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Defining Hospitality Entities in Contracts and Statutes: A Proactive and Preventative Approach

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COMMENT

DEFINING HOSPITALITY ENTITIES IN CONTRACTS AND STATUTES:

A PROACTIVE AND PREVENTATIVE APPROACH

> "The sine qua non of a life in the law is a willingness to devote a great deal of thought to issues which seldom concern nonlawyers."[1]

INTRODUCTION

The concept of a hospitality entity, such as a "restaurant" or "hotel," is something that ordinary people (non-lawyers) have little difficulty describing, but which has long created a legal quandary for attorneys, courts, and legislatures. The struggle to specifically discern the nature of certain hospitality entities is the bane of hospitality law, particularly inns, hotels, and motels from the lodging segment, and restaurants, nightclubs, bars, and cabarets from the food and beverage spectrum.

Statutes and contracts use hospitality classifications and definitions to accomplish particular objectives.[2] For example, to minimize neighborhood noise and traffic problems, a lease may restrict the use of the premises for a "nightclub," but allow

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[1] Tily B., Inc. v. City of Newport Beach, 81 Cal. Rptr. 2d 6, 10-11 (Cal. Ct. App.1998).

[2] JACK P. JEFFERIES, UNDERSTANDING HOSPITALITY LAW 6 (3rd ed.1995).

"restaurant" activity.[3] A breach of the lease becomes debatable, however, when components detailing the definition of "restaurant" or "nightclub" are omitted. Would the restaurant owner breach the lease for operating a non-permitted nightclub if she served alcoholic beverages and allowed dancing? Like many hospitality entities, nightclubs and restaurants share similar elements.[4] In the absence of specific terms, reasonable minds differ as to the definitions.[5]

The multiplicity and diversity of characteristics in the modern hospitality industry contribute to the foggy nature of hospitality definitions. As a result, the parties often unintentionally violate the law or infringe a contract.[6] For instance, in *State v. Shoaf,* suit was brought against an owner to enforce a public law that restricted the sale of goods on Sundays.[7] The applicable statute, which exempted "restaurants" and "cafes," did not narrowly define either term.[8] The state believed that the owner's business was a "wiener joint," not a true "restaurant," because there were no tables and he sold only hotdogs and sandwiches at a counter.[9] Referencing historical definitions from a dictionary, the Supreme Court of North Carolina found the premises was a "restaurant."[10] The court reasoned that the word "restaurant" is commonly understood as "a place where refreshments can be had,"[11] whereas a "joint" is a rendezvous "for persons engaged in evil and secret practices of any kind . . . as is usually kept by Chinese for the accommodation of persons addicted to the habit of opium."[12] This interpretation protected the business from closing on Sundays.[13] Elusive definitions of hospitality entities,

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3 Hellenic Inv. Inc. v. Kroger Co., 766 S.W.2d 861, 863 (Tex. App. 1989).
4 *Id.* at 864.
5 *Id.*
6 State v. Shoaf, 102 S.E. 705 (N.C. 1920).
7 *Id.*
8 *Id.* at 706.
9 *Id.*
10 *Id.* at 705.
11 *Id.*
12 *Id.* at 706.
13 *Id.* The court found that the policy of the statute barring restaurants from opening on Sunday was not violated, because the owner did not "mar in the least the proper and peaceful observance of the Sabbath." *Id.*

such as the distinctions between a "wiener joint" and a "restaurant," often create confusion and lead to litigation.[14]

Litigants often argue that a hospitality term in a contract or statute is too vague to be enforced.[15] When interpreting a vague term, however, courts make every effort to discern the intent of the parties from the remnants of the contract or statute.[16] Accordingly, courts construe vague or undefined hospitality terms utilized in contracts and statutes by their "commonly understood meanings."[17] This is a difficult task for courts, because hospitality entities have nebulous "commonly understood meanings" due to the numerous characteristics they share.[18] Adding to the confusion, the evolution of legal language and colloquial language is not always concurrent.[19] The mountain of judicial opinions attempting to establish "commonly understood meanings" of hospitality entities is indicative of the difficulty courts have in distinguishing between them.

Likewise, the consequences of after-the-fact judicial interpretation of the definition of an entity can be severe.[20] Courts will not interpret the definition of an entity where it is unambiguous.[21] To best prevent litigation, definitions should be composed with clear and specific terms.[22] Utilizing restrictive covenants and permitted uses in the definition allows drafters to explicitly describe the permitted operations of hospitality entities. In addition to achieving the objectives of the statute or contract, affected parties will easily

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[14] *See generally* State v. Shoaf, 102 S.E. 705 (N.C. 1920).

[15] Hellenic Inv. Inc. v. Kroger Co., 766 S.W.2d 861 (Tex. App. 1989).

[16] *Id* at 866.

[17] *See generally* JACK P. JEFFERIES, UNDERSTANDING HOSPITALITY LAW 6 (3rd ed. 1995); Oak Hills Prop. v. Saga Rest. Inc, 940 S.W.2d 243, 245 (Tex. App. 1997); Adams v. Fazzio Real Estate Co., 268 F. Supp. 630, 635 (E.D. La. 1967).

[18] *See generally* Montella v. City of Ottertail, 633 N.W.2d 86, 89-90 (Minn. Ct. App. 2001). The court struggled to determine if a business that sold desserts and coffee was a "restaurant" under a liquor license statute. *Id.*

[19] *See generally* Cromwell v. Stephens 2 Daly (N.Y.) 15, 3 Abb. Pr. 26 (Ct. C.P. N.Y. Co. 1867), *reprinted in* JOHN E. H. SHERRY, THE LAWS OF INNKEEPERS 17 (3rd 1993).

[20] Hellenic Inv. Inc. v. Kroger Co., 766 S.W.2d 861, 865 (Tex. App. 1989). The trial court issued a permanent injunction that enjoined the business from operating as a "nightclub." *Id.*

[21] Roe v. Hopper, 408 P.2d 161, 164 (Idaho 1965).

