage Service Station Tenancies

Despite their common roots, relatively few marriages between gasoline stations and shopping centers occurred. Although some of the early shopping centers did include gasoline stations, gasoline is one of the few products that's hard to find in shopping centers today. For the most part, the shopping center and gasoline station industries took separate paths. The following market reasons are principally responsible for the separation:

- Consumers are inclined to purchase most of the gasoline they need near their homes. They tend to avoid buying gasoline elsewhere unless they're on a trip and notice that the tank is low.
- Regional shopping centers usually serve broadly defined geographic markets. They are usually anchored by two or more department stores and depend on the department stores' reputation and advertising to attract their customers. Most of the customers they attract live too far away to use a gasoline station located in the center as their primary source of gasoline purchases.
- Community shopping centers also serve broadly defined markets even though these markets are not as broad as regional center geographic markets. Community shopping center customers tend to spend less time at the shopping center than regional shopping center customers, and they are more likely than regional shopping center customers to visit the center to buy a specific item. Most of their customers, although they often visit the typical center's anchors (usually one department store and one supermarket), live too far away from the center to plan to purchase their gasoline in the center on a regular basis.
- Although factory outlet shopping centers target an even larger group of people than do conventional regional and community shopping centers, they tend to be far away from population centers. They are seldom positioned to serve anybody's daily or weekly repetitive needs.
- Neighborhood shopping centers target relatively small geographic markets. To succeed, they need to be near large clusters of people concentrated in small geographic areas. Neighborhood shopping centers' usual anchor tenants are supermarkets and drugstores. They concentrate on people's constantly repetitive needs. Despite the proximity of neighborhood shopping centers to consumers' homes, neighborhood shopping center landlords are inclined not to pursue gasoline station tenancies. Neighborhood shopping center landlords value every inch of their buildable land. Faced with constantly rising land prices and difficult-to-cope-with land use regulations, they prefer to use every square foot of land for buildings for anchor tenants and specialized small stores. They especially want to build as many specialized small stores as they can squeeze on the site. They'd rather build small stores than make room for a gas station because owners of these stores have been willing to pay much more rent over the years than oil companies were willing to pay.
- Gasoline station proprietors believe that locations on or near busy highways are preferable to sites within a shopping center that offer less exposure.

■ Gasoline stations are unpopular with planning boards. Many developers fear that a shopping center site plan that includes a potential gasoline station location would face long delays and incite community opposition.

Landlords who omit or ignore the language of use clauses do so at their peril.

Nevertheless, shopping center gasoline stations are convenient for shoppers. Although a shopping center gasoline station is not likely to be the first choice of many motorists, shoppers who neglect to fill up near home can be a significant market for a shopping center gasoline station. These drop-in motorists can make a shopping center location more interesting to an oil company than many comparable free-standing highway locations. However, it takes a very attractive site to convince an oil company executive to agree to pay the kind of rent that shopping center landlords demand.

GASOLINE STATION USE AND EXCLUSIVE CLAUSES

Once an oil company and a shopping center landlord agree to place a gasoline station into the shopping center, they must focus on the lease that codifies their relationship. They should particularly examine use and exclusive clause proposals with special care. They should do so regardless of whether the landlord owns adjacent property and regardless of whether the landlord is bound by previous commitments embodied in their tenants' leases.

Leaving a use clause out of a lease or adopting a use clause that does not limit the tenant's permitted uses can be especially dangerous for a landlord. Without a use clause, the tenant usually has the right to change the use of the premises without the landlord's consent. In addition, the absence of a restrictive use clause makes it much easier for a tenant to assign its leasehold estate or to sublet the premises without the landlord's consent.

When the Landlord Is a Highway Authority

Even a free-standing highway gasoline station landlord can have a compelling need to insist that a gasoline station premises be used as a gasoline station only. An example of such a landlord is a limited access highway authority. Although converting an existing gasoline station to a fine jewelry shop might not bother most landlords, a limited access highway authority real estate negotiator who approved a lease permitting such a conversion should be reprimanded. Limited access highway authorities lease space to oil companies in the expectation that the planned gasoline station will serve the motorist's need for a convenient place to purchase gasoline without leaving the highway. Highway administrators want to promote convenience and avoid stalled vehicles. Of course, they also want to earn money from rentals, but rent alone is not enough in these circumstances.

