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Peer to Peer Session # 11

CO-TENANCY ISSUES GO VIRAL: ADDRESSING SHOPPING CENTER CO-TENANCY MATTERS BEFORE, DURING, AND AFTER THE PANDEMIC

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TOPIC DESCRIPTION:

Sophisticated tenants typically require co-tenancy provisions in their shopping center leases – the co-tenancy requirements may include x-y-z (and more) current tenants or XX% of the shopping center's total floor area be open and operating in a center as a pre-condition of the new tenant taking delivery of possession, opening for business, or continuing to operate, and a failure of a co-tenancy requirement may lead to significant rent reduction or the tenant's right to terminate the lease, or both. Failure of a co-tenancy requirement can wreak havoc on a landlord's rent roll and leasing, or even redevelopment, plans, and during the pandemic, when tenants and landlords weren't poring over lease force majeure clauses, they were poring over lease co-tenancy provisions to determine whether various co-tenants' closures and / or reduction in hours and / or services, however temporary, had triggered a co-tenancy failure. Participants in this Peer to Peer session will discuss scenarios from pre-, during, and post-pandemic perspectives, with a focus on what we have learned from the pandemic period and how co-tenancy provisions may evolve, or even survive, in a post-pandemic retail lease world.

CO-TENANCY BASICS – A PRIMER:

A retail lease “co-tenancy” provision provides the Tenant with certain remedies if the other tenancies (or “co-tenancies”) in the shopping center do not achieve or maintain a certain level of occupancy and/or quality of a named specific tenant mix or list. A co-tenancy clause assumes that the value of any retail location to the Tenant is in part dependent on the number or occupied floor area minimum percentage in the center, type, and quality of other tenants. A Tenant will commonly believe that this holistic retail environment, not its own single store, forms the basis of Tenant’s obligation to pay full rent, operate, and maintain its leasehold obligations. Upon “failure” of the co-tenancy requirement, however defined, the Tenant may seek a remedy of reduced rent and even lease termination after a stated minimum period of the co-tenancy requirement or requirements not being met

Of course, the Landlord’s position is that a landlord is not guaranteeing that the shopping center or project will be leased up to any minimum degree, or with stated particular tenants, or with any particular sales results for the Tenant. The Landlord’s argument is that it’s in the Landlord's best interest as well, whether with or in the absence of express co-tenancy rights granted to any particular tenant, to have a fully leased, occupied, and well operating shopping center, and that Landlord doesn’t want the Tenant to be dictating the tenancy mix or store choices of the shopping center. After all, a successful tenant mix generally means a healthy rental income stream, and a strong presence (even pre-eminence) in a “multi-malled” market. However, a typical tenant with strong negotiating leverage is unwilling to rely solely on the Landlord's underlying economic incentives to ensure the shopping center is well leased with a desired tenant mix and underlying support for Tenant’s store, and the Tenant will want remedies if the landlord does not achieve bargained-for parameters in the shopping center's retail environment. Further, given that a typical shopping center landlord’s leasing and marketing materials for the property prominently highlight the tenant mix at the property, in particular the major draw tenants, as an enticement to prospective tenants to consider entering into a lease for premises at the center, it’s not surprising that a new tenant will expect the resulting lease to include a co-tenancy provision (a “put your money where your mouth” is approach).

Along with a lease’s common area maintenance (CAM), exclusive use, and assignment / subletting provisions, the co-tenancy clause is one of the most heavily negotiated clauses in the document. The co-tenancy provision can easily be a deal-breaker or a deal-maker and goes to the essence of why a tenant may prefer to lease space at a particular center instead of another center in the same market. If the desired co-tenant mix is maintained, then the Tenant can expect a volume of shoppers to be drawn to its store at the shopping center by the center's other tenants. Tenants learn quickly the value of "loving thy neighbor". The Tenant will argue that the tenant mix at a center plays a critical role in the success of nearly all of the tenants and that few retailers can afford to stand on their own.

Because a lease extends through a period of time, all clauses, not just co-tenancy clauses, should be as relevant and workable at the end of the lease term as they are in the beginning. Absent a crystal ball, the only way for a landlord to meet the challenges of the future is to provide as much flexibility as is practical, given the intent of the parties, and draft the lease accordingly. Concepts may generally remain the same throughout the term of the lease, but the details undoubtedly will evolve.

