
How Amazon Built a Swim School

By Gary A. Kravitz

Historic use restrictions on a shopping center can sink the aspirations of an unwary landlord or tenant and leave brokers scratching their heads.

Many shopping centers are saddled with traditional use restrictions contained in reciprocal easement agreements (“REAs”). These traditional use restrictions prohibit certain types of uses such as: (a) perceived parking hogs like movie theaters and gyms; (b) uses deemed incompatible with traditional retail such as educational and medical facilities; and (c) morally impermissible uses such as “head shops” and adult book stores.

These restrictions were deemed critical to promote traditional retail uses and to encourage perceived synergies between retail tenants. These restrictions may have been helpful in the days when traditional retail was king. In the Amazon era, however, retail businesses are leaving shopping centers and many available replacements fall into non-traditional categories. Far more medical, exercise and service industry tenants are moving into shopping centers than ever before, making these uses critical for a functional, thriving center. Working with these types of businesses requires careful attention to REAs.

Case in point: A recent client was going to open a swim school on an outlot in a suburban shopping center. The draft lease made passing reference to an REA affecting the center. While REA documents sometimes go unreviewed in lease negotiations, given the type of tenant, we requested a copy of the REA to cover all bases. The REA disclosed that exercise facilities and educational facilities were both prohibited uses in the center. My client’s swim school was arguably prohibited under either or both of those restrictions. The transaction could not move forward without resolving this issue.

If you are a tenant going into a shopping center, pay close attention to the use restrictions contained in other leases in the shopping center, as well as the use restrictions potentially contained in any recorded reciprocal easement agreement affecting the shopping center. Never assume that a tenant’s use will be

automatically allowed just because they can pay the rent. A thorough review of a center's recorded restrictions is necessary!

Similarly, a landlord looking to fill empty retail space and lease to new opportunities will also have to pay close attention to what the applicable use restrictions allow within the shopping center. In this new era of shopping center tenants, careful review and consultation with legal counsel is always recommended when leasing out available space. In Michigan, landlords with recorded restrictions should also research recent changes in the Marketable Title Act as it may have an impact on particularly old use restrictions.

Regarding the swim school, we initially asked the landlord to indemnify the tenant in the event that the restrictions were enforced by another tenant. The landlord agreed to send written correspondence to every tenant in the shopping center explaining the new proposed use. The letter gave every existing tenant the option to object to such use within a certain number of days or waive their right to object. Only then did the landlord provide the indemnity. This is just one of many possible remedies to consider, but it was the one the swim school needed in order to lease the space.