

# Drafting Commercial Lease Use Provisions: Permitted, Exclusive, or Restrictive Use

Avoiding Anti-Competition Concerns and Establishing Reasonable Scope Limitations,  
Regulation, and Enforcement

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Today's faculty features:

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# Drafting Commercial Lease Use Provisions: Permitted, Exclusive, or Restrictive Use

Avoiding Anti-Competition Concerns and Establishing Reasonable Scope  
Limitations, Regulation, and Enforcements

September 30, 2021



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Hannah Dowd  
McPhelin



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## 01. Permitted Use

What can a tenant use the space for?

## 02. Exclusive Uses

What uses are exclusive to a tenant and what uses must the landlord prohibit for other tenants?

## 03. Restrictive Uses

What is the tenant expressly prohibited from using the space for?

## 04. Best Practices; Sample Provisions; Q&A

Best practices  
Sample Provisions  
Questions and Answers



# Permitted Uses

# Permitted Uses – Considerations

- Statement of what Tenant may do in leased space
- Opening Covenant and Remedies
- Continuous Operations Covenant and Remedies
- Obligation to occupy (non-retail context)
- Provisions related to use: operating hours, signage, advertising, parking
- Rules and Regulations
- Outparcels
- Brand and Trade Name restrictions
- Percentage Rent

# Landlord's Perspective

- Landlord (or landlord's lender) may want to ensure that the building is being used at a certain level (premium/high end or not "low end" or for less desirable use)
- Tenant complement
- Percentage Rent
- Draw shoppers and other tenants
- Get use that was "bargained for"

# Tenant's Perspective

- Incentive to broaden permitted use for maximum flexibility
- Future changes in use or new innovations
- Permitted use should include every facet of intended use, including ancillary uses

# Landlord's Perspective

- Landlord must consider existing and future tenants' rights
- Control changes
- COVID considerations
- Lender considerations
- Landlord remedies

# Tenant's Perspective

- Assignment/Sublease considerations
- Anticipated changes in use
- How permitted use affects compliance obligations
- COVID considerations
- How to make a change

# Best Practices – Permitted Uses

- Make sure both parties understand what Tenant is permitted to do
- Use plain language
- Make sure any potentially ambiguous terms are defined or described
- Make sure the Lease addresses how changes will be handled
- Make sure remedies are clear



# Exclusive Uses

# Exclusive Uses – What Are They?

- Right of a tenant to be the only tenant at the property allowed to engage in a specific use
- All other tenants/occupants must be prohibited from engaging in this use
  - Competitor names, shelf space or sales area, certain products
- Always include all existing exclusive and prohibited uses as a Lease exhibit and require Tenant to abide by them
- How to handle waivers
- Possible carveouts for exclusive uses

# Landlord's Perspective

- Landlord wants to narrow as much as possible (sale of specific food/goods/services vs. entire categories)
- Flexibility for future leases and plans for the property
- Obligations to existing tenants

# Tenant's Perspective

- Ensure no competition (or as little as possible for your business)
- Prohibit Landlord from consenting to other tenants' change in use or assignment or subletting
- Consider what the landlord entity owns
- Consider ordering a title report

# Exclusive Use Considerations and Remedies

- Tenant Remedies
  - Rent abatement (and sunset of same)
  - Termination right(s)
  - Rights against other tenants
    - ❖ Cure periods
    - ❖ Scope of obligations
    - ❖ Litigation
    - ❖ Who pays for costs?
- Rogue Tenants
- Radius Restrictions
- When do they end? (default, certain time period, go dark)
- What to do if Landlord only owns part of Center
  - How to bind Landlord affiliates and third parties

# Best Practices – Exclusive Uses

- Narrow enough to create flexibility for Landlord to lease the rest of its property
- Broad enough to protect Tenant's exclusive use
- Descriptive enough to eliminate competition and capture the nature of the business
- Keep up to date document of prohibited and exclusive uses for each property
- Helpful if you keep verbatim copies, do not paraphrase
- Where issues and disputes arise



# Restrictive Uses

# Restrictive/Prohibited Uses – Considerations

- Use Plain Language
- Explicit Terms
- Preclude Tenant from selling specific items
- Always include all existing exclusive and prohibited uses and require Tenant to abide by them
- Declarations/REAs/CC&Rs
- Marijuana dispensaries (state/federal law conflicts)
- Uses that do not fit neatly in one category
- Necessary but limited uses in Shopping Centers (for example: restaurant, professional office)
- Exceptions to traditional noxious uses (for example: massage parlors)
- Effect of different uses on operating expenses

# Landlord's Perspective

- Lender may have specific prohibited uses
- Landlord may want to avoid uses that impose significant wear and tear on property
- Exposure to liability if use conflicts with law
- Remedies

# Tenant's Perspective

- Review prohibited uses to verify that none conflict with Tenant's intended use
- Tenant may want to dig into whether prohibited use is a Landlord "must have" or "nice to have"
- Remedies

# Best Practices – Restrictive Uses

- Use Plain Language
- Explicit Terms
- Always include all existing exclusive and prohibited uses and require Tenant to abide by them
- Tenant should review carefully to make sure it can comply and discuss any issues with Landlord before signing the Lease



# Bonus Slides

# Hypothetical

- Client owns a mixed use property that is anchored by a grocery store, a big box retailer and a movie theater and includes a drugstore, pizza parlor, ice cream shop, pet store, donut shop/bakery, hair and nail salon, national sandwich/soup/salad chain.
- What possible use issues do you see?