Types of Co-Tenancies:

Delivery Co-Tenancy

The better the negotiating power of the Tenant, the earlier in the lifecycle the co-tenancy protection will kick in. As such, some co-tenancies – a “delivery” co-tenancy – provide that the Tenant need not take possession of

the premises until such time as a certain portion of the center or a certain named tenant or tenants is under lease, ideally, from the Tenant's perspective, a "non-contingent" lease. A delivery co-tenancy might include a provision that the Tenant, and even the Landlord, may later terminate the Lease (perhaps coupled with a payment to Tenant for its costs incurred to date) if the delivery co-tenancy threshold or requirement isn't met by a certain date or within a certain time period.

Opening Co-Tenancy

A second category of co-tenancy – an "opening" co-tenancy – conditions the Tenant's obligation to initially open for business in its premises on the center being leased or open and operating to a stated opening co-tenancy minimum threshold and / or with stated (or named) co-tenants being open and operating in the center, or, if the Tenant opens before the opening co-tenancy requirement or requirements are met, then conditions the Tenant's obligation to pay full rent upon the Landlord satisfying the stated opening co-tenancy requirements. An opening co-tenancy clause will likely include a provision that the Tenant may terminate its lease if the opening co-tenancy requirement or requirements aren't met by an agreed upon date certain or within a stated period of time, and if the Tenant doesn't so terminate, then the Tenant may (but not always) be required to jump to "full" rent even if the opening co-tenancy requirement/s remain unsatisfied.

Ongoing or Continuing Co-Tenancy

A third type of co-tenancy continues throughout the term of the lease (or a number of years into the term), with the result that the co-tenancy level and the stated minimum co-tenancy occupancy level, or named or identified co-tenants (or both), are measured and watched throughout the term. As with an opening co-tenancy, an on-going co-tenancy provision may (or likely will) include Tenant's right to reduced rent during the period of any on-going co-tenancy failure and the Tenant's right to terminate the lease after a stated period of co-tenancy failure, possibly coupled with the obligation to resume full rent if Tenant does not exercise its right to terminate the lease due to a continuing failure of the on-going co-tenancy after an agreed upon period of time.

Occupancy Level Based Co-Tenancies

Some co-tenancy provisions require that a specified percentage of the center's gross leasable area is open and occupied, while other co-tenancies require that a certain number of stores are open and occupied. Another type of co-tenancy requirement is based on the category of open stores, such as anchor stores, in contrast to co-tenancy requirements that focus on occupancy numbers alone.

Identity Based Co-Tenancies

Specifically identified retailers are the typical co-tenant requirement in an identity based co-tenancy. While competition among retailers is a constant consideration, retailers are aware that there is often a synergy created when a group of them get together. The identity based co-tenancy requirement typically name the required co-tenant or co-tenants, and, especially with an on-going or continuing co-tenancy, will also permit a "comparable replacement" if a specifically identified co-tenant closes or vacates the shopping center. The Landlord must take a sharp interest in expanding the scope of a permitted "suitable" or "comparable" replacement for any required co-tenancy, and both parties must take care to be as precise as possible in defining – and in using words that define – what constitutes a replacement co-tenant for the co-tenancy clause.

Comparable Replacement Co-Tenant:

A recent decision in the 10th Appellate District of the Court of Appeals of Ohio, *DN Reynoldsburg, LLC v. Maurices Incorporated (No. 20AP-57, C.P.C. No. 18CV-7616, Rendered 3/24/2022)*, highlights the importance of clearly defining the meaning of "comparable replacement" tenant. In this case, the Landlord (DN Reynoldsburg, LLC) and the Tenant (Maurices Incorporated) signed a lease in July 2015. The lease contained both opening co-tenancy and ongoing co-tenancy provisions, and the provisions referenced, respectively, "Inducement Tenants" and "Anchor Tenants" (i.e., identity based co-tenancies). The tenant Sports Authority ("TSA") was defined as both an Inducement Tenant and an Anchor Tenant; however, TSA filed for bankruptcy and did not open for business in the shopping center before Maurices opened for business. The Landlord ultimately re-leased the TSA premises to a furniture store, "Rooms for Less," and ultimately the Landlord and Maurices went to court over the issue of whether Rooms for Less satisfied the comparable replacement tenant definition, which read in pertinent part that a comparable replacement was "…a national or regional retail tenant with a use comparable to the Anchor Tenant being replaced and operating in not less than seventy-five percent (75%) of the same leasable space utilized by the replaced Anchor Tenant." Ultimately, the Court of Appeals remanded the case to the lower County Court of Common Pleas for further consideration, but only after a discussion as to the terms "national" and "regional," and

