

Thursday, November 4, 2021  
8:00 AM - 9:15 AM

Peer to Peer 4

Co-tenancy in a post-COVID world - has/should anything change?

**Gary Glick, Esq.**  
Cox Castle & Nicholson LLP  
2029 Century Park East, Suite 2100  
Los Angeles, CA 90067  
gglick@coxcastle.com

**Robert Ondak, Esq.**  
Benesch, Friedlander, Coplan & Aronoff LLP  
200 Public Square, Suite 2300  
Cleveland, OH 44114  
rondak@beneschlaw.com

Outline

- I. Introductions.
- II. Construction Co-Tenancy Provision.
  - A. What is a Commencement of Construction Co-Tenancy Provision?
    1. Tenant does not have to commence construction of its tenant improvements until Landlord has signed leases with a certain number of tenants or a certain number of tenants are open and operating at the shopping center.
    2. This provision is often found at new shopping centers where the Tenant does not want to invest monies on a build-out without knowing that a certain number of other tenants will be open at the shopping center.
    3. If this provision is not satisfied for a certain period of time, the Tenant is often provided with a termination right.
- III. Opening Co-Tenancy.
  - A. What is an Opening Co-Tenancy Provision?
    1. The Tenant is not required to open for business from the Premises and pay rent until certain other tenants are open and operating at the shopping center.
    2. If the Tenant chooses to open, it will usually have the right to pay reduced rent until the opening co-tenancy is satisfied.
- IV. On-going/Operating Co-Tenancy.
  - A. An operating co-tenancy provision permits the Tenant to pay reduced rent if a certain number of other tenants at the shopping center are not open for business. The Tenant usually needs to be opens for business for it to take advantage of an operating co-tenancy failure.
  - B. Landlord is usually provided with a cure period if the operating co-tenancy is not satisfied.
  - C. The operating co-tenancy requires certain named co-tenants to be open for business. The Landlord typically negotiates appropriate "Replacement" tenant language.

- D. Landlord should negotiate certain exception for permitted closures such as, but not limited to, the following set forth below. However, the Tenant will try to limit these permitted closures to a certain defined period (i.e., six months).
1. Casualty/condemnation
  2. Force majeure.
  3. If the name co-tenant is undergoing a transfer.
  4. Remodeling.
  5. Other government-required closures, including those caused by a pandemic.
- E. The Landlord will sometimes attempt to negotiate a sales test before the Tenant can take advantage of a co-tenancy violation. However, almost all Tenants strongly resist this type of provision.

V. Replacement Tenants.

- A. Landlord should always have the right to substitute comparable tenants for the named co-tenants.

VI. Tenant Remedies.

- A. If an opening co-tenancy failure, the Tenant will want the right to not open and delay the rent commencement date. The Landlord may want to place a limit on this time period. Once the time period is reached, the Tenant must either open or terminate.
- B. If Tenant opens, Tenant will want to pay reduced rent. The reduced rent can either be a percentage of sales or a percentage of base rent. Landlord will insist the Tenant pay triple nets.
- C. There is often a limit on the length of time for the Tenant to reduce its rent. At the end of this time period, the Landlord will want the Tenant to either terminate the Lease or return to full rent.

VII. Impacts of Pandemic.

- A. Landlords are attempting to negotiate “carve-outs” from co-tenancy violations for pandemic relating closures. The result of how this provision gets drafted will be based upon the respective bargaining positions of the Landlord and the Tenant.