Reciprocal Easement Agreements: Structuring and Amending REAs for Retail Development
Protecting Rights and Obligations, Minimizing Risk for Developers and Retailers

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Reciprocal Easement Agreements: Structuring and Amending REAs for Retail Development

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Reciprocal Easement Agreements: Structuring and Amending REAs for Retail Development

I. Overview of REAs
II. Drafting Effective REAs
I. OVERVIEW OF REAs

What is an REA?

Contract + Easement + Affirmative and Negative Covenants

Contract between/among signatories and a conveyance of common, limited common and exclusive rights which tie a project together based on the current vision of its developers
Also called:

- Construction, operation and reciprocal easement agreement (COREA)
- Shared use agreement
- Declaration of covenants, conditions, restrictions and easements (CC&Rs)
- Development, operating and reciprocal easement agreement
- Multiuse agreement
Traditional Uses

• Neighboring property owners want to develop their properties as one integrated shopping center (mall)

• Developer wants to develop property as a single shopping center but sell components or out-parcels

• Property owners desire to share facilities or amenities (shared parking or drainage facilities)

• Industrial park
New Face of Retail: Mixed Use Developments

• Single building with two or more owners (ground floor retail with residential, office or hotel on top)

• Commercial or mixed-use development with a uniform design/appearance and private roads

• Resort project with recreational, residential, hospitality and retail uses

• Mixed uses around attractions – arenas, sports facilities and hotels
**New Urbanism**

- Master planned community with retail mixed throughout or central business district
- Reinventing village concept
- Trend for governmental entities to provide fewer services – not accepting responsibility for roads, trash service and sometimes even fire protection or police services
Preliminary Considerations

• Quantity and types of property owners involved (now and in the foreseeable future)

• Building components and the shared uses
  o Parking
  o Pedestrian access
  o Utilities
  o Building systems
  o Life safety systems (fire suppression, fire escape)
  o Encroachments
Preliminary Considerations

- Plan for maintenance and operation
  - Utilities
  - Cleaning
  - Beautification (flowers, decorations, etc.)
  - Routine maintenance
  - Security
  - Repairs
  - Renovations and alterations
II. DRAFTING EFFECTIVE REAs

A. Identify and Describe Project Components

Describe all of the shared project components in a precise manner to help ensure that all necessary easements are created and allocate maintenance responsibility for each component.

Legal descriptions can become complex.
A. Identify and Describe Project Components

1. **Shared Use Component**

*Property, an improvement or piece of equipment that benefits or will be used by more than one parcel. Can be located entirely within one parcel or within multiple parcels.*
A. Identify and Describe Project Components

1. Shared Use Component

   - Parking facilities (including subsurface garages underneath parcels)
   - Driveways or private roads
   - Loading docks
   - Elevators, escalators and stairwells
   - Plaza, courtyard, atrium or lobby
   - Sidewalks and pedestrian thoroughfares
   - Signage
   - Public restrooms
   - Stormwater runoff and drainage facilities
   - Utility lines
   - Skywalks
   - Party walls
A. Identify and Describe Project Components

2. Common Building Component

Building element that benefits more than parcel

- Foundation
- Roof
- Support column

3. Shared Benefit Components

Properties or items within one or more parcels that may not be physically used by all parcels but provide a benefit to more than one parcel

- Management or security offices
- Janitorial and maintenance facilities
- Lake, fountain or public art
- Common area lighting
A. Identify and Describe Project Components

4. Exclusive Components

*Items or equipment located within one parcel that exclusively serves another parcel*

- Elevators that serve only upper floors
- Utility pipes, lines and ducts that go through one parcel to serve another parcel
- Rooftop HVAC or antennae
- Encroachments (awnings, signage, building components)
B. Create Appropriate Easements

• Easements will depend upon design and intended uses

• Describe with specificity the burdened and benefitted properties or parties

• Specify that agreement runs with the land

• Specify whether appurtenant (for the benefit of property, not a particular owner) or in gross (for the benefit of a particular person; terminates when person is no longer the property owner)
C. Particular Easements

1. **Construction, Maintenance and Repair**
   Provide an easement through another owner's parcel for the purpose of constructing initial improvements, performing routine maintenance, repairing or reconstructing (after a casualty) the initial improvements and, if appropriate, altering and renovating the initial improvements.