OIL COMPANIES AS LANDLORDS AND TENANTS

Oil companies have been landlords as well as tenants for gasoline stations that they operate for their own account. Sometimes they have purchased land, built gasoline service stations, and operated them. They have also leased good sites they couldn't or didn't want to buy. These leases usually require the landowner to build the gasoline station buildings and other facilities. The landowner raised the funds needed to pay for the construction with a mortgage loan. Lenders were impressed with an oil company tenancy and looked principally to the rental stream from the lease as the source of funds to repay the debt.

Sometimes, oil companies leased or sublet gasoline stations to others who operated them pursuant to various arrangements. In some cases, these leasing arrangements came about because the oil company preferred not to operate the stations. Leasing and subletting arrangements served other useful purposes too. Oil companies that preferred playing the wholesaler's rather than the retailer's role leased stations they owned (or sublet stations they leased) to distributors. The distributors would then sublet them to operators. In some circumstances, a major oil company would purchase gasoline stations from independent operators and lease them back to the sellers. Some independents had been selling several brands of gasoline from these stations. The company that purchased the independent's station made the station operator agree to sell only the company's brand.

Oil companies that operated their own stations as tenants pursuant to leasing arrangements had limited tolerance for use restrictions. They could afford to be independent; they were among the most powerful companies in the world. These tenants often were able to eliminate the use clause from their form leases altogether or to substitute a clause that imposed virtually no limit on the tenant's activities.

> Use clauses should limit a tenant's right to give things away as well as its right to sell them.

Nevertheless, before the Arab oil boycott of the 1970s, a resolute property owner had a reasonable chance of convincing a potential oil company tenant to limit the use of the premises to the following activities: selling gasoline and motor oil; selling other petroleum products; providing repair and maintenance services for automobiles and other vehicles; selling tires, batteries, and automotive accessories; and selling or giving away promotional items.

The oil companies, shocked by the Arab oil boycott, began to demand greater privileges in their use clauses. Their negotiators routinely demanded that the lease accommodate the prospect that gasoline resources may one day be depleted and that the service station might then be used to distribute other forms of energy.

Use Clauses Required by Shopping Center Landlords

Many landlords have no real need to restrict the tenant's use of the premises. A gasoline station landlord that owns no adjacent property normally has no economic interest in a use limitation. As long as the premises are being used for legal purposes and the rent is paid on time, this kind of landlord is normally happy.

However, some gasoline station landlords have important economic interests, social principles, or both to protect. They care intensely about how the premises are being used. Such landlords include:

- Shopping center owners;
- Limited access highway authorities and public park authorities;
- Farmers, land developers, and others who own adjacent land;
- Office and garage building owners that lease parts of the building for service station use; and
- Eleemosynary institutions.

What kinds of oil company activities cause concern for landlords, and what should landlords do to protect themselves?

A gasoline station tenant in a shopping center or multi-use project might violate a restrictive covenant in an old deed or in a co-tenant's lease. So landlords in such projects negotiate use clauses that prohibit tenants from violating these restrictive covenants. The gasoline station tenant's lease should identify these restrictive covenants in exclusive clauses and old deeds and specifically bar the tenant from selling products or performing services that would cause the existing covenants to be violated.

A shopping center's gasoline station tenant that is not restricted by a use clause could arbitrarily decide to carry a heavy concentration of the same products principally offered for sale by one of the center's specialized small stores. This unexpected direct competition could cause a severe downturn in a specialized small store's sales and profits and drive it into insolvency. Accordingly, shopping center landlords should protect their small store tenants from the possibly overwhelming on-site competition even if the small stores' leases don't protect them. A landlord can't collect rent from an insolvent tenant.

Gasoline station tenants are also prone to give things away or to sell them at promotional prices. Before the Arab oil boycott, gasoline stations were aggressive distributors of cheap glassware and other giveaways. They didn't charge anything for these products; they gave them to people who purchased gasoline. Although there are apparently fewer giveaways today, one does see them now and then. Of course, the worst kind of competition a merchant can face is competition from a merchant who gives things away. Consequently, use limitations in a shopping center gasoline station lease should limit the tenant's rights to give various products away as well as the tenant's right to sell the products.

Limits of the Negotiation

Oil companies will not agree to extremely restrictive use clauses. Their real estate executives are aware that the gasoline business is as volatile as the fumes of their principal product. They know that future stations may need to make changes to engage in activities that are far from today's business of distributing gasoline. They demand a degree of flexibility so that the stations can adapt to new conditions.

Landlords can hope to impose reasonable boundaries on the oil company tenants but they can't expect a gasoline station tenant to agree to limit its products and services to a narrow list. Shopping center owners who are aware that they may be negotiating a gasoline station lease some day in the future should keep the needs of potential oil company tenants in mind when they negotiate the various store leases.

