

Exclusive rights

How exclusive use clauses benefit both landlords and tenants **Interviewed by Meredyth McKenzie**

You are a retail tenant and it's time to renew the lease on your current location, but when you contact your landlord, there's a major problem. Another business in the same industry has also signed a lease in the retail center. Now, you are forced to compete with your next-door neighbor or find a new location.

Including an "exclusive use clause" in your lease agreement can go a long way in preventing this problem from happening. Exclusive use clauses are more prevalent in the retail sector, but do occasionally show up in office or industrial leases. They protect tenants in the event that a competitive retailer or retailer with a similar "use" attempts to move into the same complex. It also protects landlords by limiting an existing tenant's ability to change its uses during the lease term and by providing them room to lease the remaining areas of the center.

"You want to have something that allows the landlord to grant an exclusive use to a tenant," says J.R. Yocco, retail brokerage and leasing manager with Grant Street Associates, Inc. "But at the same time, you want to make sure it doesn't restrict the landlord from entering into a lease down the road with a physically larger business."

Exclusive use clauses also can impact the tenant mix synergy, so you want to be sure that it is fair to both parties.

"You don't want the majority of your leaseable area to be taken up by one kind of business, because that's overuse," says Jared S. Imperatore, retail brokerage and leasing manager with Grant Street Associates, Inc."

Smart Business spoke with Yocco and Imperatore about the key points for understanding exclusive use clauses.

What are the benefits of including exclusive use clauses?

From a tenant's perspective, one benefit is that it eliminates the chance that your competition will move in next door. For example, many tanning salons have exclusive clauses in their leases so that no other tanning facilities can move into the same center. But certain gyms include tanning beds as part of their services. There could be a problem if that gym moves into a facility that includes a tanning salon. Even if it's 10 to 15 percent of that gym's business, it's still being offered there. The gym might have to change its business plan because of the exclusivity clause.

Another plus is that an exclusive use clause limits a certain ratio of businesses within a



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center that could negatively impact your business. An example of this would be a neighborhood center with a doctor's office. The medical facility would not necessarily want to be next door to a nail salon, where fumes or chemicals might negatively affect its patients. Exclusive use clauses can help to prevent this from happening.

On a similar level, landlords can ensure a greater return on investment by structuring leases with exclusive use clauses to provide a more attractive offering to the consumer. In smaller centers, an overage of restaurants can present parking problems. An exclusivity clause would help to control the tenant mix and ensure ease of traffic and parking.

What are the risks associated with exclusive use clauses?

Landlords often have to weigh the risks of signing large retailers because many of them have blanket exclusivity clauses that limit the ability of other tenants or the landlords themselves from providing a full-service offering to customers. This could occur if a major grocery chain demands a clause that limits various uses such as florists, optometrists, pharmacies, daycare, fitness centers and delis. A large user will generally negotiate a lower rental rate, as well, so if the landlord agrees to this, he could be narrowing his profit margin on top of reducing the list of prospects to occupy his center.

For tenants, the risk involves the limitations placed on expanding or changing uses. If an exclusive use clause is part of your lease, you may not be able to add another business line

to your company — a deli might not be able to add a specialty coffee bar to its location if it was situated near a gourmet coffee shop.

What can be included in a typical exclusive use clause?

You can look at percentage of sales or a certain use within an exclusivity clause. That can be a wet use, like a restaurant, or dry retail, such as a communications or optical store. Location can be included in an exclusive use clause. You can have an exclusivity that no other restaurants can be constructed on an out parcel near your location and will have first right of refusal on that out parcel if any restaurants try to come in.

The key is to make sure that the level of protection is as reasonable as possible for all parties. You don't want one to be adversely impacted, so you can look at something like percentage of sales to keep it fair.

You also want to try to get as close as you can to all parties being protected in the lease and find out what's really important to them, but that doesn't always work. You have to pick your battles. You'd love to have everything, but where would you put it all?

How do exclusive use clauses vary between big box and small business tenants?

Big box tenants have more flexibility and carry a big stick. They can get a wider variety of clauses and uses in the lease. They can look for carve outs because they won't necessarily dismiss a location just because someone else is doing similar business there. You have to look at the existing uses, because you can't go back and hurt a company that's already doing business in the center.

Small businesses just don't have that flexibility — they need more protection because the exclusivity clause will directly impact them. They will need to stick to the key points of the clause because they'll only go so far in the process. Even though you may not get every point of an exclusivity clause, it is absolutely worth going after and at least you can get some protection.

In the end, it all goes back to the structure of your document. You have to work with your broker to make sure that you know about and understand any exclusivity clauses in the lease before you are committed to a long-term agreement. <<

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