[22] Vitolo v. Chave, 314 N.Y.S.2d 51, 58 (N.Y. App. Div. 1970). It is often difficult for courts to tell whether the business is the allowable entity or only of the same character as the allowable entity (hence allowable only by exception). For example, is a "diner" a "restaurant" or just in the nature of a "restaurant?" *Id.*

understand the operational scope of the entity that they are expected to run.[23]

This Comment serves as a guide to contracting parties and legislative drafters to initially, in an accurate and descriptive manner, define the scope of the entity, and thus, avoid litigation. Additionally, the factors enumerated through permissive uses and restrictive covenants (such as a dancing or minimum stay requirement) if utilized, will enhance the enforceability of the statutes and contractual restrictive covenants.

Part I describes the general background of the need for specificity in arriving at definitions for hospitality entities.[24] Part II explains why the court's use of historical definitions in interpreting vague or missing definitions of hospitality establishments in contracts and statutes is unsound.[25] Part III examines why an entity's characteristics are relevant, focusing on specific issues arising in contractual and statutory arenas.[26] Part IV provides a logical progression for clearly defining each term of art by the use of specific permissive and restrictive covenants.[27] Part V concludes that a proactive utilization of these covenants by all affected stakeholders prevents litigation.[28]

I. BACKGROUND

Early hospitality entities were much simpler to classify than the mélange of entities comprising the industry today.[29] It appears that all present day hospitality entities evolved from an "inn," but even the concept of an "inn" took a long time to develop.[30] In the ancient Middle East, empty huts gave shelter to traders along caravan stops.[31] In the Middle Ages,

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[23] *See generally* Hellenic Inv. Inc. v. Kroger Co., 766 S.W.2d 861, 865 (Tex. App. 1989).

[24] *See infra* notes 29 -66 and accompanying text.

[25] *See infra* notes 67-108 and accompanying text.

[26] *See infra* notes 109-191 and accompanying text.

[27] *See infra* accompanying text and chart.

[28] *See infra* note 192 and accompanying text.

[29] *See generally* Cromwell v. Stephens 2 Daly (N.Y.) 15, 3 Abb. Pr. 26 (Ct. C.P. N.Y. Co. 1867), *reprinted in* JOHN E. H. SHERRY, THE LAWS OF INNKEEPERS 17 (3rd 1993).

[30] *Id.*

[31] *Inn*, ENCYCLOPEDIA.COM, *available at* <http://www.encyclopedia.com/html/i1/inn.asp.> (last visited Sept.14, 2002).

monasteries established hospices to fulfill the Christian duty of hospitality by providing accommodations and food for travelers.[32] Less primitive inns arrived by the sixteenth century.[33] Beginning in this period, guests, in addition to receiving overnight accommodations, expected greater services such as a place to stable their horse and a supply of food and drink during their stay.[34]

Hotels opening in the early 1800's enhanced the public's accommodation by providing not only rooms for the night, but also food and beverage service, soap and water for each room, bellboys, and room service.[35] The infant industry blossomed with the industrial revolution, automobiles, and cross-country highways.[36] In addition, the engine of technology improved services with inventions such as indoor plumbing and refrigerators.[37] As a result, guests anticipated broad-based facilities including retail outlets, in-house laundry, garage facilities, and entertainment.[38]

As the concept of public accommodation continued to evolve, numerous characteristics among traditionally separate entities applied to new entities.[39] Soon after, conflicts arose concerning the classifications of hospitality entities. In 1905, a plaintiff, who had been living in the Ten Eyck Annex, a hotel in New York, for seventeen months, brought a liability suit for lost and damaged property.[40] She argued that the Ten Eyck Annex had many of the same characteristics of an "inn" and was, accordingly, subject to liability laws that only applied to inns.[41] The hotel argued that, historically, transient guests

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[32] Cromwell v. Stephens 2 Daly (N.Y.) 15, 3 Abb. Pr. 26 (Ct. C.P. N.Y. Co. 1867), *reprinted in* JOHN E. H. SHERRY, THE LAWS OF INNKEEPERS 17 (3rd 1993).

[33] WILLIAM S. GRAY, HOTEL AND MOTEL MANAGEMENT AND OPERATIONS 3-4 (3rd ed 1994).

[34] *Id.*

[35] John Mariani, *A Look Back: milestones in the hospitality industry history,* HOTEL & MOTEL MANAGEMENT, June 5, 2000; WILLIAM S. GRAY, HOTEL AND MOTEL MANAGEMENT AND OPERATIONS 5-6 (3rd ed 1994).

[36] *See generally* John Mariani, *Roadside Attractions; History of Diners,* RESTAURANT HOSPITALITY, May, 1992.

[37] *Id.*

[38] *See generally* WILLIAM S. GRAY, HOTEL AND MOTEL MANAGEMENT AND OPERATIONS 156-162 (3rd ed 1994).

[39] *See generally* YMCA of Greater N.Y. McBurney Branch v. Plotkin, 519 N.Y.S.2d 518 (N.Y. Civ. Ct. 1987).

[40] Crapo v. Rockwell, 48 Misc. 1, 5 (N.Y. Trial Term 1905).

[41] *See generally Id.*

stayed at inns while hotels tended to house long term guests or "tenants."[42] If the court classified the Ten Eyck Annex as an "inn," the owner, as the insurer of a transient guest's property pursuant to the concept of infra hospitium,[43] would be liable for the plaintiff's loss under common law.[44] To determine if the Ten Eyck Annex corresponded to the commonly understood meaning of "inn," the court examined historical definitions of the term.[45] The New York Supreme Court, relying on historical definitions, found that an "inn" was always used in connection with the corresponding notion of travelers (transient guests) seeking accommodation and protection.[46] The plaintiff was more in the nature of a tenant at the hotel rather than a transient guest of an "inn."[47] Accordingly, the hotel was not liable for the woman's property.[48] If the facts of this case were considered today, a different outcome would most likely result, because hotels have evolved from long term tenancies into transient guest lodging.

More recently, courts have had increasing difficulty defining entities pursuant to the industry's constant evolution. For example, in the hotel sector, a facility with rooms, outfitted with spas and mirrored ceilings, are rented to members in four-hour blocks.[49] If the court regarded the premises as a "hotel" or a "motel," an occupancy tax of five percent would apply.[50] Although many properties defined as hotels do not require an overnight stay,[51] a federal appellate court held that the entity was not a "hotel" or a "motel," but a "private place of enhanced romantic surroundings for sexual activity between two persons" and, accordingly, not subject to the tax.[52]

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[42] *Id.* at 4.

