

EXCLUSIVE USE CLAUSES: THREE KEYS TO MAKING THEM WORK FOR YOU

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Tenant exclusive use clauses have proven to be very contentious in negotiating leases. Tenants demand them to protect against competition and maximize sales, while landlords resist them in order to retain maximum flexibility in marketing their centers to prospective tenants and in creating the ideal tenant mix.

An exclusive use clause, or "exclusive," reflects the agreement of the landlord to allow any other tenants within the shopping center to use their respective premises for a specific use, whether selling certain products or providing certain services. Exclusive uses may cover all or only a portion of a shopping center or may extend to a radius beyond the shopping center.

When entering into and negotiating a lease, writing a meaningful exclusive use clause is critical. Three points to consider:

Drafting Considerations. Tenants desire an exclusive use clause to protect their operations from competition from other tenants. A clause which is too narrow in scope will not adequately protect the tenant against competing uses of other tenants. Additionally, although the clause may be drafted broadly, if the clause contains too many exceptions or "carve-outs," the benefits of having the clause will be negated. Even if a tenant is successful in negotiating the inclusion of an

exclusive use clause in its leases, the tenant may not have the level of protection that it thought. For example, other tenants which have entered into leases at the shopping center before the tenant will not be bound by the tenant's exclusive. Furthermore, most exclusive use clauses will not apply to large anchor tenants and therefore, should the anchor expand or change its business, a tenant might find itself in direct competition with the proverbial eight hundred pound gorilla in the shopping center.

Future Tenants. It is important that the tenant's exclusive is binding upon all future tenants of the shopping center. Therefore, the exclusive should specifically obligate the landlord to include the tenant's exclusive into an addendum or rider which will be attached to all future leases and restrict all future tenants. Also, a short form memorandum of lease may be filed in order to put third parties on notice of the exclusive use in that shopping center. These steps are important to support the tenant's position in seeking an injunction against an offending tenant.

Affected Area. Even the most carefully drafted exclusive cannot protect a tenant from potential competition in a nearby shopping center not owned by the landlord. However, the landlord may own adjoining properties. Therefore, a prudent tenant should try to make sure that area restricted by its exclusive use clause covers not only the presently existing shopping center, but all future expansions thereof and adjacent properties owned by the landlord. This consideration is especially important in shopping centers under construction or which are being built in phases. Again, negotiating power will dictate a tenant's success in this area.

Remedies. Finally, a tenant should negotiate for specified contractual remedies. Because damages may be difficult to prove, a landlord needs an incentive to make sure there is no violation of the exclusive use clause. These "incentives" may come in the form of various

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types of damages sought by a tenant. Such remedies typically include a tenant's ability to terminate the lease, sue the landlord for damages, seek abatement of rent, liquidate damages or recover lost profits. Keep in mind, however, that remedies available to a tenant for breach of an exclusive use clause will be dictated by state law and may be severely limited by the courts. The remedies contained in the lease must negatively impact the landlord enough to dissuade the landlord from breaching the exclusive, notwithstanding a high rental rate that it might receive from another (competing) tenant. For example, a tenant should never agree as its sole remedy to a reduction of rent tied to a demonstrated loss of sales, nor should a tenant agree to the termination of the lease as its sole remedy. Furthermore, if a landlord violates the tenant's exclusive use clause, consideration should be given to releasing the tenant from other restrictions contained in the lease (i.e. radius restriction).