Limited access highway authorities must consider the public's needs for specialized services.

For example, landlords should know that many contemporary gasoline station proprietors like to incorporate food mart (convenience store) sales into their service station operations. Food mart products include fresh coffee, soda sold in plastic cups, ice cream, candy, cookies, cake, and snack food. Unless the landlord has been foresighted, the food mart operation of a gasoline station with a liberal use clause might violate exclusive clauses in supermarket, luncheonette, fast food restaurant, coffee shop, delicatessen, and grocery store leases. Shopping center landlords who hope for a future gasoline station deal should bargain for a gasoline station exemption in those tenants' exclusive clauses.

Before the arrival of the now familiar gasoline station food mart, some gasoline service stations were selling cigarettes in cartons and canned soda in cases. Now, a motorist can buy individual packs of cigarettes and individual cans of soda in gasoline stations that don't incorporate a food mart operation. Contemporary stations, even if they have no food mart, might still want the right to sell diverse products like newspapers, cigarettes, soda, snacks, candy, toys, maps and travel guides. They can use vending machines and/or racks at their cash register desks for this purpose. Unless the landlord has been foresighted, the sale of any one of these products by the gasoline station might be subject to a restriction in the exclusive clause of another tenant's lease.

Landlords With Special Interests

Limited access highway authorities have a much greater interest in meeting motorists' needs than in collecting rent. When they negotiate a gasoline service station lease, their goal should be to obtain assurances that the service station will fulfill travelers' needs. Limited access highway travelers need to be able to purchase fuel and motor oil en route to their destinations without leaving the highway. They also need clean rest rooms.

To make sure that the gasoline service station serves the public in this way, the highway authority should demand the right to stop the tenant from converting the service station facility to another use. Other gasoline station landlords to which continued fuel sales and other services are at least as important as rent include garage operators and public park authorities. These landlords also need the use clause to enable them to achieve their goals.

A limited access highway authority that promotes coordinated highway "oases" and rest stops along its route has additional reasons to restrict a service station tenant's merchandise and service categories. Many highway oases combine service stations in coordinated retail complexes with restaurants and gift shops. The oasis is actually a specialized shopping center, and it is small. The oasis restaurant tenant is likely to be far less tolerant of a gasoline station co-tenant's decision to sell prepared food than a shopping center restaurant would be. Similarly, the oasis gift shop's very existence might be threatened if the gasoline station operator should decide to give away teddy bears for a sustained period.

Future limited access highway oases might not be limited to service stations, restaurants and gift shops. Other kinds of merchants might be attracted to that kind of retail format. Perhaps book stores and casual clothing stores will migrate to highway service areas. The highway authority landlords should avoid foreclosing these potential future opportunities by lax use clause negotiations.

Farmers, land developers, and building owners may also own or lease property adjacent to a gasoline station premises. They, too, should be aware of the need to prohibit a gasoline station tenant from using its premises for obnoxious purposes that are, nevertheless, legal. They don't want to see the gasoline station converted to a junkyard or a pornographic bookstore. Moreover, landlords who anticipate future leases on parcels that are next to or near the gasoline station premises should negotiate for reasonable use limitations to avoid potential use/exclusive clause conflicts.

RESTRICTIVE COVENANTS

Oil company restrictive covenants are principally contained in four types of documents: gasoline station leases; leases from some existing shopping center TBAs (tire, battery and auto accessory enterprises); documents that encumbered the land before it was developed; and agreements by developers who purchased land from oil companies. Each arose from different historical circumstances.

> The language of an oil company restriction determines the degree of special care needed to negotiate tenants' use clauses.

Leases for Existing Shopping Center Gasoline Stations. The premise underlying an oil company's willingness to bear the higher rent burden of shopping center locations was that the location would attract shoppers and store employees in addition to motorists. The shopping center location was attractive when the projected additional revenue outweighed the increased rent burden. However, this premise would work only if the gasoline station got the exclusive right to serve the shopping center community. So, oil company executives reasoned that, without the protection afforded by an exclusive clause, the potential for additional revenue from the shopping center would be diluted, and the additional rent expended there would be wasted.

Leases for Limited Access Highway Gasoline Stations. A limited access highway offers the same kind of audience as a shopping center because motorists' reluctance to exit the highway to search for gasoline or food delivers them as a captive audience to oil companies and food service chains. Oil company executives quite legitimately expect that the highway won't be crowded with competitors. Accordingly, they seek leases that contain assurances against excessive competition along the highway.