# Sample Language – Permitted Use

- General office and administrative uses and no other purpose
- Retail sale of communication products and services
- Operation of a full service dental office

# Sample Language – Exclusive Use

- Sale of bath and/or body care products
- A store that primarily sells furniture, clothing and accessories for children
- Any business that primarily sells pizza
- Any business that sells greeting cards and wrapping paper in more than 25 lineal feet of space
- Any business that sells beer or other alcoholic beverages for off-premises consumption
- A store that includes “Dollar” in its name or primarily sells goods at a single price point

# Sample Language – Prohibited Uses - Retail

- Off-track betting (other than state sponsored lottery tickets)
- Adult bookstore or facility selling or displaying or selling access to pornographic books, literature, websites or videotapes
- So called “head shop” which sells drug paraphernalia
- Warehouse or storage space
- Office space except incidental to retail use (or not within X feet of retail space)
- Liquor store
- Automotive service or repair
- Pet store
- Restaurants (except for certain locations)
- Training or educational facility

# Sample Language – Prohibited Uses - Retail

- Flea market, amusement or video arcade
- Pool or billiard hall
- Car wash
- Club or dance hall
- Massage parlor
- Bar or tavern

# Sample Language – Prohibited Uses - Retail

- Mortuary or funeral home
- Veterinary hospital or animal raising or boarding facility
- Hotel or motel
- Residential use
- Movie theater or live performance theater
- Bowling alley or skating rink or trampoline park
- Automobile, truck, trailer or recreational vehicle sales, leasing or display
- Dry cleaning plant or laundromat
- Second hand or surplus store or pawn shop
- Manufacturing facility
- Use that emits obnoxious odor, noise or sounds
- Any user that requires more than X parking spaces
- To conduct or permit any fire, auction, going-out-of-business or bankruptcy sale

# Sample Language – Prohibited Uses - Retail

- To engage in any unethical or disreputable method of business operation
- To sell or display for sale or display any pornographic or obscene material
- As a gambling or gaming establishment such as, without limitation, an Off-Track Betting, sport gambling, casino gambling or similar establishment, provided that the sale of lottery tickets shall be permissible
- For any loudspeakers, phonographs or other devices of similar nature in such a manner so as to be heard outside of the Premises
- For the preparation, manufacture or mixing of anything that might emit any objectionable odors or noises
- As a billiard or pool hall
- As an office, store, reading room, headquarters, center or other facility devoted or opposed to the promotion, advancement, representation, purpose or benefit of: (a) any political party, political movement or political candidate, (b) any religion, religious group or religious denomination, (c) any foreign government or (d) any “cause” of any type or nature whatsoever

# Sample Language – Prohibited Uses - Retail

- As an unemployment, counseling or other similar social services office
- For a swap show selling merchandise that is used, damaged or discontinued
- Any establishment the primary purpose of which:
  - (a) is to sell, afford or permit on-premises sexual stimulation or sexual liaisons;
  - (b) permits or presents obscene, nude or semi-nude performances or modeling;
  - (c) sells, affords or permits body massages, whether or not of a sexual nature;
  - (d) sells “rubber goods” or other sexual or erotic products of a type not commonly found in national chain pharmacies; or
  - (e) sells, rents or permits the viewing of x-rated video, photographs, books or other material (except, in the case of a video rental store or book store, if such materials do not constitute a primary product of the establishment and if such materials are discreetly displayed in such manner as not to be visible from the sidewalk outside the Premises)

# Sample Language – Prohibited Uses - Retail

- For a ballroom, dance hall or discotheque
- As a place of instruction, reading room or any operation catering primarily to students or trainees rather than to customers
- As a funeral parlor
- As a facility for the sale of paraphernalia for use with illicit drugs (provided that the foregoing shall not preclude the sale of items customarily sold by retail drugstore chains)
- As an arcade
- As a pawn shop or auction house

# Sample Language – Prohibited Uses - Office

- Government entity
- High foot traffic use
- Warehouse
- Any non-office space
- Presence of animals (with limited exceptions and strong indemnity)
- A banking, trust company, or safe deposit business, in each case open for business to the general public
- A savings bank, a savings and loan association, or a loan company, in each case open for business to the general public
- The sale of travelers' checks and/or foreign exchange, in each case open for business to the general public

# Sample Language – Prohibited Uses - Office

- A stock brokerage office whose business involves off-the-street retail sales to the general public
- A restaurant, bar or for the sale of food or beverages
- Photographic reproductions and/or offset printing
- An employment or travel agency or airline ticket counter
- A school or classroom or other place of instruction, catering primarily to students or trainees rather than to customers
- For any medical purpose or as a psychiatric office or drug/addiction treatment center
- Conduct of an auction
- Gambling activities

# Sample Language – Prohibited Uses - Office

- Conduct of obscene, pornographic or similar disreputable activities
- Offices of an agency, department or bureau of the United States Government, any state or municipality within the United States or any foreign government, or any political subdivision of any of them
- Offices of any charitable, religious, union or other not-for-profit organization
- Offices of any tax exempt entity within the meaning of Section 168(h)(2) of the Internal Revenue Code of 1986, as amended, or any successor or substitute statute, or rule or regulation applicable thereto
- Office, headquarters or other facility devoted or opposed to the promotion, advancement, representation, purpose or benefit of any political party, political movement or political candidate
- As an unemployment, counseling or similar social services office

# THANKS!

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