

## THE BIGGEST MISTAKE DEVELOPERS MAKE WHEN DRAFTING CC&RS (PART 3 OF A 3-PART SERIES)



Hartman Simons' partner, [Jeremy Cohen](#), discusses provisions to consider when drafting CC&Rs for mixed-use developments. The following is part 3 of a 3-part series.

Cohen discusses the following critical factors:

**Q:** How can a developer create CC&Rs without alienating the retail tenants?

**A:** As counsel to the developer, I try to address the biggest concerns the retail tenants have in the CC&Rs with the hope that doing so will allow those tenants to allow greater flexibility on the overall development. The only thing that really alienates retail tenants is being unable to operate for what it is they want to do, whether that is a restaurant, sporting goods store or soft goods retailer.

So, if there are a lot of restrictions on use, that could actually hurt the ability of the retail tenants to operate as they desire. As a result, you try to draft the use provisions in the CC&Rs in a way that gives the developer as much flexibility as possible, while also protecting the initial retail tenants that were part of the project from the onset. As counsel to a developer, there is a fine line and a balance you need to achieve between protecting the initial tenants and preserving as much flexibility as you can to lease the project in the future.

**Q:** What should you avoid when drafting CC&Rs?

**A:** The biggest drafting error is putting your client in a box by limiting their flexibility to develop the project in a manner they desire. If there are too many restrictions at the onset, you would be required to go back to each tenant and ask them to change their original lease provisions—and that almost always carries a cost.

In addition, the CC&Rs need to account for additional, and often not contemplated expenses, that arise so that such expenses can be split amongst all of the occupants of the project and the initial developer is not left holding the bag, as it were. So, the biggest mistake an attorney can make when drafting CC&Rs would be drafting it too narrowly.