[43] STEPHEN BARTH, HOSPITALITY LAW, John Wiley and Sons, 271 (2001). Historically, the common law held a hotel liable for the loss of the guest's property if the property and the guest were within the premises of the hotel. The concept was infra hospitium a Latin term meaning "within the hotel." *Id.*

[44] Crapo v. Rockwell, 48 Misc. 1, 2 (N.Y. Trial Term 1905).

[45] *Id.* at 4. Historical definitions are often analyzed to discover a commonly understood meaning. Id.

[46] *Id.*

[47] *Id.* at 8.

[48] *Id.*

[49] Lucio Guerrero, *Is Getaway a Hotel, There's No Telling*, CHICAGO SUN-TIMES NEWS, Oct 31, 2000, at 10.

[50] *Id.*

[51] *Id.*

[52] *Id.*

The conception of food and beverage entities evolves at a pace as rapidly as the lodging sector. The first restaurants, independent of inns, that operated with a shade of modernity, with private tables and a somewhat varied menu, appeared in France in the late eighteenth century.[53] In America, customary restaurant entities did not develop until 1838 when the Swiss Del-Monico brothers opened the still-famous Delmonico's restaurant in New York.[54] As modern variations of restaurants mushroomed in America, disagreements and resulting litigation arose over the characteristics of eating and drinking establishments.[55] As early as 1859, the Supreme Court of New Hampshire questioned whether a saloon serving only beer and oysters matched the definition of a "restaurant" within a city ordinance.[56] The ordinance did not allow any person to "keep open any restaurant, or any place used as a restaurant, in the city, in the night, after ten o'clock."[57] The court held that the saloon was a restaurant even though no definition of "restaurant" was detailed in the ordinance.[58] As a result, the owner was not allowed to operate his business past ten o'clock.[59]

Changes in modes of life, travel and transportation continue to modify the composition of hospitality entities and consequently, their definitions.[60] The explosion of creativity in the industry over the years has resulted in shared common characteristics between traditionally separate entities. For example, if you linger too long in Miyagi's Sushi Restaurant in Los Angeles, California, you may find yourself suddenly transported to a nightclub as the temperature inside gently rises, the music becomes increasingly louder, and patrons start to dance. The restaurant transforms into a nightclub for all intents and purposes.

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[53] *Restaurant*, ENCYCLOPEDIA.COM, *available at* <http://www.encyclopedia.com/html/r1/restaura.asp.> (last visited Sept. 14, 2002).

[54] Anthony Conners, *Delmonico's Lives Again*, DAILY NEWS SUNDAY EXTRA, May 17, 1998, at 52.

[55] *See generally* State v. Freeman, 38 N.H. 426 (N.H. 1859).

[56] *Id.*

[57] State v. Freeman, 38 N.H. 426, 426 (N.H. 1859).

[58] *Id.* at 427.

[59] *Id.* at 428.

[60] Creedon v. Lunde, 90 F. Supp. 119, 121 (W.D. Wash. 1947).

Due to creative conceptualization, present-day hospitality entities are not as conventional or as easily distinguishable from each other as they once were.[61] Yet, contracts and statutes continue to define entities ambiguously, forcing the courts to look elsewhere to interpret intent and construct definitions.[62] When the court is interpreting an imprecise term in a contract or statute, the court must unearth and apply the commonly understood meaning of the term.[63] As previously revealed, however, commonly understood meanings in the hospitality industry are not so common any longer.[64] In spite of this, modern day courts continually utilize outdated historical definitions to ascertain commonly understood meanings of hospitality entities,[65] even though it was held, almost one hundred years ago, that adherence to ancient definitions of hospitality entities is not an effective practice.[66]

II. PROBLEMATIC HISTORICAL DEFINITIONS

Inns, hotels, motels, restaurants, bars, nightclubs and cabarets are the hospitality terms of art that tend to create the most confusion. In addition to overlapping characteristics, several historical definitions can be found for each hospitality entity further complicating the courts application of dated historical definitions. The following are typical ambiguous historical definitions and illustrative cases in which courts utilize unbridled discretion to reach extraordinary judicial interpretation.

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[61] *See generally* John Mariani, *Roadside Attractions; History of Diners,* RESTAURANT HOSPITALITY, May, 1992.

[62] *See generally* Creedon v. Lunde, 90 F. Supp. 119, 120 (W.D. Wash. 1947); Vitolo v. Chave, 314 N.Y.S.2d 51, 58 (N.Y. App. Div. 1970).

[63] *See generally* Vitolo v. Chave, 314 N.Y.S.2d 51, 58 (N.Y. App. Div. 1970).

[64] Creedon v. Lunde, 90 F. Supp. 119, 120 (W.D. Wash. 1947). In this case, the court found that the historical definitions between hotel and apartment-house were so similar that they were not helpful. *Id.*

[65] Vitolo v. Chave, 314 N.Y.S.2d 51, 57-8 (N.Y. App. Div. 1970). The court looked to dictionaries to find the definition of "restaurant" and "drive-in." If these definitions had been taken seriously, the court would have held that a "drive-in" is a "restaurant" without parking spaces. *Id.*

[66] Nelson v. Johnson, 116 N.W. 828, 829 (Minn. 1908).

A. INN

One historical definition described an "inn" as "[a] house for entertainment of travelers and passengers, in which a lodging and necessities are provided for them and for their horses and attendants."[67] This definition conceives a "hotel" as an entity independent of an "inn."[68] Contrast this with the opinion in *YMCA of Greater N.Y. McBurney Branch v. Plotkin*, which found that "hotel" is tantamount to "inn."[69] In that case, to recover rent overcharges and treble damages, pursuant to a statute regulating hotels requiring the posting of a room rate, the court required the plaintiff to prove that the YMCA was operating as either a "hotel" or an "inn."[70] The New York Civil Court found the YMCA was subject to this statute, reasoning that the facility rents rooms to transient guests in conjunction with the commonly understood meaning of hotel or inn.[71] Although it was only a peripheral issue in this case, the court stated that the terms "hotel" and "inn" were synonymous and refer to places where "transient guests are received and lodged."[72] Despite decisions like this, the distinctions between "hotel" and "inn" are often embraced in other cases.[73]

B. HOTEL

Black's Law Dictionary defines a hotel as "[a] building where lodging and usually meals, entertainment and various personal services are provided for the public."[74] An airport, casino, homeless shelter or even a shopping mall could fit within this definition.[75] Similarly, in *Greentree at Murray Hill Condo. v. Good Shepherd Episcopal Church*, a group of

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[67] Cromwell v. Stephens, 2 Daly (N.Y) 25, 3 Abb. Pr. 26 (Ct. C.P.N.Y. Co. 1867), *referencing* Thompson v. Lacy (3 B. & A 238), *reprinted in* JOHN E. H. SHERRY, THE LAWS OF INNKEEPERS 17 (3rd 1993).

