

PROFESSIONAL EDUCATION BROADCAST NETWORK

RISKY TENANTS: DRAFTING ISSUES FOR LANDLORDS

Sample Lease Provisions

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SAMPLE PROVISIONS #1:

A. When an anchor/major wants parking restrictions (*tenant friendly*):

1. Prohibited Parking-Intensive Uses. Landlord acknowledges Tenant requires convenient ingress and egress and ample parking for its customers during peak sales periods, and the parking and other common facilities should not be burdened by either large scale or protracted use. Therefore, except as may be expressly approved in writing by Tenant, Landlord agrees that no building located within five hundred (500) feet of the front of the Demised Premises [within that portion of the Shopping Center designated "Protected Area" on the Site Plan other than the Demised Premises,] shall be occupied by any restaurant, office building, entertainment or recreational facility, or training or educational facility (as defined below); *provided, however*, (i) a restaurant shall be permitted within any Outparcel that separately complies with the Parking Requirement, so long as alcoholic beverage sales (for on-premises consumption) do not exceed fifty percent (50%) of the total restaurant sales, and (ii) one (1) restaurant, not to exceed 1,200 square feet of gross floor area, shall be permitted within such restricted area, so long as it does not sell alcoholic beverages, other than beer and wine sales (for on-premises consumption) not exceeding thirty percent (30%) of the total restaurant sales. As used herein, "entertainment or recreational facility" includes, but is not limited to, a bowling alley, skating rink, theater, banquet hall, auditorium, billiard room, health spa, fitness club, gymnasium, bingo parlor, amusement arcade, carnival, circus or other place of public amusement; and a "training or educational facility" includes, but is not limited to, a child care center, beauty school, barber college, reading room, place of instruction, or any other operation catering primarily to students or trainees rather than to customers.

B. Sample Exclusive Use Clause (*tenant friendly*):

1. Tenant's Exclusive Uses. During the Lease Term, except as otherwise provided for in Section __. below, Landlord covenants and agrees that Landlord shall not directly or indirectly lease, use or permit to be used, nor shall Landlord permit any Affiliate of Landlord to directly or indirectly lease, use or permit to be used, any stores or structures within the Shopping Center (other than the Demised Premises) or within any premises located within one (1) mile (as measured on public or private roads) of the Shopping Center ("Restricted Area") for any of the following purposes, either as a separate store or structure or within a larger store or structure:
 - a. [Insert uses reserved to tenant].

2. Exceptions to Tenant's Exclusive Uses. Notwithstanding the provisions of Section __. above, the following uses shall be permitted within the Restricted Area:
 - a. [Insert any exceptions to the exclusive uses]; and
 - b. Uses permitted under leases of other tenants in the Shopping Center as of the Lease Commencement Date ("Existing Tenant Leases"), as such uses are more particularly set forth on Exhibit D attached hereto ("Existing Tenant Uses"); provided, however, that to the extent any of the Existing Tenant Uses violate any exclusive use rights or restrictions contained in Section __ above, such Existing Tenant Uses shall be permitted only for the remaining term of such Existing Tenant Leases

3. Violation of Tenant's Exclusive Uses. Landlord acknowledges that Tenant's remedies at Law would be inadequate in the event of a breach of the covenants set forth in this Article __, and in such event Tenant shall be entitled, at its option, in addition to any remedy available under Article __, (i) to seek full and adequate relief by injunction, specific performance, damages or otherwise without the need to observe any cure period, or (ii) unless the breach is cured within thirty (30) day after notice to Landlord, to reduce the Base Rent thereafter due to fifty percent (50%) of the amount otherwise due, until such breach is cured. In addition, at the request of Tenant, Landlord shall use best efforts to diligently pursue and exhaust any and all remedies available at law, in equity, or otherwise, against any tenant or occupant that violates the provisions of this Article __. Landlord and Tenant hereby agree that the terms of this Article __ are material to the execution of this Lease and have been based upon Landlord's representations to Tenant that there will be no other supermarket or food store located in any other premises owned or controlled by Landlord or its Affiliates within the areas restricted by this Article __. Notwithstanding the foregoing, in the event of a foreclosure or exercise of a similar remedy under a mortgage held by an institutional lender on the Shopping Center, this Article __ shall not be breached on account of the ownership by such lender (or other resulting successor in interest) of any then existing use on other premises restricted under this Article __.