noting that these terms were not defined, including the court quoting testimony from the parties' witnesses to demonstrate that the understood meaning of these terms varied widely (i.e., there was no "understanding" as to these terms…).

Of further note, the Court of Appeals did not address the issue that the opening co-tenancy did not include a "comparable replacement" concept while the continuing co-tenancy did since, the Court of Appeals noted, the lower court had not addressed this issue. As such, the further lower court proceedings will presumably broaden review to the fact that a "comparable tenant" is allowed in one but not in the other "type" of co-tenancy in the lease. Since the events concerning TSA occurred before Maurices opened for business, it's possible that further consideration of this case by the County Court of Common Please may result in Maurices paying the "alternate" rent, due to failure of the opening co-tenancy, through the balance of the Maurices lease term.

An earlier decision in the New York Supreme Court (Queens County), *Staples the Office Superstore East, Inc. v. Flushing Town Center III, L.P. (2011 NY Slip Op 50405(U), 24475/2010, February 28, 2011)*, addressed a near identical question as to whether a "Co-tenancy Requirement [that means] Home Depot or a national retailer having not less than 100 stores and occupying not less than 1000,000 square feet" could be satisfied by BJ's Wholesale Club replacing Home Depot. Staples argued "no", and ultimately the court concluded that BJ's is a "regional" and not a "national" retailer in that BJ's at that time operated in "only" 16 states in the eastern U.S.

How a Co-Tenant's Operation is Determined to Satisfy the Co-Tenancy Requirement:

In addition to the Landlord and Tenant agreeing upon the list of identified or named co-tenants, or the percentage of floor area to be occupied, or whatever the specific co-tenancy calculation to which the parties have agreed, the lease needs to describe the level of operation – or even lease execution – by the co-tenants that will be sufficient to satisfy the co-tenancy requirements. These can be summarized as follows:

Leased

The designated co-tenants have entered into leases with the landlord for premises in the shopping center, sometimes described as "binding" or "non-contingent" leases.

Leased + Level of Construction

In addition to the co-tenants having entered into (binding or non-contingent) leases, the co-tenants' premises have reached or achieved a certain level of construction, e.g., to the point that the co-tenant's premises storefront is completed and/or front elevation signage is installed, or the co-tenant's construction has reached a point where the co-tenant will be able to complete its build out and open for business within a stated period of time.

Leased and Occupied

The required co-tenants have entered into leases with the landlord for premises in the shopping center, and each co-tenant is either open for business, or is required to open and begin operating within a stated period of time.

Open and Operating

The required co-tenants are fully leased, have taken occupancy, and are open and operating for business in their respective premises. "Open and operating" should also be defined, for example open for business with a full complement of staff and merchandise, and operating during normal shopping center hours seven (or six…) days a week, holidays excepting. The landlord will want to include exceptions to "open and operating", such as co-tenants' closures for remodeling, inventory, or due to damage, condemnation, or force majeure, or even (temporary) closures to allow for substitution of a comparable replacement (i.e., build out time).

Lastly, a tenant might require that, as part of the co-tenancy being satisfied, the Landlord provide notice to the Tenant of such satisfaction, including detailing the "facts on the ground" that support satisfaction of the co-tenancy requirement. A tenant may even require that a landlord, upon Tenant's written request, provide to the tenant periodic confirmation or details as to whether a co-tenancy at that time is or continues to be satisfied (e.g., provide a list of open tenants and their premises leasable area), which confirmation may be limited in frequency (such as not more than 1x per year) and/or together with the landlord requesting an estoppel. Understandably a landlord will not be a fan of these requirements, and whether either or both requirement is included in the lease may be one more issue left to "leverage" and which party has "the greater of" during the course of the lease negotiation and whether the landlord realistically has the bandwidth internally, as part of its lease administration operations, to concede the point.