[68] *Id.*

[69] YMCA of Greater N.Y. McBurney Branch v. Plotkin, 519 N.Y.S.2d 518 (N.Y. Civ. Ct. 1987).

[70] *Id.*

[71] *Id.*

[72] *Id. cited in* Dixon v. Robbins 246 N.Y. 169 (1927).

[73] Pierro v. Baxendale, 20 N.J. 17, 23 (N.J. 1955).

[74] THE MERRIAM WEBSTER DICTIONARY 359 (New ed.1994).

[75] West Edmonton Mall in Edmonton, Alberta provides a hotel, 3 movies theatres, ice skating rink and many attractions. <http://www.westedmall.com> (last visited Feb. 20, 2003).

condominium owners attempted to enjoin a neighboring church for operating as a non-permitted "hotel" under a city zoning ordinance.[76] The plaintiffs argued that by housing the homeless, the church's charity was tantamount to the operation of a hotel.[77] Using a dictionary for guidance, the New York Supreme Court declared the commonly understood definition of a hotel to be "a house which is held out to well-behaved members of the traveling public, *who are willing to pay reasonable rates for accommodations*, as a place where they will be received and entertained *as guests for compensation*, and will be furnished with food, drink, and lodging, and everything which they have occasion for while on their way."[78] The court inferred that sleeping accommodations for compensation, twenty-four hour desk, bellboy or telephone service are prerequisites, set out by the historical definition, to constitute a "hotel."[79] These characteristics were absent from the homeless shelter.[80] Accordingly, the court viewed the shelter as merely a permissible accessory use to the church; the operation of the homeless shelter could continue.[81]

C. MOTEL

One dictionary defines a motel as, "[a] **hotel** in which the rooms are accessible from the parking area,"[82] while another finds that a "hotel and motel are interchangeable and refers to places that provide overnight accommodations to transients."[83] The language "overnight accommodations to transients" can encompass any sort of public accommodation, even campgrounds. In a Rhode Island case, a developer sued a zoning review board to allow the construction of a motel.[84] The plaintiff argued that since a hotel was a permitted use, a motel

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[76] Greentree at Murray Hill Condo. v. Good Shepherd Episcopal Church, 550 N.Y.S.2d 981, 984 (N.Y. App. Div. 1989).

[77] *Id.* at 985.

[78] *Id.* at 986. (emphasis added).

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] THE MERRIAM WEBSTER DICTIONARY 480 (New ed.1994). (Emphasis added).

[83] NORMAN G. COURNOYER ET AL., HOTEL, RESTAURANT AND TRAVEL LAW 572 (5th Edition 1998).

[84] Barbara Realty Co. v. Zoning Bd. of Review of the City of Cranston, 138 A.2d 818, 823 (R.I. 1958).

should also be permitted.[85] The Supreme Court of Rhode Island did not refer to any historical definitions before it held that a motel was the equivalent of a hotel.[86] The court explained that in the absence of any specific definitions contrary to this notion, a motel was a permissible use and could be constructed.[87]

D. RESTAURANT

One historical definition states that a restaurant is "[a] place where meals are served to the public."[88] Many entities can be classified as a "restaurant" under this definition, including a soup kitchen, café, hotdog stand, grocery store, or even a bowling alley. The tenant's lease in *Fulway Corp. v. Liggett Drug Company* involved a restrictive covenant that prohibited the premises to operate as a luncheonette with a soda fountain.[89] The lease was silent as to whether the premises could be used as a "restaurant."[90] The New York Civil Court, however, considered several definitions and held that a restaurant is "a place which serves, through waiters or waitresses, full meals or food specialties, totally or principally at tables, in comfortable surroundings, and where the food is not prepared, cooked and served from apparatus open and visible to the customer."[91] A luncheonette would seem to embody this definition. The New York Civil Court, using its discretion, distinguished the entities.[92] Reasoning that "restaurant service was intended to be leisurely, whereas . . . luncheonette service" is swift with a high customer turnover, the court prohibited the "luncheonette" from operating on the premises.[93]

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[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1108 (New College ed. 1976).
[89] Fulway Corp. v. Liggett Drug Co., 148 N.Y.S.2d 222, 225-6 (N.Y. Special Term 1956).
[90] *Id.* at 226.
[91] *Id.* at 230.
[92] *Id.*
[93] *Id.* at 231.

E. BAR OR BARROOM

A dictionary defines a bar as "[a] room or entity whose main feature is a bar for the sale of liquor."[94] This elusive definition encompasses a wide variety of businesses selling liquor such as wineries, nightclubs, cabarets, some restaurants and possibly liquor stores. When an ordinance in *Hall Drive Ins, Inc., v. City Ft. Wayne* restricted smoking in "restaurants," but did allow smoking in "bars," the Indiana Supreme Court analyzed whether the city correctly charged the plaintiff with violating the ordinance when he allowed smoking in his restaurant's bar.[95] Although shared characteristics easily muddy the water of an entity's definitions, the court noted that the restaurant's bar was not in a separate enclosure.[96] Accordingly, the Indiana Supreme Court held that the bar exception to the smoking ordinance did not apply to this "restaurant."[97]

F. NIGHTCLUB

Webster's dictionary defines a nightclub as, "[a] place of entertainment open at night usually serving food and liquor and providing music for dancing."[98] Restaurants, bars, cabarets, cruise ships and even resorts often contain all of these characteristics. In *Town of Belleville v. Parrillo's Inc.,* a city sued a defendant who converted a restaurant into a non-permitted discotheque.[99] The New Jersey Supreme Court acknowledged that "discotheque" was a new entity in the hospitality industry and had characteristics that the court was not readily familiar with.[100] As a result, the court struggled to find the common meaning of "discotheque."[101] The introduction of new entities into the marketplace presents difficulties for courts to employ any definition. Initially, the New Jersey Supreme Court examined dictionary definitions and found that

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94 THE MERRIAM WEBSTER DICTIONARY 73 (New ed. 1994).
95 Hall Drive Ins, Inc. v. City of Ft. Wayne, 773 N.E.2d 255 (Ind. 2002).
96 *Id.* at 259.
97 *Id.*
98 THE MERRIAM WEBSTER DICTIONARY 497 (New ed. 1994).
99 Town of Belleville v. Parrillo's Inc., 416 A.2d 388, 389 (N.J. 1980).
100 *Id.* at 389.
101 *Id.* at 389-90.

