Do You See What I See? Most Likely Not!

Visibility Covenants in Commercial Leases

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Introduction

In commercial leases, landlords want as much flexibility as possible to expand, renovate, alter, redevelop or even demolish their property with minimal interference from tenants. Tenants, on the other hand, will look to restrict a landlord from making changes to the property that could impact the tenants' right to occupy their particular premises without disruption or result in a change of the physical characteristics or advantages of its premises.

In order to avoid any disruptions and preserve the physical characteristics and advantages of a particular premises, tenants often insist upon a number of basic protections in the lease. In addition to concerns regarding access, traffic flow, and the size, location and configuration of its premises, tenants often seek a covenant to the effect that the "visibility" of the premises will not be adversely impacted by any renovation, alteration, redevelopment or change to the property, or as a result of a relocation of the premises. If a landlord grants a visibility covenant to a tenant, the proper interpretation of such covenant will come into sharp focus when a landlord undertakes any change to its property or attempts to relocate the premises. In such cases, the landlord may be forced to modify its construction or redevelopment plans to some degree, causing potential delays and added costs.

The Nature of a Visibility Covenant

A visibility covenant is a type of non-interference clause that operates to preserve the vista or sight line of a tenant's premises upon a redevelopment, alteration or change to the property or following a relocation of the premises. Generally, commercial landlords are loathe to grant representations concerning qualitative characteristics, such as visibility, exposure, traffic and access, because they are far too subjective in nature. Instead, landlords prefer to rely on objective criteria, such as size, frontage and configuration of the premises, particularly in connection with a relocation right under the lease. Nonetheless, a tenant with superior bargaining power may successfully negotiate a requirement that the landlord maintain the "visibility" of the premises. In such circumstances, the proper interpretation of the term "visibility", including the specific

viewpoint from which "visibility" must be maintained, comes into prominence. For example, it is incumbent upon a landlord to determine whether a covenant for "visibility" merely refers to an obstructed view of the storefront of the premises from directly in front of it, or whether the landlord must also maintain "visibility" of the entire premises (i.e. storefront and any exposed side of the exterior of the premises whether or not branded) as well as any exterior signage on the premises from adjoining sidewalks, parking facilities, streets, highways, etc.

In the 2001 decision *First Windsor Shopping Centres v. Langille*[1], the landlord sought to relocate the tenant to alternate premises on the property. Pursuant to a development clause in the lease, the landlord was obligated to provide the tenant with replacement premises having "visibility and access equal to or better than that of the existing premises." The tenant refused to relocate and the landlord brought an application for an order requiring the tenant to move. The Court rejected the landlord's application on the basis that the relocation premises did not have visibility equal to or better than the visibility of the original premises. In so deciding, the Court noted that the tenant's original premises fronted the adjacent street, while the proposed relocation premises were not visible from the street. The Court took a liberal view of the term "visibility" and held that the landlord was not entitled to exercise its right to relocate the tenant because visibility from the relocation premises to the nearby street was obstructed.

Although the *First Windsor* case dealt with visibility in the context of a relocation, one can see how the same principles of interpretation may be applied to circumstances where a landlord constructs a building on the property blocking the sight line of the premises from portions of the parking areas or from the adjacent street. Such a change in the sight lines of the premises could be tantamount to a relocation of the premises if the visibility of the premises is not equal to that prior to the new building being constructed and would most likely result in a breach of a visibility covenant.

[1] 2001 CarswellOnt 4860.

In the 2002 case, *Stonegate Enterprises Ltd. v. West Oaks Mall Ltd.*[2], the landlord undertook to redevelop its shopping centre and relocated a tenant from its original position between two anchor tenants to a short interior mall. Under the lease, the landlord was obligated to provide the tenant with relocation premises in a "similar location" to the original premises. In rendering its decision, the Court held that the proper interpretation of the words "similar location" indicated compatibility with the business-attractive features of the original premises, such as, *inter alia*, visibility and exposure. The Court noted that while visibility and exposure relative to vehicular traffic and to the primary mall entrance would remain the same upon relocation, and while the relocation premises allowed customers to gain additional access to the premises from a rear parking lot, the overall visibility of the premises and convenience to shopper traffic would be greatly reduced because the relocation premises were located at a dead end of the shopping centre. The Court held that, in this case, the tenant contracted for a location in an interior mall between two anchor tenants, with the obvious advantage of high visibility. The Court held that relocation premises situated at the back end of a much shorter interior mall did not correspond with the tenant's intentions at the time it entered into the lease.

