WHAT YOU NEED TO KNOW ABOUT RESTRICTIVE USE CLAUSES

By Dana Kreis Glencer

For retail tenants and landlords alike, use and exclusive use clauses, which refer to the terms written into a lease that dictates what is and is not permitted by both parties, are a critically important part of the tenant-landlord relationship and lease negotiation process. It is also a potentially contentious subject that will not only affect a retailer’s operational specifics, but can have a profound impact on the bottom line.

While clauses can be restrictive or permissive (some of which depends upon context, perspective, and legal and rhetorical interpretation), language in the lease that limits the landlord’s ability to enter into leases with other tenants who have a competing product or service are among the most common. This category of restrictive use clauses is also arguably the most important for retailers to understand and leverage to their advantage.

On the surface, restrictive use clauses may seem fairly straightforward. A tenant may to have the benefit (or rather the exclusive right) to be the only tenant in a shopping center which sells or uses its space for a specific purpose. For example, a national sandwich brand retailer like Subway would not want another sandwich retailer situated nearby and would seek to secure a restrictive use that would grant it the “exclusive right” to sell sandwiches there. This would be deemed a “restrictive use or covenant” against the landlord leasing or allowing another space in the shopping center to be operated in a manner which may violate Subway’s exclusive use provision. Sounds simple, right?

The gray areas begin to creep in very quickly, however. What if a fast-casual taco concept wants to secure space in the center? Subway may say it’s a violation of the restricted use clause, but a landlord might say that the restricted use clause only prevents other sandwich shops from opening in the vicinity. As
comical as it may seems, this scenario could lead to a lengthy—and potentially relationship-damaging—debate about whether a taco can be considered a sandwich.

Restrictive use clauses can also be affected by new products and concepts that enter the marketplace. Language that seemed clear and comprehensive eight years ago might be on shakier ground when a new retail concept arrives on the scene. That is why it is so important that the defining language in a restricted use clause be eminently clear and precise. Consider the medical marijuana shops appearing in some locations. A family-oriented business like a movie theater may have cause to not want that type of store in the same shopping center, but it is not likely that cannabis shops were something imagined by the theater owners when signing its lease and drafting its restricted use clauses.

How broadly these clauses may be defined depends on several variables. Influential national brands or new, hot concepts are more likely to secure broader restrictive use clauses. A landlord might also be more flexible if, for instance, a highly desired tenant agrees to locate in several of its centers. Some landlords are so motivated to sign tenants that they will often agree to generous restrictive use clauses, while others may rarely, if ever, agree to exclusives.

Tenants have their own priorities, of course, and their decision-making process is based on a similar blend of self-interest and circumstances. Some tenants may recognize they have little to no chance of securing a use restriction against the landlord’s shopping center, while others might even push to expand a restrictive use clause onto other landlord-owned properties within a certain distance.

Above all, it is essential that retailers understand exactly what they are getting and what they are potentially giving up when they enter into negotiations around restricted use clauses, including. Some items for consideration:
- Retailers advocating for their own interests would be wise to push for terms that are as broad as possible—for as long as possible.
- Think about what your business will look like in five to 10 years and conduct that same exercise with your competitors. Think about whether the agreement you sign today will be flexible enough to accommodate anticipated business changes.
- Carefully consider your relationship with the landlord. Your tactics and priorities are likely to be different depending on specific landlords and markets.
- Make sure there are strong and clear remedies in your lease for any violation of your exclusives.

If one party feels that terms of the restrictive use clause have been violated, their options include actions like terminating the lease, possibly ceasing rental payments, and seeking legal recourse and injunctive relief if the issue is not resolved.

The remedy section in the lease usually stipulates a previously agreed-upon course of action. In some cases, the clause may contain language that stipulates that those remedies do not apply if certain conditions are met (such as

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Finally, while landlords want specificity with no gray areas and tenants want terms that are as broad as possible, it is important to remember that both sides have an interest in striking a reasonable balance. No one benefits from a center that is unleasable. Everyone wants to profit from the co-tenancy benefits that can come from a diverse and vibrant tenant roster. Viewed through that lens, restrictive use clauses ultimately are not really about restrictions at all. They are about finding ways for all parties to benefit from a thriving commercial or mixed-use environment.