"a discotheque is a small intimate nightclub for dancing to recorded music; broadly: a nightclub often featuring psychedelic and mixed-media attractions (as slides, movies and special lighting effects)."[102] To justify its decision, the court held that hospitality entities must be analyzed in their totality by focusing on the "quality, character and intensity of the use," instead of on historical definitions.[103] Therefore, the court held that the entity was a "discotheque" because of the number of tables, the music volume, how it was advertised, the presence of a cover charge, and that the primary purpose was for dancing.[104] Since discotheques were a non-permitted use, the court found the defendant in violation of the city's zoning ordinance and required him to apply for a zoning variance to continue operating.[105]

G. CABARET

Although nude dancing is historically the primary purpose of a cabaret, one dictionary defines a "cabaret" as identical with a "nightclub."[106] The owner of a nude dancing club challenged the constitutionality of an ordinance requiring licenses for adult cabarets.[107] The city ordinance defined a cabaret as an entity intending to "sexually stimulate any member of the public."[108] This proposed definition could include the restaurant Hooters, any nightclub with professional dancers, stores with erotic literature, and potentially movie houses.

III. CONFUSION OF THE ENTITIES AND LEGAL IMPLICATIONS

This Comment accounts for the amorphous character of the industry and strives to guide individuals, businesses and legislative bodies in composing sound definitions. By properly defining and utilizing explicit restrictive covenants and permitted uses, the ability to draft definitions that are

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102 *Id.* at 390.
103 *Id.*
104 *Id.* at 390.
105 *Id.* at 393.
106 THE MERRIAM WEBSTER DICTIONARY 176 (New ed. 1994).
107 *See generally* Keith Ervin, *Adult Entertainment Returns to Agenda for Bellevue Council,* THE SEATTLE TIMES, Jan. 23, 1995, at B1.
108 *Id.*

consistent with the intent of all interested parties is enhanced.[109] The incorporation of restrictive covenants and permitted uses into the definition of a hospitality term also reduces ambiguity and sets clear parameters for the intended business's operation.[110] As a result, unintended breaches are avoided and the potential for litigation is reduced.

As demonstrated in Part I,[111] increasing urbanization and creative conceptualization gave rise to a large number of various hospitality entities.[112] Overlapping characteristics often occur in modern hospitality entities, making it almost impossible to rely on historical definitions.[113] These changes in modern life require that courts acknowledge the reality of the relationship between customer and business, instead of adhering to rigid historical definitions.[114] Hospitality terms of art that ignore the dynamic nature of the entity often result in legal conflicts.[115] Consequently, modern innovation and its confusing collection of hospitality entities necessitate the need for clear definitions in statutes and contracts.[116]

If a contract or statute contains a vague hospitality definition, distinguishing among the entities becomes a question of fact to be determined by the court.[117] As seen in Part II,[118] ambiguity in hospitality definitions routinely results in unpredictable outcomes in the courtroom as the decisions are often based on "commonly understood meanings" drawn from dated historical definitions.[119] When authors sufficiently define the entity in the contract or statute, however, the court must look to that definition alone.[120]

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109 *See generally* Fulway Corp. v. Liggett Drug Co., 148 N.Y.S.2d 222, (N.Y. Special Term 1956).

110 *Id.*

111 *See supra* notes 29-66 and accompanying text.

112 *See generally* Creedon v. Lunde, 90 F. Supp. 119 (W.D. Wash. 1947).

113 *See generally* Fulway Corp. v. Liggett Drug Co., 148 N.Y.S.2d 222 (N.Y. Special Term 1956).

114 Nelson v. Johnson, 116 N.W. 828, 829 (Minn. 1908).

115 *See generally Id.*

116 *See generally Id.*

117 *See generally* Friedman v. Shindler's Prairie House, 224 A.D. 232, 237 (N.Y. App. Div. 1928). The court uses the circumstances of the conflict, or the intent of the parties, or both. *Id.*

118 *See supra* notes 67-108 and accompanying text.

119 Friedman v. Shindler's Prairie House, 224 A.D. 232 (N.Y. App. Div. 1928).

120 Montella v. City of Ottertail, 633 N.W.2d 86, 89 (Minn. Ct. App. 2001).

A "restaurant" to most people would not include a machine in a hallway which delivers a food item with the push of a button. Yet, the New Hampshire Supreme Court decided a vending machine was a "restaurant," because the applicable statute specifically stated "food vending machines" were an applicable taxable "restaurant" in its definition.[121] By specifically listing permitted and restricted uses for a particular entity, authors can construct clear and unambiguous descripStions of allowable operations and therefore, circumvent judicial interpretation or even prevent litigation.

A. LEGAL IMPLICATIONS IN CONTRACTS

The customary contractual varieties utilized in the hospitality industry where vague legal definitions or terms of art frequently give rise to conflict are leases,[122] owner or management contracts,[123] and franchise agreements.[124] Similarly, in *Oak Hills Property v. Saga Restaurants*, the restaurant owner's sublease provided that access to the attached parking easement was available only if the premises operated as a restaurant.[125] As the lease did not define a "restaurant" explicitly, the court used the commonly understood definition.[126] The property owner proposed that the commonly understood definition of a restaurant was "a business establishment which derives at least 51 percent of its gross revenues from the sale of food and non-alcoholic beverages; and which does not sell alcohol other than as an accompaniment to meals or to individuals generally awaiting tables for food service in an area of the structure that does not exceed 25% of the customer floor area."[127] This definition

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[121] Cagan's Inc. v. N.H. Dep't. of Revenue Admin., 490 A.2d 1354, 1356 (N.H. 1985). The statute further defined a restaurant as an eating establishment where food, food products, or beverages including alcoholic beverages are served and for which a charge is made. *Id.*

[122] Hellenic Inv. Inc. v. Kroger Co., 766 S.W.2d 861 (Tex. App. 1989). A landlord allowed the operation of a "restaurant," but not a "nightclub" on the premises, but did not define the mentioned entities. *Id.*

[123] Thacher Hotel, Inc. v. Economos, 197 A.2d 59 (Maine 1964).