Remedies:

Reduction in Rent

The landlord will want the rent reduction to apply only to base rent (fixed minimum rent), whereas a tenant may argue that the rent reduction should apply to both base rent and the additional rent operating expenses. Alternatively, the tenant might pay only percentage rent in lieu of base rent and charges, although, if representing the tenant, it's best to qualify any "percentage rent only" provision with a "cap" of not more than tenant would otherwise pay for full rent.

The rent reduction, however defined, might not come into play until a certain period of time has elapsed so that the landlord may first attempt to remedy the co-tenancy failure. Another "timing issue" related to a tenant paying alternate rent during a co-tenancy failure period concerns when the alternate rent commences. The landlord will argue that the reduction applies at the expiration of its designated cure period, or that the reduction doesn't commence until the tenant has notified the landlord of the specific co-tenancy failure. In contrast, the tenant will expect the reduction to commence retroactively, so commencing immediately following on Day 1 of the co-tenancy failure without taking into account any cure period or later tenant notice to the landlord of the co-tenancy failure.

Right to Terminate

This most drastic remedy may apply after any negotiated rent reduction has been in place for a specified period to give the landlord a reasonable period to lease space to another tenant (and a longer time would be required for an anchor), and for the replacement tenant to build out its premises and open. If the co-tenancy clause permits the landlord to replace a required co-tenant, or if the co-tenancy failure is one of occupancy level, the landlord will want to be able to cancel the tenant's election to terminate by showing that it has leased the vacant premises to qualifying co-tenants. Lastly, a key point of negotiation in a "right to terminate" remedy for failure of a co-tenancy is whether the right to terminate is "ongoing" or if the tenant must exercise the right by a specific "end date" or go back to full rent. This is called…

A "Fish or Cut Bait" Provision

The landlord will want to limit the period of tenant's rent reduction such that a tenant is required to make an election either to terminate the lease after a stated time period of co-tenancy failure or to resume paying full rent. While not a tenant's favorite approach, a "fish or cut bait" is a common approach, especially if the stated time period is long enough (e.g., one or two years) for the tenant's sales to readjust to the co-tenancy failure and the feared negative impact on the tenant's sales. At a minimum, a common end point for continued alternate rent reduction due to a co-tenancy failure would be the tenant's exercise of a renewal or expansion option; the lease may provide either that any such exercise would act as the tenant's acceptance, without co-tenancy remedies, of the then current co-tenant status in the shopping center, or more specifically, that the co-tenancy failure that triggered the rent reduction is deemed to no longer be a co-tenancy failure (but any future co-tenancy failure will still result in the alternate rent due to such a failure).

Lastly…

In a best case and perfect world, a landlord will want the tenant's gross sales reports to demonstrate an *actual* decline following the co-tenancy failure as a condition to the tenant's exercise of its designated remedy. This, too, is an issue to be resolved based on the respective negotiating leverage of the parties.

CO-TENANCY DURING THE PANDEMIC:

Many large national tenants, and even some regional tenants, are able to negotiate a co-tenancy provision. Many times this is because of the Tenant's leverage based on its strength in numbers of operating stores, the size of the actual company (in sales and net worth, or both), the size (square footage) of its average individual store, the tenant's a unique use, financial wherewithal, etc.---or a combination of one or more of the foregoing. So it's not unusual these days for certain tenant leases to include co-tenancy provisions.

Just as the recession in 2007-2009 caused or played a part in a loss of stores, retail bankruptcies and other sweeping changes in the retail environment, the pandemic has forced a new look at how both landlords and tenants handle the risks inherent in both operating a shopping center and operating a store within a shopping center. Those leases that include co-tenancy clauses are worth another look because times and circumstances have changed

Theory, language, and practice that may have worked 20 years ago, or even three years ago, and which didn't anticipate what the retail and shopping center industry has lived through since March 2020, could imperil a shopping center and/or a tenant post-March 2020. And a domino effect could cause many tenants to fail and some shopping centers to go from "A" to "D" or "F" centers.