2. **Support and Encroachment**
   Provide an exclusive easement to attach improvements to or receive support from another parcel.
C. Particular Easements

3. **EXCLUSIVE COMPONENTS**
   Provide an easement for the purpose of installing, maintaining and using the item.

4. **ACCESS EASEMENTS FOR SHARED USE COMPONENTS**

5. **INTENDED USE**
   Easements over another's property should generally be restricted to the intended use of the item.

6. **VIEW EASEMENT**
   Exclusive or limited rights for sight, views, air and ventilation.
D. Term of Instrument

• Identify items that are perpetual (if any)
• Identify those that expire
  o Duration of restrictive covenants may be limited by state law
  o Affirmative election to renew or automatic renewal
• Termination with the consent of all parties or some majority (changed circumstances)
E. **Construction**

1. **Approval of Plans**

   *If project components will be constructed by different owners, the design of the different improvements will affect other parcels.*
   
   - Maybe have approval over only certain aspects of design
   - Standards for disapproving
   - Approval not unreasonably withheld

2. **Construction Schedule**

   *If construction of adjacent improvements affects or is critical to the construction or operation of other improvements, include commencement obligation, required completion date, milestones and appropriate remedies.*
E. Construction

3. Coordination and Cooperation

Parcel owners should be obligated to work together and communicate regularly to complete the entire project on schedule or where reconstruction or renovation of existing improvements impacts other parcels.

• May need to address hours of construction, staging and storage areas, and temporary facilities and utilities.

• Restrict other owners from interfering with construction activities or taking action that increases construction costs.
E. Construction

4. CONSTRUCTION STANDARDS
   • Design guidelines
     o Setbacks
     o Building envelopes
     o Building heights
     o Curb cut locations
   • Good and workmanlike manner using quality materials
   • Good construction and engineering practices
F. Affirmative and Negative Covenants

1. Prohibited Uses or Uses Requiring Approval
   - Exclusivity/competition concerns
   - Quality of vendors – some debate about what "first class" means
   - Types of commercial uses (particularly in mixed-use project)
   - Limits on signs, sidewalk sales, etc.
   - Airspace development rights

2. Preferred Use Rights
   - Reserved or restricted parking (e.g., bank parking can be used by restaurant at night)
F. Affirmative and Negative Covenants

3. Maintenance Obligations

- Generally each owner maintains its own private or exclusive use area
- Obligate someone to maintain common areas
  - Developer (but contemplate exit strategy)
  - Primary property owner
  - Large anchor owner (preferably one with maintenance/management experience, such as hotel)
  - Business association
  - Homeowners association in a mixed-use project
- Not all components need to be addressed the same
F. **Affirmative and Negative Covenants**

4. **Allocate Shared Costs**

- Determine a method for allocating costs for shared components among benefitted parties
- Can be difficult to conceive of what may be fair to all at the outset
- Make sure there is flexibility to change allocations or add/subtract cost categories
- Allocation should bear some relation to type of shared item, intensity of use and benefit received
F. Affirmative and Negative Covenants

4. **Allocate Shared Costs** (continued)

   - Consider whether some uses should be charged less/subsidized by other uses (e.g., church, arts and other nonprofit or low profit uses)
   - Consider whether some uses should be charged less because they support or provide amenities to retail customers (food court vendors, newsstand or convenience store)
   - Include payment obligations, terms and remedies for nonpayment
   - Audit rights
Common Methods for Allocating Liability for Common Expenses

• Fixed percentage allocations
  o Arbitrary allocation (e.g., 50-50 split)