[124] First & First, Inc. v. Dunkin' Donuts, Inc., No. 90-1060 1990 U.S. Dist. LEXIS 7432 (E.D. Pa. 1997).

[125] Oak Hills Prop. v. Saga Rest. Inc, 940 S.W.2d 243, 244 (Tex. App. 1997).

[126] *Id.* at 245.

[127] *Id.* at 244-5.

encompassed specialized proposals, however, which were neither commonly understood meanings, nor terms intended by the parties.[128] The court refused to declare the property owner's proposed commonly understood meaning and the restaurant was allowed to use the parking easement.[129] Providing a definition detailing acceptable uses or restrictive covenants would have prevented this result.

Other contracts that often give rise to conflicts over terms of art in the hospitality industry are management contracts. In *Thacher Hotel v. Economos*, the definition of "hotel" in a statute controlling liquor licenses became relevant when the hotel sued a manager for breach of a management contract.[130] The manager contended that the contract was void in light of a liquor license statute, which required that licenses be issued only to bona fide hotels.[131] The manager reasoned that since the entity was not a bona fide hotel it was not entitled to a liquor license.[132] If this premise was correct, the "management contract" dealt with an unlawful enterprise and was therefore void.[133] The court found that since the statute expressly included "eating places controlled by the manager" in its definition of bona fide hotel, the contract was enforceable.[134] Due to the precise definition in the contract, the court concluded that the "hotel" was bona fide for the sale of liquor consumption on the premises.[135] As a result, the court upheld the management contract.[136]

Definitions of hospitality entities are also relevant in franchise agreements. When Dunkin' Donuts attempted to buy another donut chain, Mr. Donut, plaintiff consumers asked for a preliminary injunction claiming the purchase was an anti-

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128 *Id.* at 244.

129 *Id.*

130 Thacher Hotel, Inc. v. Economos, 197 A.2d 59 (Maine 1964).

131 *Id.* at 60.

132 *Id.*

133 *Id.*

134 *Id.* The Maine Revenue Statute defines hotel as "any reputable place operated by responsible persons of good reputation, where the public, for a consideration, obtains sleeping accommodations and meals under one roof and which has a public dining room or rooms operated by the same management open and serving food during the morning, afternoon and evening, and a kitchen, apart from the public dining room or rooms, in which food is regularly prepared for the public on the same premises." *Id.*

135 *Id.* at 64.

136 *Id.*

trust violation.[137] In determining whether the acquisition would lessen competition or create a monopoly in the fast food sector, the court heard witnesses testify as to the definition of the franchises.[138] One expert witness stated that a Dunkin' Donuts restaurant does not fall neatly into any single hospitality definition because it had characteristics of a bakery, sit-down restaurant and fast food enterprise.[139] Due in part to the entity spanning across many different types of enterprises, the court found there were no anticompetitive effects from the acquisition.[140]

B. LEGAL IMPLICATIONS IN STATUTES

Hospitality terms of art and vague legal definitions give rise to a wide variety of conflicts in statutes. Conflicts generally arise over the application of zoning ordinances concerning sexually oriented businesses,[141] smoking ordinances,[142] and granting of liquor licenses.[143]

In 1970, a New York zoning board revoked a restaurant's building permit.[144] The New York Superior Court examined whether the establishment was a "restaurant," which was a permitted-use, or a non-permitted "drive-in restaurant."[145] Since precise descriptions of these entities were absent, the court analyzed the dictionary definitions to distinguish between the terms.[146] The inadequacy and vagueness of the definitions forced the court to consider attributes like seating capacity, permanency of the building, toilet facilities, parking facilities, and intercom equipment.[147] These characteristics

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[137] First & First, Inc. v. Dunkin' Donuts, Inc., No. 90-1060, 1990 U.S. Dist. LEXIS 7432 (E.D. Pa. 1997).

[138] *See generally* Id. at *125-6.

[139] *Id.* at *130.

[140] *Id.* at *261.

[141] Tily B. Inc. v. City of Newport Beach, 81 Cal. Rptr. 2d 6, 10-11 (Cal. Ct. App. 1998).

[142] Samara Kalk Der, *Smoking Debate Heats Up; Restaurateurs Cool to New Rules,* THE CAPITAL TIMES, Aug. 13, 2002, at 1A.

[143] Kraincic v. Bd. of Zoning Appeals of the City of Willoughby Hills, No. 94-L-113, 1990 Ohio App. LEXIS 930 (Ohio App. Ct. 1990).

[144] Vitolo v. Chave, 314 N.Y.S.2d 51, 54 (N.Y. App. Div.1970).

[145] *Id.* at 54-55.

[146] *Id.* at 57.

[147] *Id.* at 59.

embodied those of a drive-in, which the building lacked.[148] As the premises did not have any attributes of a non-permitted "drive-in restaurant," the building was completed and operated as the proposed restaurant.[149]

Other statutory concerns over hospitality entities arise in liquor licensing requirements. In *Krainic v. Board of Zoning Appeals of Willoughby Hills*, for example, the city required the nightclub to serve a minimal amount of food to its patrons to obtain a liquor license.[150] The city, however, regarded foodservice as effectively turning the nightclub into a "restaurant," which was not a permitted use under the license.[151] As there were no specific definitions of "restaurant" or "nightclub" set forth in the ordinance for guidance, the city denied the zoning certificate.[152] Without securing the proper licenses first, the proposed nightclub could not be built.[153]

Smoking ordinances also present a problem. When Madison, Wisconsin passed an ordinance restricting smoking in restaurants, some restaurants constructed special ventilated rooms costing thousands of dollars to comply with the new law.[154] A short while later, the city passed another ordinance that restricted smoking completely from "restaurants" and the newly constructed ventilated rooms became useless.[155]

C. CHARACTERISTICS OF THE ENTITIES

Some courts recognize the futility of relying upon historical definitions and commonly understood meanings for hospitality entities. [156] As a result, these courts evaluate various characteristics of the entities to determine whether they fall within the scope of the term of art stated in the contract or statute. [157] These characteristics include the entity's primary

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148 *Id.*

149 *Id.* at 60.