C. Sample Exclusive Use Clause (*landlord friendly*):

1. Exclusive Use Right. Except as to the Anchor Tenant, Rogue Tenants (as hereafter defined) and any other existing tenants of the Shopping Center (the leases of which may be renewed, extended or replaced), Landlord covenants and agrees that during the Term of this Lease, Landlord shall not lease any space within the Shopping Center to any tenant for a use the same as the Exclusive Use ("Tenant's Exclusive Right"); provided however, that (i) Tenant's Exclusive Right shall only be enforceable so long as Tenant is continuously operating in the entire Premises (excluding temporary closures

permitted under the Lease) under the Permitted Use; (ii) any lease of space to Anchor Tenant, or any other major tenant (i.e. a lease of space for more than 10,000 contiguous square feet of the Shopping Center) shall not be subject to Tenant's Exclusive Right set forth herein. Tenant's Exclusive Right shall automatically terminate and be of no further force or effect upon the occurrence of any of the following: (a) any Default by Tenant, (b) Tenant's Assignment (as hereafter defined) of this Lease, without the express written consent of Landlord; (c) the final six (6) months of the Lease term. For the purposes of this Lease, the term "Exclusive Use" means the following uses, which, notwithstanding anything to the contrary in this Lease, shall in no event be applicable to, or enforceable against [XYZ Supermarket], including its successors and assigns (the "Anchor Tenant"):

a. [Describe the uses reserves solely to Tenant]

2. Rogue Tenants. Notwithstanding anything stated to the contrary herein, in no event shall it be deemed a violation of Tenant's Exclusive Right by Landlord, nor shall Tenant have any right of offset, Rent reduction or any other remedy under this Lease if all of the following occur: (1) another tenant or occupant in the Shopping Center offers services to the public that are in violation of the Tenant's Exclusive Right, and such tenant or occupant is either (i) expressly prohibited from using its premises for the uses provided in the Tenant's Exclusive Right, or (ii) is operating contrary to the stated uses permitted under such tenant or occupant's lease or license agreement (each a "Rogue Tenant"); and (2) upon Tenant notifying Landlord of such Rogue Tenant, Landlord provides notice of the violation of the Tenant's Exclusive Right, pursuant to such Rogue Tenant's lease or license agreement; and (3) upon the expiration of any applicable notice and cure period, if Rogue Tenant continues to act in violation of the Tenant's Exclusive Right, Landlord shall promptly commence an action (or arbitration, if required by such lease or license agreement) against such Rogue Tenant, and thereafter uses commercially reasonable efforts to enforce its rights under such lease or license agreement and to obtain Judicial Relief. For purposes hereof, "Judicial Relief" shall mean a temporary restraining order, preliminary injunction, order of eviction, other court order or order resulting from an arbitration proceeding enjoining the prohibited use; provided however, Landlord shall not be required to appeal or take any further action if Landlord's Judicial Relief is denied.

D. Sample language for Landlord to insert when a Tenant desires an overly broad Exclusive Use (i.e. pizza):

3. Tenant's Exclusive Use: For the purposes of this Lease, the term "Exclusive Use" means the following uses, which, notwithstanding anything to the contrary in this Lease, shall in no event be applicable to, or enforceable

against [XYZ Supermarket], including its successors and assigns (the “Anchor Tenant”):

A dine-in or take-out restaurant where the primary food offering is pizza;

Notwithstanding anything to the contrary in this Section ____, in no event shall the foregoing Tenant's Exclusive Right be construed as a general prohibition against the sale of pizza by other tenants and occupants of the Shopping Center. Tenant hereby acknowledges and agrees that it shall not be a violation of Tenant's Exclusive Right if another tenant or occupant of the Shopping Center offers pizza for sale during the Term of this Lease, so long as the sale of pizza by such other tenant or occupant does not account for more than fifty percent (50%) of the gross revenues generated from such tenant or occupant's respective premises.

SAMPLE PROVISIONS #2:

Prohibited Uses. Notwithstanding anything to the contrary set forth in this Lease, Landlord agrees the Shopping Center [and Outparcels] shall be used only for retail uses and for services customarily found in neighborhood shopping centers. Landlord expressly agrees not to operate or lease (or permit to be operated or leased) any building or other area in the Shopping Center [or Outparcels] for any of the following uses:

- (a) Any use that involves the keeping of any animals or poultry.
- (b) Any manufacturing, mining, smelting, rendering, brewing, refining, chemical processing or other industrial uses.
- (c) Any bar or establishment that sells alcoholic beverages for on-premises consumption, other than by a restaurant whose alcoholic beverage sales do not exceed fifty percent (50%) of the restaurant's total sales.
- (d) Any facility for the sale or lease of motor vehicles, trailers or mobile homes.
- (e) Any flea market or any area with individual vendors or booths (or tables) selling used articles, curios, antiques, cut-rate merchandise and the like.
- (f) Any use that may require water or sewer services in excess of the capacities allocated to the Shopping Center by any authority.
- (g) Any noxious or unreasonably offensive activity, any unreasonably dangerous or unsafe uses, or any activity which Tenant deems detrimental to the operation of a fresh food store because of the emission of noise, smoke, odors or dust.
- (h) Any church, temple, synagogue, mosque or other religious use.
- (i) Any facility for the sale of paraphernalia for use with illicit drugs.

- (j) Any facility for the sale or display of X-rated, lewd or pornographic material (excepting materials typically displayed in family video stores and supermarkets).
- (k) Any massage parlor, funeral home, or gambling or off-track betting parlor.
- (l) Any fairs, carnivals, circuses, amusement parks, car shows, shows or sales by merchants utilizing vehicles or booths, and similar forms of public entertainment (or parking for any of the foregoing);
- (m) Any use which violates any applicable Laws.