• Percentage based on land use/load factor in relation to other uses; assign "points" or "equivalent units"
  o Land points based on size of parcel
  o Points based on linear feet of road frontage
  o Building points based on square feet of gross floor area within structures
  o Use points based on land use classification
  o Combination of the above

• Fluctuating percentage based on value or actual use/intensity of use
  o Percentage of sales
  o Quantity of parking spaces used
<table>
<thead>
<tr>
<th>Land Use Classification</th>
<th>Equivalent Units</th>
</tr>
</thead>
<tbody>
<tr>
<td>All undeveloped Parcels</td>
<td>0.60 per acre of land (prorated by one-hundredth of an acre)</td>
</tr>
<tr>
<td>Paved and striped, revenue-generating surface parking areas</td>
<td>0.10 per marked parking space</td>
</tr>
<tr>
<td>Retail and service establishments including, without limitation, banks (including ATMs) and other financial services and institutions, travel agencies, and service stations</td>
<td>1 per square foot of gross floor area</td>
</tr>
<tr>
<td>Restaurants (excluding restaurant and bar areas within a hotel which are reserved primarily for the convenience of and use by hotel guests only), bars, nightclubs</td>
<td>1 per square foot of gross floor area</td>
</tr>
<tr>
<td>Entertainment including movie theaters, dinner theaters, theme-based attractions, stand-alone attractions (e.g., Ferris wheel, carousel), sports arenas, etc.</td>
<td>1 per square foot of gross floor area</td>
</tr>
<tr>
<td>Hotel rooms and time-share units</td>
<td>60 per hotel room or time share unit</td>
</tr>
<tr>
<td>Art galleries, museums, places of worship, libraries, nonprofit educational, research, or cultural institutions</td>
<td>0.15 per square foot of gross floor area</td>
</tr>
<tr>
<td>Office or medical facility</td>
<td>0.15 per square foot of gross floor area</td>
</tr>
<tr>
<td>Industrial or light industrial uses, including warehouse, mini-storage, and manufacturing facilities</td>
<td>0.15 per square foot of gross floor area</td>
</tr>
<tr>
<td>Residential units (single family attached or detached, condominium, and rental apartment units)</td>
<td>60 per dwelling unit</td>
</tr>
</tbody>
</table>
F. Affirmative and Negative Covenants

5. **Insurance Requirements**

   - Identify risks that must be insured
   - Minimum liability amount and maximum deductible
   - Minimum rating for insurer
   - Parties to be named as additional insureds
   - Whether parcel owner may self-insure (particularly for governmental entity)
F. Affirmative and Negative Covenants


- Obligation to rebuild for critical items
- Circumstances under which owner does not have to rebuild
- Time frame during which must be rebuilt
- Construction procedures and obligations
- Clearing of premises
F. Affirmative and Negative Covenants

8. **Transfer Restrictions**
   - When identify of owner is a concern
   - Require approval to transfer
   - Approval may not be unreasonably withheld or approval rights limited
   - Purchase right if do not approve sale
   - Do not limit foreclosure sales or deeds in lieu of foreclosure

9. **General Indemnity Provisions**
   - Indemnify for activities arising out of indemnitor's parcel
   - Mechanic's and materialmen's liens
G. Remedies

- Termination is not appropriate remedy in most cases
- Injunctive relief
- Self-help (right to enter the property and complete improvements or assume maintenance at the defaulting party's expense)
- Financial penalties (liquidated damages)
- Construction bond, completion guaranty or other assurance of timely completion
- Force majeure clause
H. Mortgagee Provisions

• Give lender notice of owner's default and opportunity to cure

• Give estoppel certificates to owner's mortgagee or prospective mortgagee

• Pre-existing mortgage company needs to consent to REA and subordinate its interest to REA to avoid wiping out the REA in the event of foreclosure
I. Drafting Considerations

1. Leverage of anchors is significant.

2. If one of the participants is a governmental entity, a change in administration can produce significant policy changes.