150 Kraincic v. Bd. of Zoning Appeals of the City of Willoughby Hills, No. 94-L-113, 1990 Ohio App. LEXIS 930, at *2 (Ohio App. Ct. 1990).

151 *Id.*

152 *Id.*

153 *Id.*

154 Samara Kalk Der, *Smoking Debate Heats Up; Restaurateurs Cool to New Rules*, THE CAPITAL TIMES, Aug. 13, 2002, at 1A.

155 *Id.*

156 Vitolo v. Chave, 314 N.Y.S.2d 51, 57-58 (N.Y. App. Div.1970).

157 *Id.* at 59.

purpose, the manner in which the entity portrays itself, the effects on the surrounding community, the customer base, the characteristics of the operation, specified sales percentages, and the name used by the entity. Although these characteristics are certainly helpful when interpreting the commonly understood definition of hospitality entities, they still leave too much room for discretionary interpretation.

1. Primary Purpose

The primary purpose of an organization is one factor courts use to interpret vague or omitted definitions of hospitality entities.[158] Utilizing the primary purpose with specificity in the definitions promotes a consistent standard.[159] Preventing litigation, however, requires a detailed illustration of how the premises should be maintained.[160] Interested parties and courts understand precisely what conduct is prohibited or permitted via restrictive covenants and permitted uses in definitions of hospitality entities.

When using the primary purpose to get desired results, authors do not always succeed in incorporating the spirit of the agreement.[161] The city of Clifton, New Jersey attempted to keep out a 7-Eleven by claiming it was a non-permitted fast-food entity.[162] The zoning board reasoned that since people place orders for coffee, muffins and slurpees to go, the entity was primarily engaged in preparing fast food.[163] The court found that this was not 7-Eleven's primary purpose and the business was allowed to operate.[164] Although the fast-food ordinance identified its primary purpose, the attempt at specificity did not achieve the creator's goals.[165] Instead, the

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158 *See generally* Kraincic v. Bd. of Zoning Appeals of the City of Willoughby Hills, No. 94-L-113, 1990 Ohio App. LEXIS 930, at *6 (Ohio App. Ct. 1990).

159 Tily B., Inc. v. City of Newport Beach, 81 Cal. Rptr. 2d 6, 11 (Cal. Ct. App. 1998).

160 *Id.* at 11-12.

161 *See generally* Kraincic v. Bd. of Zoning Appeals of the City of Willoughby Hills, No. 94-L-113, 1990 Ohio App. LEXIS 930, at *6 (Ohio App. Ct. 1990).

162 Josh Gohlke, *Clifton Loses Battle to Stop 7 Eleven*, THE RECORD, Dec. 19, 2000, at L1.

163 *Id.*

164 *Id.*

165 *Id.*

use of the words "primary purpose" implies that there must also be secondary uses.[166]

2. Sales Percentages

Authors of contracts and statutes often define entities by utilizing sales percentages of a certain category, such as food or beverage sales.[167] Including sales percentages in a hospitality definition is helpful to limit the occurrence of certain activities, such as alcoholic beverage consumption or even smoking. Madison, Wisconsin altered the definition of "restaurant" in the previously mentioned smoking ordinance by increasing the acceptable percentage of beverage alcohol from thirty-three percent to fifty percent.[168] As a result, entities that patrons believed were bars essentially transformed into restaurants and thus, became subject to the ordinance restricting smoking.[169]

Courts also utilize sales percentages to determine if the business is run according to the primary purpose set out in a contract or statute. When a landlord brought an action for breach of a lease in *Ray-Ron Corp. v. DMY Realty Co.*, the Supreme Court of Indiana evaluated whether the tenant was using the premises outside the permitted use of the restaurant when he installed arcade games.[170] The court used sales percentages to determine whether the "commonly understood meaning" of restaurant precludes a proprietor from providing any more than food or drink.[171] Although the lease did not require a certain percentage of sales, the Supreme Court of Indiana reasoned that a pizza entity did not breach its lease by having video games on the premises, because it received ninety-four percent of its revenue from food and drink sales.[172] In addition, the court stated, arbitrarily, that if the pizza restaurant were to derive two-thirds of its income, instead of

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166 Rose Ltd. Liability Co. v. Watertown Planning, 1997 Conn. Super. LEXIS 2710, at *2 (Conn. Super. Ct. 1997).

167 Samara Kalk Der, *Smoking Debate Heats Up; Restaurateurs Cool to New Rules*, THE CAPITAL TIMES, Aug. 13, 2002, at 1A.

168 *Id.*

169 *Id.*

170 Ray-Ron Corp. v. DMY Realty Co., 500 N.E.2d 1163, 1164 (Ind. 1986).

171 *Id.* at 1166.

172 *Id.*

the actual six percent, from video game machines, then it might be in violation of its lease.[173] To preclude the use of the arcade games, the landlord should have prohibited any sales outside food and beverage in the lease.

Even though sales percentages help determine how an operation is being run or how it is expected to function, they can be difficult to track and often do not reflect the true intent of the parties.[174] Further, many courts dislike using sales or other ratios as the controlling factors in the determination because doing so can induce an entity to conform its internal business operations to the specified percentage ratio.[175]

3. Space Allocation

Authors of contracts, legislators, and courts may specify the definitions of hospitality terms of art with physical space allocation. The capricious nature of this requirement is a battle for courts and parties. For example, in Newport Beach, California, an entity that uses thirty-two percent of its space for nude dancing is considered a cabaret, and thus, a non-permitted use under the city's ordinance.[176] If that same proprietor reduced the space used for nude dancing down to twenty percent, use of the premises would be considered an eating entity, which is approved under the ordinance.[177]

In addition, the overall goal of a contract or statute is compromised when relying on space allocation. For example, in *State ex rel. Edmond Meany Hotel, Inc. v. City of Seattle*, an owner contracted to sell its fourteen story hotel to a retirement home.[178] The city claimed the new use constituted a non-permitted "home for the retired" and not an allowable "hotel."[179] The relevant statute defined the "hotel" as using "fifty percent of its habitable floor area for sleeping."[180] The

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173 *Id.*

174 *See generally* Hellenic Inv. Inc. v. Kroger Co., 766 S.W.2d 861, 867 (Tex. App. 1989).

