

Creative Solutions is a bi-monthly column offering creative solutions to unusual problems in drafting leases for retail space. Please email your questions or problems you are encountering and your Creative Solutions to Glen Cornblath, gcornblath@ksc-law.com.

The recent case involving Limited Brands and a co-tenancy clause (“Limited Brands fights ban on store closures,” Shopping Centers Today, November 2002) highlights the difficulty in defining different uses of other tenants in a lease. Terms such as “anchor,” “office use,” “retail use,” “primary use” and “incidental use” are used in co-tenancy clauses, continuous operation clauses and prohibited use clauses (i.e., provisions which prohibit the landlord from leasing to other tenants having the listed uses), often without any definitions or defining terms. This column will explore some of those terms and ways a landlord and tenant can more clearly define their intention in the lease.

Co-tenancy clauses frequently provide that the tenant can either close its store or terminate its lease if an “anchor” tenant is no longer open at the shopping center. Even when the anchor tenant is named, the language usually permits the landlord to substitute another “anchor” in its place without being in violation of the clause. As the article about the Limited Brands case shows, the tenants definition of anchor may be very different than the landlords. Here are some suggestions on how to gain a clearer definition of the word “anchor”:

- Minimum number of contiguous square feet leased to the same tenant
- Space operated as one business
- Tenant is a national/regional tenant with more than one location in the metropolitan area in question
- Tenant operates multiple departments selling different goods
- If the anchor is named, then a replacement must be a similar store
- Certain uses do not qualify as anchors, regardless of the square footage

Of course, these items will be negotiated based on the business deal and the parties’ relative strengths, but this list is meant to guide the negotiations so neither party is surprised later.

Sometimes the co-tenancy or other clause requires that the landlord limit the “office use” in the shopping center, or conversely, that the remaining spaces be used for “retail uses.” Here are some guides to help define what is meant by those words:

- “Retail office uses,” which can be defined as offices which provide services directly to consumers including, but not limited to, _____ [insert your examples here]_____. Some examples to consider: financial institutions, real estate agencies, stock brokerage companies, title companies, doctor’s offices, alternative medicine offices, currency exchanges, law firms, accounting firms, and travel and insurance agencies.
- Avoid words like “uses traditionally associated with shopping centers” because there is no “traditional” anymore.

- Prohibitions against office use should always exclude offices that are incidental to the retail use conducted at the space. If needed, provide for square footage of the incidental office use.

Using terms such as primary use and incidental use can be problematic in today's retail environment of big boxes and category killers. Here are some suggestions for tailoring those terms:

- square footage, or percentage of square footage, devoted to the sale and display of a particular category of goods
- Distinguish between square footage of floor space, wall space and linear shelving space.
- Percent of gross sales of the tenant derived from a particular class of goods

If you have other ways of more clearly describing the terms used above, please send them to gcornblath@ksc-law.com and we will include them in next month's column.

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