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COMMERCIAL LEASE NEWSLETTERS

Exclusivity Clauses and Use Clauses:

In the December 2007 newsletter exclusivity provisions were addressed and the need to have such exclusivity provision written in clear, unambiguous and definite, identifying each and every right that was granted to the commercial tenant for the exclusive use of the subject premises.

The countervailing clause in reference to exclusivity provisions is the use provisions.

I. Definition of Use Provision

A use provision is a specific grant of the identifiable and allowable use of the Leased Premises set forth in the Lease Agreement. It seems fairly fundamental to commercial property owners and landlords that it is important for a commercial landlord to be able to control the type of use to be made at the commercial landlord's building, business premises or shopping center. However, in many instances the Trier of Fact, Judges or juries aren't sophisticated to the extent of understanding the specific requirements of a commercial landlord or property manager in making sure there is an appropriate tenant mix at the building, especially where tenant mix is significant such as a retail setting where a proper diversity of tenants is required for the success of the retail center.

II. Use of Premises is restrictive rather than permissive/all encompassing

Contrary to the exclusivity provision, (which indicates that the tenant has a sole and exclusive use of the premises for a specific and identifiable purpose), the use provision specifically **limits** the tenant as to the type of use stated and as identified by the landlord. There is the restrictive end of the use provision which indicates that the tenant can utilize solely and only for the use identified in that specific use clause.

Further the fact that the tenant is allowed to utilize the premise for such use does not imply, indicate or in any way require the landlord to preclude other tenants for making use of the premises for that very same purpose. The point of the use provision is to specifically and clearly identify for the tenant the use it can make of the subject premises so that the tenant can not stray from such use and the landlord can clearly control the tenant mix at the premises.

An example of this would be a shopping center which consisted of approximately ten stores anchored by a major supermarket chain and which might consist of an insurance office, a hair salon, a clothing store and several other retail establishments.

Quite obviously in such a shopping center for the tenants to be viable there can't be a duplication of the uses by one tenant as against the other. By way of example and in using our ten store model, it would be counterproductive for both the tenants as well as the landlord for the landlord to allow for two retail stores essentially having the same service or product to be located in close proximity in such a small shopping center.

While it might be acceptable for two ladies clothing stores to exist in a regional mall, a small shopping center would not be well served by having two ladies specialty stores located next to or in close proximity to each other with the small amount of traffic that would support such ladies specialty store.

III. Reasonable Restriction – Landlord can not withhold consent for Assignment of Lease

In many situations, a tenant is willing to sell its business to a third party purchaser who wants to assume the lease and take over the tenant obligations. In the case of Fernandez v. Vasquez, 392 So.2d 1172 (3DCA 1981) the Court indicated the following criteria indicating that the landlord must not unreasonably withhold consent to transfer:

“Where the lease merely contains a provisions – without more – granting a person, normally a **landlord**, the power to withhold **consent**, regardless of whether explicitly qualified to reasonable exercises of the power ... the courts have held the person's refusal to **consent** to a person acceptable by reasonable commercial standards to be an unreasonable exercise and thus violative of the lease.....”

“...the following factors are among those which a jury may properly consider in applying the standards of good faith and commercial reasonableness: (a) financial responsibility of the proposed subtenant (b) the “identity” or “business character” of the subtenant, i.e., suitability for the particular building, (c) the need for alteration of the premises, (d) the legality of the proposes use, and (e) the nature of the occupancy, i.e., office factory, clinic, etc.,;

See Popovic v. Florida Mechanical Contractors, supra. Whitman v. Pet Inc., supra. American Book Co. v. Yeshiva University, Development Foundation, Inc., 59 Misc.2d31, 297 N.Y.S.2d 156 (1969); Johnson v. Jaquith, supra. Denying consent solely on the basis of personal taste, convenience or sensibility or in order that the landlord may charge a higher rent than originally contracted for have been held arbitrary reasons failing the tests of good faith and reasonableness under commercial leases. Catalina Inc., v. Biscayne Northeast Corp., supra., [**9] Chanslor-Western Oil & Development Co. v. Metropolitan Sanitary District, 131 Ill.App.2d 527, 266 N.E.2d 405 (1970, citing Broad and Branford Place Corp. v. J.J. Hockenjos Co., 132 N.J.L. 229, 29 A.2d 80, 82 (1944)).”

However, as noted in Fernandez v. Vasquez the landlord can specifically refuse an assignment of the lease if the new prospective tenants would be making use of the premises inconsistent with the prior use. This is supportive of the fact that a granting clause or premises use clause can be specific and a tenant can only utilize the premise for the purpose intended as a matter of contract law and for no other purpose.

Landlords should draft with specificity the use provision. One example of a use provision which would limit the premises for a specific use would be as follows:

“USE – For the primary use of a full-service restaurant serving beer and wine only and a variety of entrees and appetizers including cheese plates, antipastos, salads, flatbread pizzas, sandwiches and deserts; and for no other purpose.”

The use provision should be drafted by the commercial landlord with a clearly identifiable purpose for the landlord to insure a specific use only. Again the same concept applies in regards to the use provisions as it would apply to exclusivity provisions.

If the tenant strays from the use of the premises by contract the landlord needs to be in a position clearly and identifiably set forth to the Court why the tenant can not utilize the subject lease premises in the manner objectionable to the landlord and demonstrate to the Court that use of the premises violates the specific use provisions set forth in the use lease. Precise clear lease language which can be viewed objectively by a Trier of Fact must be incorporated into the document.

Problems that the landlord faces in regards to improperly drafting use clauses [or exclusivity clauses as discussed in the December, 2007 newsletter] is that (a) the landlord may not be able to enforce such a provision if it is not clear; (b) if the provision is not clearly drafted or the tenant believes it has some exclusive right to the type of business, the tenant may assert such claim can sue the landlord for constructive eviction by the

landlord as a result of the Landlord entering into the lease with another tenant having a similar type use for a location at the shopping center. Hollywood Shopping Plaza, Inc. v. Schuyler, 179 So.2d 573 (4DCA 1965).

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