Assuming the parties have written mutually agreeable and complete operating co-tenancy language (from what we all learned during the 2007-2009 Great Recession), *what could possibly go wrong*? After all, the parties have successfully figured out and negotiated language that covers the correct number of anchor tenants, percentage of non-anchor tenants, and in some cases, even specific named tenants. Landlord and Tenant have even reached agreement on what a "suitable" or "comparable" replacement for an anchor or named tenant would be.

Going forward, it may work for both of a landlord and tenant to reach an agreement that not only must there be an occupancy failure (i.e., a failure of a store or stores to be operating), but there must also be a sales test, meaning that the tenant's sales drop below an agreed upon threshold before a tenant may pay "co-tenancy failure" alternate rent. For example, a sales test could be that a tenant's sales must drop by 15% over a similar prior period for a tenant to get the benefit of the remedy(ies) in the co-tenancy provision.

The pandemic has highlighted several *huge* issues that few people considered when drafting operating co-tenancy provisions, and case law is not always consistent or predictable beyond, perhaps, courts typically enforcing the "plain language" of the lease, whether it's complete, entirely sensible (or fair), or not. Important provisions that impact co-tenancy language became susceptible to multiple interpretations and questions during the height of the pandemic. Amongst the biggest issues since March 2020 is whether a tenant seeking to enforce a co-tenancy clause is itself in default, and, if so, whether a defaulting tenant (or arguably defaulting tenant) should have the benefit of co-tenancy failure remedies (e.g., if a tenant is not paying rent or full rent and/or is closed due to a government mandate). Query whether a tenant is itself "open and operating" within the meaning of the Lease if the tenant is only offering takeout or curbside service? Were the requisite number or specific named stores, in the case of named anchor(s) or tenant(s), open and operating if they too were just providing limited hours, limited services, etc.? How fair is a sales decrease test (if a co-tenancy clause includes one) if the reason behind the sales decrease isn't the landlord's leasing efforts, but the fact that the city/county/state shut down all shopping centers causing the sales drop test to have been met?

Tenant's own actions/inactions—default?

In many co-tenancy provisions, assuming any other contingencies have been met, the Tenant who is to get the benefit of co-tenancy must not be in default under the terms of the Lease and must be open and operating. (Please note that as to any negotiation, if a Tenant has substantial leverage, they may have negotiated out the requirement that Tenant not be in default.)

There are several points to note. First, for the default and/or "not open and operating" provision to prevent a co-tenancy violation, the landlord should have sent a formal notice. Did the landlord do that? A landlord could have sent default notices either for not paying rent, and/or not being open.

At first, tenants often argued that they did not have to be open or pay rent because of the "force majeure" nature of the pandemic. Especially in situations where the government mandated the closure of retail stores and/or centers, a tenant would argue that the pandemic and/or the government response to it caused a force majeure event. Many landlord-oriented leases have language that either don't define a pandemic as a force majeure situation, or even if the leases did, contained language that stated that in a force majeure situation, Tenant was still required to meet financial (rental) obligations. A typical pre-pandemic force majeure provision might state: "If either party is delayed, hindered or prevented from the performance of an obligation because of strikes, lockouts, labor troubles, the inability to procure materials, power failure, riots, insurrection, war or another reason not the fault of the party delayed, but not including financial inability, the performance shall be excused for the period of delay. The period for the performance shall also be extended for a period equal to the period of delay." Query—is a pandemic or epidemic a force majeure event under this provision?

If the words "pandemic" or "epidemic" or "government restrictions" aren't documented in the lease, it may be an uphill battle. However, some courts have allowed a broader "catch-all" provision—like "circumstances beyond our or your reasonable control" or "natural disaster" to qualify the pandemic as a force majeure event. JN Contemporary Art LLC v. Phillips Auctioneers LLC No. 20-cv-4370 (S.D.N.Y. December 16, 2020)

Case law is all over the place, inconsistent and unpredictable on how force majeure language in the lease will be interpreted, but plain, inclusive, specific language tends to go the farthest. In any case, if the language is unclear, it's probably not a good idea to bet all your chips on its enforcement (either landlord or tenant).

Even if the Tenant isn't in default for non-payment of rent or for staying closed, it could be considered unfair if the Tenant "violates" the terms of the lease but is not in default. Why should a Tenant get the benefit of a co-tenancy provision while it is not paying rent, for instance? One can argue whether non-payment of rent is a force majeure situation (look back to the lease)—but even if a pandemic or epidemic were a force majeure event, more often than not, Tenant still must undertake its rental obligations.