Leases for Existing Shopping Center TBAs. Shopping center TBAs prospered during the late 1960s and early 1970s, and some department store tenants tried to complement their TBA operations with gasoline islands. Some of these tenants also sought to bar other gasoline sales in the shopping center by negotiating restrictive covenants in the exclusive clauses of their leases. The terms of many of these department store leases were 50 years or longer when one counts options to extend or renew. Consequently, these restrictions might continue to bind some landlords into the twenty-first century.

Restrictive Covenants in Documents That Encumbered a Project Before Its Development. Gasoline station restrictive covenants were part of many agreements made during the years when landowners sold corner parcels to oil companies and retained the balance of their land. Oil companies that paid a premium price for a tract of land demanded something extra for all that money. In exchange for the generous purchase price, the oil company insisted that the balance of the owner's land be subject to restrictive covenants against competition. Many of these parcels were farms, and the farmers expected to continue farming portions of the land that they retained for the rest of their lives. However, farmers die, and many of their children don't want to be farmers. After World War II, when shopping centers began to sprout, the farmers' heirs found a new class of potential purchasers for their land—shopping center developers. When these developers purchased the land, they had little choice but to purchase it subject to the oil companies' restrictive covenants.

Restrictive Covenants Agreed to by Developers Who Purchased the Land From an Oil Company. Oil companies still own a considerable amount of land. A developer who purchases land from an oil company should not be surprised if the seller chooses to reserve a corner parcel for future development as a gasoline station and demands a restrictive covenant limiting the use of the land it does sell.

There's nothing much a developer can do about an oil company restrictive covenant that, pursuant to an old deed or easement declaration, encumbers land that it seeks to buy. All the developer can do about a restriction in the back title is refuse to buy the land or go begging to the oil company that imposed the restriction. However, a developer who's negotiating a lease or land purchase agreement with an oil company can weigh the proposed restrictive covenant carefully, try to understand the problem, and negotiate appropriate changes.

TYPES OF RESTRICTIONS

The language of an oil company restriction determines the degree to which the landlord of a shopping center or other kind of multiuse project must use special care when it negotiates tenants' use clauses. Although the possibilities are endless, following are the three most common kinds of restrictions:

- Restrictions against leasing to another gasoline station, gasoline service station, or service station.
- Restrictions against the sale of gasoline, motor oil, other fuel, or other energy source by any vendor.
- Restrictions against the sale of petroleum products.

In the shopping center context, a restrictive covenant against a gasoline station or a service station co-tenancy shouldn't be a big problem. It's a rare shopping center that has even one gasoline station or service station. A landlord is unlikely to want a second.

On the other hand, a limited access highway authority landlord is likely to want many service stations along the route. But too many closely spaced service stations can be disastrous for the highway gasoline station tenant, so it appropriately bargains for a restriction against the presence of other service stations within a reasonable radius. The highway authority landlord, on the other hand, tries to limit the scope of any restriction.

An oil company restriction against the sale of gasoline by any vendor could be troublesome for a shopping center landlord. Department stores, supermarkets, drugstores, and TBAs have all sold dry gas. Consequently, the landlord wants to keep the incidental sale of small quantities of gasoline in prepackaged metal or plastic containers exempt from any restriction.

A restriction against the sale of motor oil poses even greater problems for a shopping center landlord than a restriction against the sale of gasoline. Many shopping center tenants (including supermarkets, home improvement centers, TBAs, and drugstores) sell motor oil. A landlord who does agree to give the gasoline station tenant a motor oil restriction must be careful to exempt stores that might insist on the right to sell that product.

A restriction against the sale of petroleum products is the toughest and possibly the most frequently encountered oil company restrictive covenant problem. The phrase "petroleum products" is not limited to gasoline, diesel fuel, and motor oil or even to automotive products. Vaseline, kerosene, lubricating oils, asphalt, wax, insecticides, and many other nonautomotive consumer products are petroleum derivatives or contain petroleum derivatives.

A petroleum products restriction weighs most heavily against shopping center landlords. Shopping center supermarkets and drugstores want the right to sell such petroleum products as motor oil. Home improvement centers and hardware stores want the right to sell a considerable number of petroleum-derived products. Even stationery stores need the right to sell petroleum products, because they routinely sell butane as a fuel for cigarette lighters. A landlord that accedes to a petroleum products restriction gives the oil company tenant too much power over the activities of other tenants. The landlord may rue the day he or she did so. ■

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