

Retail Commercial Leasing Nuts and Bolts: Protect Against Use and Exclusive Conflicts

by David S. Drobner

Introduction.

Key to success in any retail shopping center is a landlord's thoughtful control in the creation of a "tenant mix" - the many uses permitted in the shopping center and the resultant synergies. The goal is to make the center attractive to consumers as a one-stop shopping experience; an exciting destination, offering sufficient variety in an easy-to-navigate configuration. Yet even experienced landlords make common leasing mistakes that create unwarranted and dangerous risks. A few guidelines may provide important safeguards.

Use a standard lease agreement – but customize it properly.

From sophisticated investors who own many shopping center properties, to local developers acquiring or constructing one retail strip center at a time, shopping center owners typically employ one "standard" commercial lease form in every instance at all their strip shopping centers. True, the names and signature blocks will change, and an exhibit or two may change as well. But, by and large, the form is often the same. This makes good sense for many reasons. It eases lease administration - one can "know the form" irrespective of the property. It also allows for the uniform incorporation of improvements to the lease form, based upon individual experiences at each property.

But whether the standard form is to be used for the first time at a newly acquired shopping center, or whether the form is already in use, it is important to particularize the form for each shopping center. Perhaps one of the most important but often ignored issues in this process involves properly addressing the "use and exclusives conflicts" concern. A failure to pay attention to this important risk may result in far greater damages than might be imagined, including litigation and lost tenancies.

Take care when crafting use clauses and granting exclusives.

To create a desirable shopping experience (and thus a successful shopping center investment), landlords need retailers of sufficient variety and competence. To that end, it's critical to exercise strong control over the use clause in a lease. The key is to keep the use "narrow," with the valid underlying philosophy to focus the tenant on its core expertise. Landlords also may wish to group certain uses in the same vicinity; a simple and obvious example is the grouping together of food tenants. Against this background is a concept in retail leasing which, arguably, is at odds with the foregoing: the granting of an "exclusive" right of use to a particular tenant.

In concept, an exclusive can promise a protected tenant that no other tenant who leases subsequently in the center will have a permitted use too similar to – and therefore competitive with – certain aspects of the protected tenant's use. For example, a national fast food burger restaurant may successfully bargain for an exclusive protecting against another tenant primarily selling fast food burgers.

Landlords typically prefer to avoid giving exclusives because, in doing so, choice and control over future uses is impaired. Tenants typically want such an assurance but often lack the negotiation leverage to win it. A seasoned leasing attorney is a valuable partner in the process of crafting such language, including how to address the parties' remedies.

Implement procedures to protect against use and exclusive conflicts.

A lurking, often ignored danger to every shopping center owner arises out of the existence of exclusives: the possibility of unintentionally permitting a use in a new lease which violates an existing exclusive already granted to another protected tenant. The consequences of this mistake can be serious and very costly, and may result in expensive litigation.

Guarding against the use and exclusive conflict requires constant vigilance. Those who operate and lease shopping center properties must fundamentally understand at all times the current uses and exclusives permitted or granted in each shopping center. Landlords should make sure to:

1. Develop an accurate, current summary of all the exclusives. This process requires a review of all the leases for the actual exclusive language. This is the document usually used in discussions with existing and potential tenants and is often an exhibit to the lease, as a list of restrictions on use that the new tenant must agree it will abide by and not violate.
2. Avoid including all the details of the actual exclusive language in the summaries. There is an art and a science in the crafting of the summaries. For instance, a common mistake is to include portions of the exclusive language which need not, and sometimes clearly should not, be disclosed. Some of the details of your agreement with one tenant which were rather tenant favorable, obviously should not be disclosed during negotiations with another tenant.
3. Excerpted copies of the actual exclusive language from each lease where exclusives have been granted should be maintained in a separate and routinely updated file. This may be vital because, in cases where a new prospective use seems dangerously close to an existing exclusive as set out in the summary, or in dealing with majors or anchors, the summary may be insufficient. In these cases, there will be a need to "go to the source."

Utilize appropriate professional resources.

While a standard lease agreement is an efficient tool, it does not replace the seasoned leasing attorney. The leasing lawyer plays a significant role throughout the process, including helping to protect the parties from the dangers involved in the unintentional granting to a new tenant of a use which conflicts with existing exclusives in the shopping center. In fact, the lawyer's role is significant throughout the process:

- The lawyer may guide in the development of policies and procedures to force resolution of these conflicts while leasing agents and brokers are actually negotiating the lease deal.

- The lawyer can review the lease deal terms when first presented for preparation of a lease, giving consideration to the existence of any use and exclusives conflicts.
- The lawyer can apply his or her craft to the preparation of language. The lawyer's craft in focusing the use clause, and writing the exclusive granting language when applicable, can be instrumental in protecting against use and exclusives conflicts.

Conclusion.

When leasing out space in a shopping center, the educated operator, manager and owner should pay close attention to the risks surrounding use clauses, exclusives, and their possible conflicts. Among other things, the "standard" form lease should be particularized to maximize protections, and there should be practical procedures and safeguards for leasing personnel and brokers to follow. A retail commercial leasing lawyer's involvement, especially in the crafting of language, can be vital in diminishing the risks to landlord including the potentially high costs of damages and lost tenancies.

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