Typical force majeure language in a landlord-oriented lease typically provides that the tenant will not be excused from the payment of rent, additional rent, or any other monetary obligations under the lease. If the Tenant wasn't paying rent, a default letter should have been sent—or should it?

Case law has gone both ways on whether a carve-out of payment of rent is enforceable or not. In re CEC Entertainment, Inc. No 20-33163 (Bankr. S.D. Tez. December 14, 2020) –this case enforced an exclusion from force majeure clauses for tenant's inability to pay any sum of money); but see In re Hitz Restaurant, 616 B.R. 374 (Bankr. N.D. Ill. 2020)….although the lease stated that lack of money wasn't a grounds for force majeure, the court ruled that because the inability to pay was due to government restrictions, a listed force majeure event, it would trump the quoted provision on lack of funds…..

Another interesting question—is the tenant to be considered open and operating if it chooses to only do curbside delivery or "carry-out", and not be open to the extent it was prior to the pandemic? Many co-tenancy provisions specify that a tenant must be open and operating at the time it attempts to exercise its co-tenancy rights. Is a tenant open and operating when the store isn't physically open to customers? A possible revision to this language would be "open and operating in 100% of its retail floor area" or "open and operating to the extent tenant was open and operating on the first (or second) full month of the Lease term".

And complicit with this entire question of whether a tenant is open and operating---what about the other tenants and/or anchor tenants, big box tenants, named tenants? Are they open and operating, and should they be counted within the numbers of anchors, percentage of gross leasable area, etc., necessary for co-tenancy to be met if they are open, but in a different manner than before—just carryout or curbside pickup? Tenants would argue that a partial opening of the other tenants doesn't provide the traffic or robust co-tenancy that the co-tenancy of those tenants was expected to produce.

Does the co-tenancy provision include a sales test? What happens if the sales drop is because the store wasn't "totally" open—open in the manner it was before the pandemic? If the sales drop had nothing to do with the landlord's action (or non-action), why should the Tenant have the right to pay alternate rent or terminate the lease? The co-tenancy provision is usually intended to protect a Tenant against something the landlord could have done something about--by doing a better leasing job, for instance. One provision that may be helpful would be an "imputed sales" provision. If Tenant isn't open for a full measuring period (usually 12 full months), some leases are allowed to impute sales based on the prior 12-month period before closure or partial closure, or by imputing sales from the same month in the prior year (or average of several prior years).

Interesting Aligned Cases:

Several cases that involved forcing a tenant to re-open. The first case didn't involve force majeure, but could be a foundation for forcing a re-opening.

Simon Property Group LP v. Starbucks Corporation (*Simon Prop. Grp., L.P. v. Starbucks Corp.*, 2017 WL 6452028 (Ind. Sup. 2017) (Trial Order)—forcing a tenant to continue operating: Simon successfully obtained preliminary injunctive relief to enforce Starbucks lease obligations to continuously operate 77 Teavana stores. The relief required Starbucks to occupy and conduct business as usual in operating the Teavana stores, notwithstanding its claims that it was losing millions in doing so: "…while the Court acknowledges Starbucks may incur monetary and operational challenges in keeping the Teavana stores open until the disposition of this lawsuit, the Court also notes each and every one of these hardships is self-imposed by Starbucks…"

Abercrombie and Fitch Stores, Inc. v. Simon Property Group, LP, Court of Appeals of Indiana, Case No. 20A-CT-1092 (Nov. 25, 2020)---final deal terms exchanged via email, and confirming that the parties would draft conforming documents; Abercrombie continues to stay open and pay the rent under yet to be signed leases. About two months after the emails, in the first part of March 2020, Abercrombie signs the new leases and forwards the now tenant executed leases to Simon, urging Simon to countersign as soon as possible. Shortly thereafter, the

pandemic commences in earnest in the US, and Abercrombie shuts down stores effective March 16th. Simon had commenced signing and returning fully executed leases to the Tenant, but then Simon closes all of its centers on March 17th, the same day that Abercrombie attempts to rescind its signatures on all 42 leases due to "the current uncertainty regarding the impact of COVID-19." Simon rejected Abercrombie's retraction and continued to finalize its countersignatures. Ultimately the Indiana Court of Appeals upheld a lower court grant of injunctive relief that the Tenant may not "permanently" close its stores due to irreparable harm to Simon (although a "temporary" closure due to pandemic ordered closures was OK).

