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"USE(LESS) CLAUSES"

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LEASING LAWS

Use(less) Clauses

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Leasing persons often draft "use clauses" describing the business that the tenant is restricted to conducting in the premises based on their own ideas of how to describe the business. This can be risky.

If the language is imprecise, litigation is probable, where other tenants have the benefit of exclusive use restrictions in their leases that protect against competition. Also, the synergy of a complementary mix of tenants may be jeopardized. The use clause becomes useless in avoiding business failures from unbalanced competition and incompatible uses. To improve the drafting, two basic principles of interpretation must be kept in mind:

First, use clauses, since they restrict the tenant's ability to have the free use of the property for which it pays rent, will be interpreted to minimize their restrictive effect. As a general rule, if there is ambiguity or a lack of specific, restrictive wording, *the clause will be construed to allow flexibility.* Landlords cannot expect the courts to tighten up loose language to enable them to restrict tenants from running their businesses in the way that makes most sense to them.

Second, words will be given their ordinary meaning unless there is an express contrary statement. A dictionary is indispensable. For example, if you look up "drug store" and "supermarket" you will find definitions that allow a significant overlap of merchandise between them.

Keeping these principles in mind, here are some suggestions:

General category of business: Describe the general type of store to be operated (i.e. a sporting goods store or a drug store).

Theme and trade name: State the theme for the store (i.e. a clothing store emphasizing women's high-fashion clothing and accessories, a clothing store selling primarily lingerie, or a clothing store for family, value-oriented customers) and state the store's trade name. If the store is meant to resemble other stores with that trade name, state that intent.

Categories of merchandise: List categories of merchandise that further illustrate the theme for the store. This can be done on an inclusive basis (i.e. "including but not limited to").

Balance of merchandise: A tenant could change

the general type of store by shifting its emphasis from one category or group of categories to another within the list of permitted categories, if the clause does not require it to offer a general, balanced selection. If a clause were worded, "*The tenant will sell sporting goods including but not limited to sportswear, sports equipment and other sport related merchandise,*" the tenant could, at various times, operate as a golf store, camping equipment retailer, sports footwear store or fashion apparel store featuring sport-themed clothing.

Ancillary merchandise: If subsidiary lines of merchandise will be sold, identify them and limit them as to percentages of shelf space, advertising dollars and annual sales.

Other tenants' exclusives: Since even a good use clause can contain grey areas, it is important, if exclusive use covenants have been granted to other tenants in the shopping centre, for the tenant to be informed (preferably by attaching copies to the lease as a schedule).

The tenant should agree to abide by those exclusives, and should also agree to indemnify the landlord against legal costs should litigation arise due to another tenant suing the landlord based on an alleged breach by the tenant. If the landlord is considering granting exclusive use clauses to prospective tenants, they should be attached and the tenant should agree to be bound by them.

Other specific prohibitions: Attempt to anticipate items that you particularly would not want the tenant to sell and identify them. For example, a store selling women's apparel and accessories might be expressly prohibited from selling shoes, and perhaps handbags and jewelry. The landlord should also consider its future plans for the shopping centre to ensure that specific other proposed uses are protected where there is a chance that a use clause might allow the tenant's business to clash with an intended business. This is particularly a concern among food court tenants where menu items can cause serious problems if they overlap.

These suggestions should reduce conflict and smooth out merchandising activity, but their real goal is to emphasize the need for caution when dealing with this very sensitive and potentially troublesome part of the lease.