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## Otten Johnson Alert -

### Part I: Landlord's Perspective – Exclusive Use Provisions: The Devil is in the Details

It is not uncommon, especially in the retail context, for a tenant to request exclusive use rights in the negotiation of a lease. A tenant operating an ice cream parlor, for example, may want assurances that the landlord will not lease other space in the shopping center to other tenants who may also sell ice cream. This seemingly simple provision, however, may not prove to be so easy to implement in practice. A few key considerations when negotiating an exclusive use provision from the landlord's perspective include the following:

- A landlord should define the scope of the exclusive use as specifically as possible. Such specificity may provide the landlord with more flexibility as it negotiates future leases.
- A landlord should carve out incidental sales from the exclusive use provision. Using the ice cream parlor example, a landlord may not want to be obligated to restrict restaurants from offering ice cream as one of the many dessert items on its menu.
- A landlord should carve out existing leases from the exclusive use. Existing leases most likely do not restrict the tenants thereunder from violating the subsequent exclusive use, and, as such, the landlord may not be able to enforce the exclusive use against such existing tenants without amending the existing tenants' leases.
- A landlord should apply the exclusive use provision to only the portions of the shopping center controlled by the landlord from time to time. Such a carve out provides the landlord with flexibility to sell portions of the shopping center without having to rely upon its successor-in-interest to enforce the terms of the exclusive use.
- The landlord should make the terms of the exclusive use contingent upon the tenant operating its permitted use. Using the ice cream parlor example, if the tenant ceases to operate as an ice cream parlor, then the landlord may want flexibility to lease

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other space to other tenants who sell ice cream.

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