Gibson v. Lynn University, Inc., No. 9:2020cv81173 - Document 45 (S.D. Fla. 2020) School's alleged breach of a force majeure clause was not "suspending its operation", but rather "offering an alternative mode of teaching"---query, is being open only for takeout or curbside delivery considered "being open"? In this case, the question was whether student should get some sort of tuition refund for classes being on-line instead of in person.

Again, case law is not dispositive, and very unpredictable (not to mention expensive and time consuming to pursue). A landlord is already in a bad situation if it expects a court to force a re-opening. Getting a court to enforce a lease and require a tenant to open (or re-open) takes time and isn't voluntary (question of whether Tenant will reopen in a meaningful way when a court forces it to do so). Much of the work of landlords and tenants during the pandemic was doing "workouts" to negotiate to a mutual agreement as reduced rent, partial re-openings, elimination or modification of co-tenancy provisions, etc. Perhaps that would have happened even with a perfect co-tenancy provision.

Opening Co-tenancy During/Due to the Pandemic

Opening co-tenancy issues during or due to the Pandemic have also seen their own unique pivots. While the amount of new development over the past decade has not been anywhere near what was seen in the past, it still occurs—perhaps in the order of opening smaller centers or mixed-use centers. And certainly, there are, and will continue to be, expansions, redevelopments and renovations at existing centers that wish to transform or upgrade themselves to remain strong and meaningful to customers. A new wing or a remerchandised area of the center brings new leasing. In all those cases, a specific prospective tenant again may want to make sure that it is not "out there by themselves" or alone for many months or years before other tenancies occur. Opening co-tenancy requests make sense in those situations

Nonetheless, the Pandemic and its after effects have highlighted several issues that can't be ignored and must be addressed. Several of the issues are the same, or mimic that of the operating co-tenancy. Is the subject Tenant in default? Is it open and operating? Are other tenants open and operating? In an opening co-tenancy, the prospective tenant may not be obligated to take possession, or to open and operate or pay full rent unless other tenants (anchors, gross leasable area ("gla") percentage, named tenants) have signed leases and/or are open and operating. As stated before, some of the same analysis and legal interpretations will apply. There are, however a few other operational issues that are present in Opening Co-tenancy situations that don't apply to an operating co-tenancy.

Today, two additional issues need to be considered when drafting an opening co-tenancy and both ultimately impact ability and timing. Timing will affect how long you wish to give a tenant before it can start paying alternative rent or to terminate the lease. The ability for landlord and/or tenant to get governmental approvals/permits seems to be elongated. Staffing of permitting agencies has taken a hit in some municipalities. The Great Resignation has impacted staffing levels, and the hiring of replacement personnel takes time. It is important to know the expected permit approval timing for the area where you are building when deciding how long it will be before tenant gets the right to alternative rent and/or to terminate the lease.

Another important factor in opening co-tenancy timing is the ability to for both landlord and tenant to procure contractors, subcontractors, workers and materials to build out the center and/or the tenant space. One or all of these play a part in the timeline of getting work done. The supply chain for materials has been at least temporarily altered, and depending on the area of the country or even the time of the year, staffing has also been impacted. Again, this goes to timing and ultimately being able to meet an estimated schedule.

If opening co-tenancy language has time periods to be met prior to moving into alternative rent or thereafter to terminate the lease (by either party), the parties will want to build in protections for matters they each don't have control over. Any opening co-tenancy dependent on a landlord doing certain work, or a new tenant building out and opening by certain dates or with a certain number of construction days should have a carve-out for "delays due to the governmental authority not providing timely approvals (through no fault of landlord) and delays excused under Force Majeure". Just as a tenant may ask for a "slide/push" in its dates to issue plans, get permits, start work and open, this protection should be sought out by for situations either party cannot predict or control.

The pandemic has forever changed co-tenancy provisions and how they impact a lease. A co-tenancy provision needs to reviewed and improved to serve both landlord and tenant, and to ensure that each is protected and able to gain the benefits of what was intended.