Structuring Complex Easement Agreements in Commercial Real Estate Deals

Negotiating Use Rights and Restrictions for Air Space, Mixed-Use Developments, Retail Complexes and More

THURSDAY, MAY 1, 2014

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today’s faculty features:

David Van Atta, Partner, Hanna & Van Atta, Palo Alto, Calif.

Jesse S. Ishikawa, Shareholder, Reinhart Boerner Van Deuren, Madison, Wis.

The audio portion of the conference may be accessed via the telephone or by using your computer’s speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact Customer Service at 1-800-926-7926 ext. 10.
Tips for Optimal Quality

**Sound Quality**
If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial 1-866-871-8924 and enter your PIN when prompted. Otherwise, please send us a chat or e-mail sound@straffordpub.com immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

**Viewing Quality**
To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.
Continuing Education Credits

For CLE purposes, please let us know how many people are listening at your location by completing each of the following steps:

• In the chat box, type (1) your company name and (2) the number of attendees at your location
• Click the SEND button beside the box

If you have purchased Strafford CLE processing services, you must confirm your participation by completing and submitting an Official Record of Attendance (CLE Form).

You may obtain your CLE form by going to the program page and selecting the appropriate form in the PROGRAM MATERIALS box at the top right corner.

If you’d like to purchase CLE credit processing, it is available for a fee. For additional information about CLE credit processing, go to our website or call us at 1-800-926-7926 ext. 35.
If you have not printed the conference materials for this program, please complete the following steps:

- Click on the ^ symbol next to “Conference Materials” in the middle of the left-hand column on your screen.
- Click on the tab labeled “Handouts” that appears, and there you will see a PDF of the slides for today’s program.
- Double click on the PDF and a separate page will open.
- Print the slides by clicking on the printer icon.
STRUCTURING COMPLEX EASEMENT AGREEMENTS IN COMMERCIAL REAL ESTATE DEALS

Strafford Publications
May 1, 2014

David M. Van Atta
Hanna & Van Atta
525 University Ave, Suite 600
Palo Alto, CA 94301
Phone: (650) 321-5700
dvanatta@hanvan.com
http://www.hanvan.com

Jesse S. Ishikawa
Reinhart Boerner Van Deuren s.c.
22 East Mifflin Street, Suite 600
Madison, WI  53703
Phone: (608) 229-2208
jishikawa@reinhartlaw.com
http://www.reinhartlaw.com
I. Overview of easement issues in a hypothetical commercial mixed-use project.

A. Lisman Towers (general description).
B. Identification of all of the various easements.

C. Major business issues:

1. Who are the beneficiaries (dominant parties) of each easement?

2. Which easements should be in gross and which should be appurtenant?

3. Cost allocation for maintenance, repair, replacement. Possibilities:
   a. Square footage.
   b. Usage (e.g., electricity, water).
   c. Fixed percentage (possibly subject to adjustment based on periodic third-party review).
II. How to document the easements? Either REA or combination of separate easements.

A. Granting clause

1. Common law rule: Grantor and Grantee of an easement cannot be the same party.
2. Consider drafting the REA to provide that easements affecting each portion of the property automatically spring into existence upon the conveyance by original developer of such portion to another party.

3. To be safe, do whatever the title insurer requires to be able to insure the easements as part of the insured property. The title insurer may require the granting clause of the deed to include language such as, "together with, and subject to, those easements set forth in the REA recorded as document no. ________ ."

B. Description of each easement.

1. Legal description prepared by surveyor.

2. Reference to architectural drawings attached to the easement.

3. Generic description (e.g., with easement for emergency egress, refer to "all stairwells and exits located in the building").
C. Statement whether each easement is appurtenant or in gross.

1. Easements to utility companies are in gross.
2. Easements that benefit specific properties are appurtenant.

D. Role of an owners’ association.

1. Manage, maintain, repair, replace easement improvements.
2. Resolve disputes.
3. Assess costs to owners.
4. Enforce assessments.

E. Flexibility.

1. Amendment procedures.
2. Right of servient owner to relocate easement.
3. Provide for periodic review of formulae for allocating costs, based on actual, historical use of the easement.
III. Specific issues applicable to all easements.

A. Permitted users of the easement: consider customers, invitees, agents, contractors.

B. Limit personal liability of a party for breach of the easement agreement to acts/omissions occurring during that party's period of ownership of the benefited/burdened lands, as the case may be.

C. Exclusivity vs. nonexclusivity.

D. Rights reserved to servient land owner. At common law, the servient owner may make any use of the servient property so long as it does not materially and adversely interfere with the rights of the dominant owner.

E. Issues arising with easements in gross:

1. Assignability of easement.

2. Change in use of easement.

3. Example: beneficiary of a 10-foot wide water main easement grants rights to a cable TV company to put its improvements within the easement.
F. Duration of easement. In many jurisdictions, an easement is construed to be perpetual unless the easement document states otherwise.

G. Relocation of easement by servient owner.
1. Common law: not allowed without servient owner's consent.

2. Restatement (Third) of Property (Servitudes) 4.8(3) states:

   Unless expressly denied by the terms of an easement, as defined in § 1.2, the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not

   (a) significantly lessen the utility of the easement,

   (b) increase the burdens on the owner of the easement in its use and enjoyment, or

   (c) frustrate the purpose for which the easement was created.

