

Focus On Exclusive Use Clauses in Retail Leasing

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There is no question that an exclusive use clause can be an asset to the retail tenant. Whether the tenant in question is a household name or a mom-and-pop store just starting out, eliminating the competition within the tenant's own pond can allow the tenant to be the big fish in that pond. Coupled with a well-chosen location in a vibrant center, an exclusive use clause can give the tenant an edge and help ensure a steady stream of potential patrons from the tenant's own backyard.

Whether to grant an exclusive use often involves a more nuanced analysis on behalf of the retail landlord. The grant of exclusivity to one tenant today narrows the pool of potential tenants from which a landlord can draw tomorrow. No landlord wants to make it harder than it has to be to fill vacant space, or have to turn down a request from an existing tenant to change its use. On the other hand, demonstrating a willingness to work with a prospective tenant as to exclusivity may land that particular tenant for the center. Additionally, retail landlords typically have a vested interest in creating a diverse tenant mix.

From the tenant's perspective, it is important that the exclusivity clause accurately captures the types of uses and businesses from which the tenant seeks to be insulated. In most instances, the landlord will endeavor to narrow the scope of the exclusivity in order to maintain the utmost flexibility in future leasing activities. For these reasons, the tenant's permitted and/or actual use may not be precisely the same as the tenant's exclusive use. By way of illustration, the owner of an ice cream parlor may seek the exclusive right not only to ice cream sales, but also to the sale of frozen yogurt. On the other hand, if the ice cream parlor sells cakes and pies, but those sales make up only a fraction of overall sales, the owner may not be as concerned about extending the exclusivity to bakeries. Conversely, a bakery's exclusive may prohibit only businesses that derive more than a small percentage of their total sales from bakery items, such that the ice cream parlor and the bakery could coexist within the same center, as could a sandwich shop that offers desserts. To further this example, the local coffee shop a few suites down may have an exclusive use clause that would prevent a national coffee chain from moving into the center, but might permit the ice cream parlor, the bakery and the sandwich shop to sell coffee.

In granting exclusives, a landlord needs to account for the rights of existing tenants in the center. For example, an existing tenant with a lease permitting that tenant to use its space "for any lawful retail use" would need to be carved out from any exclusive granted to a new tenant. A tenant will be equally interested in the rights of the center's existing tenants which are potential competitors to the tenant. For that reason, it is good practice for any existing lease granting exclusive use rights to a tenant to expressly identify the rights of existing tenants in the center that are paramount to those rights.

The duration of an exclusive use clause is also an important consideration. The exclusive use clause is designed to protect a tenant's ability to operate a specific business in the center. If the tenant subsequently goes dark or engages in a different business activity in its space, the protection afforded by the exclusive use clause is no longer required, and the exclusive use clause should terminate at that point. Of course, if a tenant is in default under its lease, it should no longer be entitled to the benefit of the exclusive use clause. Finally, while a landlord may be willing to grant a particular tenant with experience operating a particular line of business the exclusive right to operate that line of business in its center, the landlord may not be willing to allow an assignee or subtenant of that tenant to enjoy the benefit of the exclusive use clause.

Another important consideration for both parties is the availability of remedies for a violation of the exclusive use clause, including the right on behalf of a tenant to sue to enjoin. Often, the tenant wants a more accessible remedy than the mere right to sue the landlord to enforce the terms of the lease, and damages can be hard to prove. Instead, the tenant may negotiate the right to abate a portion of the rent during the pendency of a willful violation by the landlord, and, if the violation continues for a certain period, the right to terminate the lease. However, the landlord may be willing to permit the tenant to terminate its lease only if the violation is caused by a rogue tenant, the violation continues beyond a specified waiting period, and the violation has a material impact on the tenant's business. Where a tenant has a termination right after a specified waiting period, a landlord may well require the tenant to either exercise that right or commence paying full rent again under its lease.

As with many lease provisions, a well negotiated exclusive use clause is key to protecting and balancing the interests of both the landlord and the tenant. Careful wording can help both parties avoid unintended consequences and achieve their goals.

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