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Seminar 13

The Wonderful World of Co-Tenancies – The Ins and Outs of These Evolving Clauses

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- I. Introductions.
- II. Opening Co-Tenancy.
 - A. What is an Opening Co-Tenancy Provision?
 - 1. Tenant does not have to open (commence rent, or commence an obligation) until another tenant is open (or signed a lease) (or another number of tenants have opened).
 - 2. In lieu of opening, Tenant may choose to pay reduced rent.
 - 3. A number of varieties of this provision exist – Tenant does not have to commence construction until a number of other tenants have also commenced construction, etc...
 - B. Why would a Tenant want an Opening Co-Tenancy Provision?
 - 1. To help ensure that it receives what it has been promised by the Landlord.
 - 2. To make sure it is not only one of a few tenants operating in the Project – it wants to confirm synergy.
 - C. Why would a Landlord not want to provide such a provision?
 - 1. Creates risk for the Landlord that it will not receive its rent.
 - 2. Landlord cannot control all of its tenants, and if they trigger co-tenancy defaults, it could lead to a domino effect – 2008.
- III. On-Going/Operating Co-Tenancy.
 - A. Similar to an Opening Co-Tenancy, except comes into play during the term of the lease. If a certain tenant (or percentage of tenants) have not been operating for a period of time, then there is a violation of the On-going Co-Tenancy provision.
 - 1. Make sure comes into effect after the Opening Co-Tenancy is satisfied.
 - 2. Should Tenant be open to be effective.
 - B. Should Landlord have a cure period?
 - C. If Co-Tenancy is pegged to named tenants, then negotiate appropriate “Replacement” tenant language. (Note, this may apply in Opening Co-Tenancy provision as well.)
 - D. Permitted Closure exceptions.
 - 1. Force majeure.
 - 2. Casualty/condemnation.
 - 3. Remodeling (should there be a cap/limit?).
 - 4. If the Tenant is undergoing a transfer (should there be a cap/limit?).
 - 5. Other government-required closures?

- E. Sometimes Conditions exist – Sales Test.
 - 1. Tenant can only assert rights if its sales drop by negotiated percentage after Co-Tenancy failure.
 - 2. How long should the test period last?
 - 3. How significant should the drop in sales be?
 - 4. How do you measure the drop in sales?
 - 5. Compare to previous year(s)?
 - 6. What if Tenant does not have a history of operating at the Premises?
 - 7. How do you account for general economic factors?

IV. Replacement Tenants.

- A. May be appropriate in Opening Co-Tenancy if there are named tenants.
 - 1. It is short term, so maybe not.
 - 2. However, if it is a development project with a long term lease, then maybe appropriate.
- B. More Common in On-Going/Operating Co-Tenancy situations.
- C. Tenant Goals.
 - 1. Try to ensure comparable foot traffic.
 - 2. Try to ensure comparable customer demographics/draw.
 - 3. Try to ensure comparable synergy for Project.
- D. Landlord Strategies.
 - 1. Create as much flexibility and options as possible.
- E. If Named or Key Tenants.
 - 1. Sometimes parties will negotiate a list of acceptable replacements.
 - 2. Consider making list non-exhaustive (leases last a long time and retailers may not).
 - 3. Describe in general terms types of acceptable replacements.
 - 4. How much space should they occupy (75% of Co-Tenant?).
 - 5. Should they be national or regional retailers? What does that mean?
 - 6. Enough to occupy 10,000 or 20,000 sf and have 10 other stores?
 - 7. Should they sell certain types of goods?
 - 8. Describe demographics of their customers?
 - 9. What if the Co-Tenant being replaced is a department store?
 - a. There are very few comparable replacements of these types of retailers left.
 - b. May need to get creative.
 - c. Combination of uses for vacated department store space.

V. Remedies.

- A. Elect not to open (option for Opening Co-Tenancy failure).
 - 1. Delays rent commencement.
 - 2. Should there be a limit on this?
- B. Pay Reduced Rent.
 - 1. Percentage rent (without regard to a breakpoint).
 - 2. A percentage of base rent.
 - 3. What about NNN's?
 - 4. Make sure Tenant is required to be open.
- C. Should there be a limit to the foregoing remedies – 6 months, 1 year?
- D. Termination option.
 - 1. Tenant right to termination if failure not cured after period of time.
 - 2. Landlord right to terminate if Tenant does not agree to revert to full rent.

E. Reversion to full rent after a period of time.

F. Confirm these are sole remedies.

VI. Impacts of Pandemic.

A. What are people experiencing?

B. Are Co-Tenancy provisions being triggered?

C. Are Co-Tenancy provisions being re-negotiated as part of deferral/abatement agreements?