   Section 4.8(3) has been adopted by only a handful of states.
H. Overburdening the easement.

1. Extension of the easement to benefit additional lands: generally this is considered overburdening unless the right to extend has been reserved in the easement document.

In the diagram below, suppose that Lot 2 owner granted the easement over the shaded area to Lot 1 owner, and that subsequently, Lot 2 owner acquires Lot 3. Does the benefit of the easement extend to Lot 3?
2. Change in the degree of use. Example: road serving a pasture (Picture A) eventually becomes a major arterial serving a 21-lot commercial development (Picture B). Generally this is not allowed unless the increase in the burden was reasonably foreseeable at the time of entry into the easement document.
3. Change in the kind of use. Example: beneficiary of an easement for a telephone transmission line assigns its rights to a cable TV company.

I. Standard of maintenance should be specified, e.g., "the parking lot shall be maintained to the standard followed in first-class shopping centers in Polk County, Iowa."

J. Insurance/indemnification.

K. Mortgagee consent. Have all holders of all recorded preexisting mortgages and encumbrances consented to, and subordinated their rights in the mortgaged or encumbered property, to the easement?

1. If they haven’t, they will not be bound by the easement, and foreclosure of the mortgage or encumbrance may terminate the easement document as it applies to the mortgaged/encumbered parcel.

2. If they haven’t, the grant of easement may be an event of default under the mortgage or encumbrance.
L. Flexibility.

1. Amendment.
   
a. In an easement with multiple beneficiaries, provide for amendment of the easement based on consent of a specified percentage of servient and dominant owners.

b. But: consider limiting, or prohibiting, the termination of any essential easement without the consent of the servient owner who is benefited by such easement.

2. Division of servient parcel: if the servient parcel is later subdivided, that the portion of the burdened parcel that does not include the easement property should be automatically released from any of the obligations imposed by the easement on the servient owner.

3. Provide for disputes re: usage of the easement to be determined by outside expert or by arbitration.

M. Remedies
IV. Specific issues related to certain specialized easements.

A. Air rights easements.

1. Horizontal subdivision regime requires easement for subjacent support to provide for support of improvements constructed in the airspace.

   a. Costs of maintenance, repair, replacement of the pillars, load-bearing walls, other means of support need to be allocated between servient and dominant properties (assuming dominant property also is benefiting from the same).
HORIZONTAL SUBDIVISION PLAN
LISMAN TOWERS
b. Need a three-dimensional description of the air rights.

c. Provide that if there are minor encroachments (because of the as-built improvements varying slightly from the three-dimensional description), an encroachment easement shall exist to allow the encroachment for so long as the improvements stand.

2. Tower crane "overswing" rights.
a. Consider limiting the transport of construction materials over servient property.

b. Limit duration to temporary construction period.

c. Consider granting reciprocal rights to servient property owner, so that in the future, servient owner would have the same overswing rights over the dominant property if servient owner needs to use a construction crane.

B. Easements for lateral support. In densely developed areas, excavation on one parcel may lead to destabilization of improvements on neighboring parcels.
1. Check state statutes and common law to determine whether neighbor has right to lateral support. If not, neighbor should seek lateral support easement from excavator.

2. Issues to address in easements for lateral support:
   
   a. Neighbor may need right to review/approve of engineering, excavation and construction plans.
   
   b. Dominant owner may need right to install underground soil nailing and shoring systems that may encroach upon or penetrate servient parcel, and to have such systems remain following completion of construction.
   
   c. Dominant owner may need access to portions of the neighboring parcel's surface during the construction period.
C. Easements for placement and operation of wind turbines and cell towers.
1. Depending on state/local subdivision laws, use of an easement (instead of a deed or lease) may avoid the application of land division requirements.

2. Wind turbine easements should include rights to install, maintain, repair and replace:
   a. Wind turbines.
   b. Electrical transmission and communication lines, transformers, junction boxes, road improvements.
   c. Meteorological equipment to measure wind speed.
3. Cell tower easements should address:

a. Radio interference (of tower with servient owner's equipment and vice versa).

b. Duty of dominant owner to comply with FCC regulations.

c. Dominant owner's ability to allow other users to use the tower.
4. **Cell tower and wind turbine easements should specify annual base compensation to landowner.**

   a. To avoid making this public record, consider putting the compensation provisions in a separate, unrecorded document.

   b. Provide for escalator, such as cost of living or periodic appraisal mechanism.

5. **Cell tower and wind turbine easements should specify compensation for destroyed crops (e.g., that year’s average bushel/acre on balance of farm x that year’s price per bushel x acreage of crops destroyed).**

6. **Cell tower and wind turbine easements should specify obligations of dominant party to remove improvements upon expiration/termination of the easement.**

7. **Cell tower and wind turbine easements should specify obligation of dominant party to pay real estate taxes attributable to land the servient owner can no longer use and to increases in assessed value resulting from the improvements belonging to the dominant party.**

8. **Cell tower and wind turbine easements should specify obligation of dominant party to comply with FAA regulations.**