175 *Id.*

176 Tily B., Inc. v. City of Newport Beach, 81 Cal. Rptr. 2d 6, 13 (Cal. Ct. App. 1998).

177 *Id.*

178 State ex rel. Edmond Meany Hotel, Inc. v. City of Seattle, 402 P.2d 486, 487 (Wash. 1965).

179 *Id.*

180 *Id.* at 489.

city contended that since the retirement home did not utilize this percentage of space, it was an unacceptable use.[181] Although the retirement home was not permitted for other reasons, the court declared that a building is not a hotel merely because of a haphazard percentage limiting the area used for sleeping in its definition.[182]

4. Name

In conflicts over the definition of hospitality establishments, the name is usually taken into consideration. Perhaps the least regarded characteristic of an entity is its name,[183] such as where the property is listed in the yellow pages, how the entity advertises itself or the term is stated on a publicly displayed sign.[184] The property owner in *Friedman v. Schindler's Prairie House* argued that the building was not a hotel under an applicable fire-safety statute.[185] The New York Civil Court found the name "house" instead of "hotel" was not determinative of its genuine nature.[186] Therefore, although what an entity is called is often taken into consideration, generally, it is not controlling in determining whether the entity falls within the definition.[187]

The actual characteristics of an operation carry more weight than the name in determining whether the entity comes within the legal definition.[188] In *Schindler's Prairie House*, the court examined the other characteristics of its operation, which included an office, a large dining room, a thoroughly equipped kitchen, a billiard room and a dance hall.[189] The court reasoned that guests of hotels are often furnished not only with lodging, but meals and entertainment, including music, dancing and certain sports.[190] Since the maintained building

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181 *Id.* at 488.
182 *Id.* at 499.
183 Nelson v. Johnson, 116 N.W. 828 (Minn. 1908).
184 *See generally* Town of Belleville v. Parrillo's Inc., 416 A.2d 388, 390 (N.J. 1980).
185 Friedman v. Shindler's Prairie House, 224 A.D. 232, 235 (N.Y. App. Div. 1928).
186 *Id.* at 236.
187 Moyer v. Board of Zoning Appeals, 233 A.2d 311, 318 (Me. 1967).
188 *Id.*
189 Friedman v. Shindler's Prairie House, 224 A.D. 232, 235 (N.Y. App. Div. 1928).
190 *Id* at 236.

encompassed these characteristics, the court held that the hotel fell within the meaning of the statute.[191]

IV. PROACTIVE DESCRIPTION

As shown above, reliance upon terms of art, dated historical definitions or "commonly understood meanings" of hospitality establishments is not an effective method when drafting contracts or statutes. Instead of allowing courts to determine which factors are appropriate for hospitality entities, authors should utilize descriptions of authorized uses and restrictive covenants to clearly establish the parameters of a permissible operation. Rather than trying to distinguish between all the major hospitality entities, the proactive descriptions set forth below have collapsed the terms of art into the two categories of "lodging" and "food and beverage." The following are examples of permitted uses or restricted covenants that should be considered and utilized when drafting contracts or statutes to avoid conflicts.

Potential Restrictive Covenants or Permitted Uses	
Lodging	**Food And Beverage**
Accommodations Overnight Minimum Number of Hours Minimum Number of Days/Weeks/MonthsPayment by Guest requirements	The Sale of Food Prepared On Site Menu The Sale of Prepackaged Food
Collection and Payment of Occupancy Taxes Membership	Service System 1. Table 2. Counter 3. Take-out 4. Delivery
Rooms 1. Accessibility from a Central Lobby 2. Number 3. Size 4. Amenities 5. Private Bath in Room 6. Computer Outlets 7. Video Equipment	Sale of Alcoholic Beverages 1. Beer by the Glass (tap) or Bottle 2. Wine by the Glass or Bottle 3. Liquor by the Drink or Bottle 4. Price Restrictions/Happy Hours

[191] *Id.* at 236-7.

Common Ingress and Egress	Dancing 1. By the Public 2. By Employee 3. Allowable square feet dedicated to a dance floor. 4. Allowable number of dance areas 5. Clothing Requirement 6. Special Effects (fog machine, strobe lights)
Specific Types of Entertainment Allowed 1. Sporting Activities 2. Music a. Pre-recorded music b. Disc-Jockey c. Types of Live Music d. Volume Level Allowed 3. Dancing a. By the Public b. By Employee c. Allowable Square feet dedicated to dance floor d. Allowable number of dance areas e. Clothing requirement 4. Health Club 5. Pool 6. Tennis Courts 7. Spa Services 8. Hours of Operation Allowed	Music 1. Pre-recorded music 2. Disc-Jockey 3. Types of Live Music 4. Volume Level Allowed
Extent of Food and Beverage service 1. Restaurant on site 2. Room Service 3. Bar 4. Outdoor Dining/Beverage Service 5. Mini-Bars in Rooms 6. On/Off Premises Catering	Smoking Restrictions Age Restrictions Parking Requirements Membership Requirements
Extent of Other Services 1. Laundry 2. Concierge 3. Child Care 4. Valet/Self-Parking	Hours of Operation Parking
Objective Quality Criteria Established by the AAA and Mobile Rating Guide	Objective Quality Criteria Established by the AAA and Mobile Rating Guide

V. CONCLUSION

Assuming that hospitality terms in contracts and statutes are self-explanatory leads to serious and unexpected consequences. Non-descriptive terms of art often lead the court to use historical definitions and "commonly understood meanings" to interpret the intent of the parties and legislators. Due to the ever-changing nature of the hospitality industry, "commonly understood meanings," such as "restaurant" or "hotel" are not so common anymore. Historical definitions are outdated. Since this approach results in unpredictable outcomes, legislatures and contracting parties should instead be more specific when drafting. Utilizing restrictive covenants and specific permitted uses enhances the ability to draft definitions that are consistent with the intent of all interested parties. All affected stakeholders can incorporate any intentions in the contract or statute with a proactive utilization of the descriptions set forth in Part IV.[192] The use of these and other applicable permitted and restrictive covenants prevents litigation because it allows drafters to communicate their purposes and assist interested parties to appreciate the designed expectations or limitations.

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[192] *See supra* text and accompanying chart

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