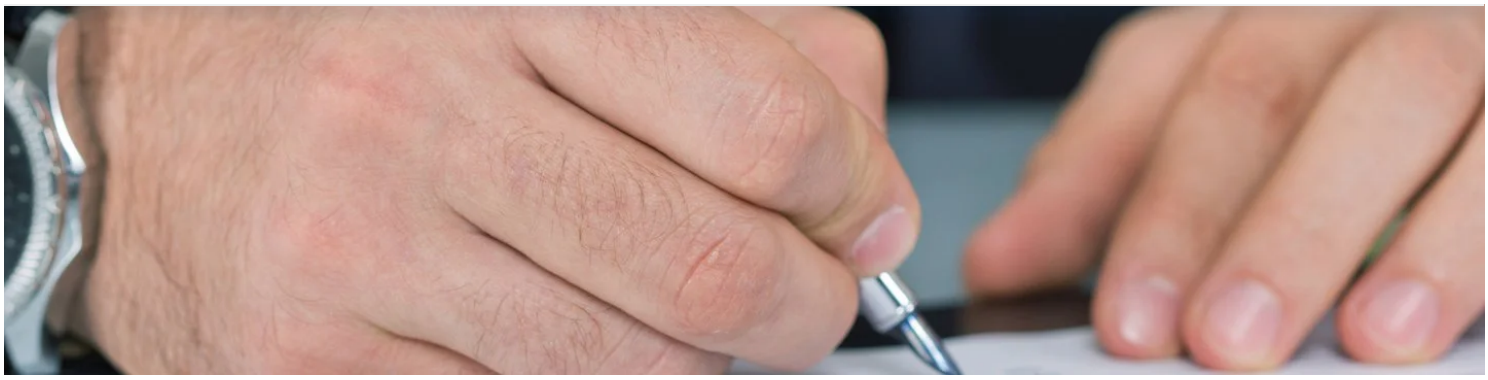
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What Is Exclusive Use?

Whether you're a commercial landlord or a tenant, you should know all the implications of an exclusive use clause before you sign a contract.

Nov 02, 2021 by **Nell McPherson**

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Commercial real estate contracts can be packed with all kinds of terminology. And of course, both the landlord and tenant will want to be sure they fully understand everything they're requesting or agreeing to. If you've heard of an exclusive use agreement but never used one in a contract, you may be wondering: What is exclusive use?

What is exclusive use in real estate?

Exclusive use grants a tenant the right to be the only tenant on the property performing a certain function, as specified in the contract. For example, a commercial landlord might grant a salon tenant renting space in a shopping center the right to be the only hair and/or nail service provider within that property. Not having to worry about a competitor moving in right next door or into the immediate area can be an extremely valuable perk for a business.

In a condominium association, "exclusive use common area" grants the right to use a certain area of the condominium complex property to one or more but not all condominium owners, along with the related maintenance responsibilities.

So for example, four condominium owners might share a large balcony. Each owner's lease agreement could specify exclusive use common area for the balcony. That would mean those four owners share a right to use the

balcony, as well as responsibility for its maintenance, while other condominium owners in the complex do not.

A third definition of exclusive use involves real estate assets in a divorce. When one spouse is granted "exclusive use and possession" of the formerly shared home, either temporarily or permanently, that spouse has the legal right to remain in the home and the other does not.

For this piece, we'll be focusing on exclusive use in a commercial real estate lease.

Commercial landlord considerations in exclusive use

There are benefits for landlords to using an exclusivity clause in a lease. The competitive advantage they provide tenants can make it easier to fill a vacancy. And ensuring that you don't have competing tenants hurting one another's businesses can help improve tenant retention, too.

But there are a few things commercial landlords need to keep in mind before adding an exclusive use clause to a lease. According to attorney David Reischer, a landlord must be very careful to ensure that the terms of an exclusive use agreement are unambiguous. All the details need to be clearly spelled out in the contract.

"A landlord must make sure to review all existing contracts to ensure that any promise of exclusivity to use commercial space for a specific purpose does not infringe upon promises made in prior agreements," Reischer says.

"Specifically, a landlord must make sure that there is no conflict in permissible activities between tenants."

Reischer also says that a landlord needs to be prepared for any potential disputes that could arise concerning exclusive use during the course of the lease.

"A landlord should be aware of their legal obligations to resolve any disputes and to mitigate the damages that result from a violation," Reischer says. "It is incumbent upon the landlord to have language in the agreement that states whether the lease agreement may be terminated for breach or whether even special penalties can be assessed against a tenant that engages in prohibited activity."

Tenant considerations in exclusive use

"A well-written exclusive use agreement provides a business with a competitive advantage that may be essential to the profitability of the business," Reischer says.

Reischer explains that any tenant thinking about entering into an exclusive use agreement should keep the following in mind:

- Any provisions in the agreement must be extremely clear as to the specific types of business that conflict and/or the kinds of activities that would violate this exclusive use agreement.

- The exclusive use agreement should afford the tenant with a specific time frame in which the landlord is obligated to take action if there is any infringement.
- The agreement should also have remedies for the tenant if the agreement is breached.

On that last point, Reischer says the tenant might want the right to repudiate the whole contract and/or be awarded liquidated damages -- damages specified in the contract -- if the agreement is breached. Alternatively, a tenant might be allowed to pay a reduced rent.

"The tenant needs to be thoughtful and consider how a breach by the landlord might affect the very viability of the business," Reischer says.

The Millionacres bottom line

An exclusive use agreement in a commercial lease can be highly beneficial for the landlord and the tenant, who both have a vested interest in the success of the business. It's important that landlords review their contracts with existing tenants before entering into a new one to avoid any potential conflicts.

It's also in the interest of both parties to ensure that all details of the exclusive use arrangement are clearly spelled out, including any potential remedies in the event the agreement is breached. And of course, it's always a good idea to contact a real estate attorney before entering into any legally binding real estate agreement.