3. Strike a balance between sufficient limitations/descriptions of future development to protect rights of pioneer developers without imposing unworkable limitations.
I. Drafting Considerations

4. Make cost allocations fluid and easily amendable. Do a budget and work backwards to create a methodology that the market will accept.

5. Master Association Scenario (Mixed-Use)
   - Give commercial appropriate protections/voting rights
   - Don't allow residential to unduly restrict or control commercial operations but give residential reasonable protections to allow peaceful enjoyment of residences
   - Don't unduly burden commercial with association participation or meeting requirements
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Restrictive Easement Agreements

Tracey M. Stockton
- Failure to Thoughtfully Consider Long-Term Nature of Relationship
- Changing Use of Real Property subject to the Agreement
- Failure to provide adequate remedial measures
- Restrictive Covenants
- Failure to objectively and specifically identify each right conferred
Failure to Thoughtfully Consider Long-Term Nature of Relationship

- Practical Considerations:
  - What party will serve as administrator of the Agreement throughout its term?
  - What provisions will be made for succession among the parties; presumably, the relationship will run with the land – what is the affirmative obligation of a selling owner or a new owner of a parcel encumbered or benefitted by the Agreement?
  - Are the duties to indemnify adequately considered and the various inter-relationships that will arise under the agreement carefully evaluated?
Practical Considerations:

- In the event ownership of a given parcel changes, what is the affirmative obligation of the new owner to deliver insurance certificates, escrow proceeds or the like, in keeping with the requirements of the Agreement?
- Who will be empowered to issue estoppel certificates, as requested by potential acquirers or mortgagees, relative to each encumbered or benefitted parcel?
- Who will be empowered to pursue remedies for failure of any party to maintain its estate pursuant to the requirements of the Agreement or remit its allocation of costs and expenses in accordance with Agreement provisions?
Failure to Thoughtfully Consider Long-Term Nature of Relationship, Continued

- Practical Considerations:
  - Who will administer annual delivery of insurance certificates and confirm that contractors working upon any easement parcel maintain the required insurance coverages?
  - What criteria will mortgagees require vis-à-vis the Agreement?
    - Consider lien rights for failure to honor expense allocations and mortgagee liability therefor
    - Are liens subordinated to the lien of a mortgage without further action on the part of mortgagee or mortgagor?
    - Limitation upon mortgagee liability thereunder, unless and until a receiver is appointed or, on a more attenuated basis, following conveyance of the property to the mortgagee at foreclosure or pursuant to a deed in lieu
Always consider, at inception, all stakeholders are motivated to consummate the agreement. Over time, the stakeholders change and some, but not all, will become disinterested in the relationship.
As the retail experience becomes technologically advanced, brick and mortar is becoming less relevant to retail operations.

Many shopping centers are considering alternative uses for their facilities:

- How will use of any parcel subject to the Agreement be affected by a change in use?
- How will expense sharing arrangements be affected by greater or lesser density or use upon a given parcel?
- A change in use can affect parking ratios, utility expense, security needs, maintenance costs, and indemnification obligations.
Alternative Uses For Shopping Center Facilities, Continued:

- Are the standards surrounding visual identity, *i.e.*, signage, landscaping, screening, lighting, and related, for the parcels encumbered by the Agreement objectively stated in a manner that will enable adherence by all parties in the event the use of a given parcel changes?