In another court decision, *First Capital (Northgate) Corp. v. 137th C.T. Grill Inc.*, the Alberta Court of Appeal spoke to the importance of "visibility" in the context of a no-build provision. In that case, the landlord proposed to erect a restaurant in the parking area of the shopping centre. However, the lease contained a no-build clause which prohibited the landlord from building any permanent structures in the parking area without the prior written consent of the tenant, not to be unreasonably withheld. The tenant refused to consent to the construction of the building on the basis that it would have a negative impact on the visibility of the premises. The landlord brought an application for a declaration that the tenant had unreasonably withheld its consent. The Court sided with the tenant, and held that the tenant's concern that the new building would negatively impact the visibility of the premises was a genuine reason for refusing to provide its consent and a reasonable concern. The Court noted that the purpose of the no-build clause was to minimize the possibility of visual interference of the premises.

[2] 2002 CarswellOnt 1172.

The Court further noted that restaurants are dependent on high visibility and that visibility of the premises would be reduced (albeit not entirely obstructed) if the proposed building was constructed.

Overall, tenants hold a significant amount of leverage where landlords attempt to make changes to their property or exercise redevelopment or relocation rights in the face of visibility covenants. As is evident from the mentioned cases, the risk inherent in making any changes to the property or attempting to enforce a relocation/redevelopment clause has been compounded by the Courts' liberal interpretation of visibility covenants. In particular, the cases demonstrate that the term "visibility" refers not only to a clear sight line from directly in front of the tenant's premises, but visibility as a whole, including from adjoining sidewalks, parking facilities, streets, highways, etc., and in making any such decision, the original intent and use of the premises will be taken into account.

What Should Landlords Do?

Due to the extreme subjective nature of visibility covenants and how they have been treated by the Courts, landlords should avoid granting tenants covenants to preserve or provide similar visibility. However, if faced with having to covenant to preserve or provide certain visibility of a tenant's premises, landlords must keep the following in mind:

- specify the degree of interference required for the tenant to rely on the visibility covenant (e.g. "landlord will not **permanently, materially**, **adversely** affect visibility…");
- clearly define the portion of the premises which is the subject of the visibility covenant (e.g. "landlord will not permanently, materially, adversely affect visibility **of the storefront of the premises**…");
- clearly define the vantage point from which visibility will be protected (e.g. "landlord will not permanently, materially, adversely obstruct the visibility of the storefront of the premises **from the parking facilities located within fifty (50) feet directly in front of the storefront of the premises"**);

- incorporate an acknowledgement by the tenant that the clause is not to be interpreted in a narrow manner and that any ambiguity is to be construed generously in favour of the landlord; and
- to avoid uncertainty of the repercussions of a breach of the visibility covenant (such as a claim for damages), impose a specific remedy in the event of a breach (e.g. a termination right with strict limits on when it can be exercised following an opportunity for the landlord to cure).

What Should Tenants Expect?

Due to the manner in which the Courts have interpreted visibility covenants in leases, tenants should expect an uphill battle when trying to obtain such protection. In such cases, it may be prudent for tenants to turn their minds to protections based on more objective criteria such as no build areas, covenants for similar square footage, frontage and configuration, parking ratios and height restrictions on any newly constructed buildings at the property. Landlords are typically more willing to discuss these types of protections, which have the ability of being measured.

Conclusion

When granting visibility covenants in a commercial lease, due to their extreme subjective nature, landlords should not dismiss them as standard boilerplate language. Rather, if faced with having to provide a visibility covenant, landlords should ensure the visibility covenant is clearly defined and carefully drafted so as to reduce uncertainty and ambiguity in the terms of the lease and the future interpretation of the covenant whether it be by the courts or not, while maximizing the landlord’s overall flexibility to carry out any alterations, renovations, changes or redevelopment of its property while avoiding costly and time-consuming disputes.

As for tenants, they should be mindful of the subjective nature of visibility covenants and their cause for concern for landlords. In light of landlords' valid concerns, tenants' time and energy may be better spent negotiating protections which are more objective in

nature, yet still preserve the vista or sight line of a tenant’s premises, such as no build areas.