- At inception, the agreement must be drafted to provide flexibility and an orderly methodology for addressing changes in use that affect the easements conferred by the Agreement.
Failure to Provide Adequate Remedial Measures

- Does the Agreement provide for a lien right in the event expense allocations are not honored?
- Are there sensitive expense issues that will arise that might benefit from an escrow or sinking fund?
- If the parcels will be developed at the time the Agreement is put in place, are there milestones for development and appropriate penalties for failure to timely perform?
- In the event any party to the Agreement fails to timely perform, what rights do the remaining stakeholders have to perform and enforce the obligations of the defaulting stakeholder?
While off the topic of the subject presentation, does it have merit to form an owners association for the purpose of administering the various relationships arising under the Agreement? An owners association may be valuable in that the association can possess the right to assess fees to enable ongoing maintenance of the common obligations arising under the Agreement, as well as serve as a single point of contact relative to on-going Agreement administration.
Restrictive Covenants

- Is it useful to prohibit certain noxious uses among the properties subject to the Agreement?
- What would be the effect of a given use upon the adjoining parcel owners?
  - High traffic tenants may cause increased maintenance to parking areas and landscaping;
  - Consider the affect of certain uses upon the overall patronage for the parcels affected by the agreement;
  - Bars and restaurants may increase the exposure of all parcel owners to increased liability;
  - As medical marijuana is legalized, what effect would a dispensary or cultivation facility have upon each of the stakeholders to the easement regime?
  - If such uses are not prohibited, should the parcel owner affected by any such use bear the burden of providing increased insurance or security protection for the remaining owners subject to the Agreement?
Failure to Objectively and Specifically Identify Each Right Conferred

- Are the easement areas identified by a metes and bounds description?
- Is an access easement granted relative to utility easements?
- Who has duty to maintain the easement areas?
- Are relocation rights expressly stated relative to utilities and access and egress?
- In the event a given parcel undergoes redevelopment, what minimum standards must be maintained vis-à-vis the servient estate and the ongoing easement rights of the dominant estates?
Failure to Objectively and Specifically Identify Each Right Conferred, Continued

- Does the Agreement thoughtfully address any relevant “black out periods,” i.e., the holiday season and related high volume usage periods?
- How does an eminent domain or condemnation affect the Agreement – how are the other stakeholders compensated for their damages, if at all?
- Are all of the easement rights conferred perpetual or are some rights of limited duration?
- Are the triggers for expiration of any limited easement right objectively stated?
Amending Existing Restrictive Easement Agreements

- Who administers the Agreement?
- How are successors-in-interest formally included within the Agreement?
- Is there an adequate review period relative to proposed Agreement amendments?
- How many stakeholders must ratify to effectuate an amendment to the Agreement?
- Does a tiered approval process have merit?
- If a quorum is not met, but a minimum number of stakeholders must secure a given amendment, what is the process to compel amendment?
Amending Existing Restrictive Easement Agreements, Continued

- Are the required submissions relative to proposed amendments clearly stated and thorough enough to include all relevant materials?
- Are plans and specifications required in connection with proposed amendments that will require redevelopment of the project in some form?
- Objective criteria and timelines are critical to effective Agreement modification.
- Does it have merit to include a “deemed approval” provision for some, if not all, amendments to the Agreement?
Amending Existing Restrictive Easement Agreements (cont.)

- If an amendment requires affirmative action of any stakeholder following passage thereof, are appropriate remedies for failure to timely perform included in the amendment?
- Following amendment ratification who is empowered to file the amendment of record?
- Does the amendment document correctly state the history of the easement by document title and recording information?
- Does the amendment document update existing ownership and contact information for all stakeholders?
Amending Existing Restrictive Easement Agreements, Continued

- Are all provisions of the agreement considered at the time of amendment?
  - Are insurance requirements or indemnification obligations outdated?
  - Has the use of any parcel subject to the Agreement been modified such that other Agreement provisions should be updated at the time of amendment?
Reciprocal easement agreements are unique in that their longevity will more than likely be sustained through several generations of ownership relative to the servient and dominant estates. More than any other agreement, one must consider the future effects of the inter-relationships upon the stakeholders. If all possible permutations cannot be contemplated at the time of drafting, an adequate and objective mechanism should be adopted within the Agreement to facilitate modification to reflect the passage of time and differing ownership interests that will be subjected to the Agreement over time.
Questions?

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