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## Reevaluating REAs

*Parking, Site Plan and  
Use Restrictions*

*Part Three of a Three-Part Article*

By Sheldon A. Halpern

Reciprocal Easement Agreements (REAs) among one or more developers, department stores, and, in the mixed-use context, owners of parcels devoted to non-retail uses, have rarely been formulaic. Part One of this article discussed how the economy has impacted the flexibility and control of REAs, nontraditional occupants, consolidation and conveyance of improvements. Part Two described operating covenants and monetization of real estate. The conclusion herein focuses on parking, site plan and use restrictions.

## PARKING REQUIREMENTS

Parking has been considered the mother's milk of retailing, especially as retailers moved from the center of cities and towns to suburbia. A vast sea of parking in front of each department store's main entrance has traditionally been an absolute requirement, and a parking ratio of five parking spaces for every 1,000 square feet of floor area has been considered the gold standard for retail. How should REAs deal with impacts on parking ratios (and other parking criteria) like: 1) shared parking based on different peak hours of different occupants — for example, theaters (with peak weekend and Friday night use) sharing parking areas with offices (with peak weekday use); 2) projects near public transportation; 3) valet parking provided by the developer or by certain restaurants, hotels and upscale specialty stores; 4) different ratios based on floor area for retail

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## Reevaluating REAs

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and office in a mixed-use project (when floor area is often defined differently for each such use); 5) ratios based on factors other than floor area for uses like hotels (often based on number of rooms plus a factor for meeting rooms) and theaters (often based on number of seats); and 6) exclusive parking for residential condos based on the number of rooms (or bedrooms) when guests may in fact need to park in the common parking areas?

For large mixed-use projects, developers often retain parking experts to prepare elaborate parking studies that, once approved by the department stores, can result in an agreed-upon minimum number of parking spaces for the project, having taken into account impacts like those listed above. A problem arises, however, when market forces or changes in electoral politics dictate changes in the density or location of some of the uses in a mixed-use project. How much change is required before a new parking study subject to the approval of all parties is required? Should a parking study be mandated periodically without the necessity of any triggering event? How are different perspectives (including cost allocation of both the study and new parking) to be reconciled? In lieu of requiring a parking study, do parking ratios remain a viable approach for a mixed-use project?

### RESTAURANT RESTRICTIONS

Restaurants are one of the major draws of lifestyle centers, but are typically subject to a variety of restrictions in projects involving department stores. The most significant concerns are typically those about the potential impact on parking and traffic, and about the quality of the restaurant operation. Both of these concerns (along with an additional concern relating to restrictions on the department store's operation of its own restaurant if there is an overall limitation on restaurant use in the project entitlements) require a categorization of restaurants when some restaurants defy categorization. In the context of these concerns: How important is the size

of a restaurant? What are fast food restaurants, and how do they differ from fast casual or casual dining restaurants? What are sit-down or table-service restaurants? How does the involvement of wait staff affect these distinctions? Does it matter if the wait staff only delivers food to the table (with the customer having ordered at the register)? Does it matter if liquor is served (and, if so, at what point does liquor service change a permitted restaurant to a prohibited bar or lounge)?

### SITE PLAN RESTRICTIONS

Many department store REA forms for regional malls (for a number of reasons, including compliance with FTC consent decrees in the 1970s that prohibit floor area limitations), limit location, configuration and height of buildings. Buildings must be constructed and maintained within permissible building areas set forth on a site plan attached to the REA. Although the consent decrees limit the department store's ability to restrict categories of retail use (beyond an area immediately adjacent to the department store) in large projects, the REA is likely to limit non-retail uses to specified areas (and, in any event, building configurations and heights may effectively limit non-retail use). These document structures may require reevaluation to accommodate the need for flexibility inherent in both mixed-use projects and phased projects and at the same time preserve legitimate control rights for the department stores. Potential methods of accomplishing this may include: 1) setting forth non-retail use zones without limiting building location, configuration and height, at least in areas not proximate to the department store exerting the control; 2) setting forth floors and ceilings as to density of each use rather than more precise limitations (with perhaps the right to trade increases in densities of certain uses for decreases in densities of other uses); 3) setting forth control areas — geographical limits to a department store's approval rights over most

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## **Reevaluating REAs**

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changes; and 4) specifying which approval rights in the REA are applicable to non-retail uses and to future phases of development. In this age of uncertainty, David Hu- prich, a principal of Reveal Real Estate Advisors, LLC, near Cincinnati, notes that it may under some circumstances suffice for a developer to obtain from a department store the benefit of flexibility in an area intended to be occupied by other department stores that have not yet committed to the project. He acknowledges that if the other department stores ultimately commit to the project, they will restrict the developer's flexibility in that area (since proximate to them), but the developer may be primarily concerned with flexibility in that area only if the developer is unable to persuade the other department stores to commit to the project. Mr. Hu- prich further notes that some department stores have greater ne-

gotiating leverage than others, de- pending on their importance in the applicable market. I would add that each also has its own hot buttons and areas of flexibility.

### **DOCUMENTATION OF PROJECTS WITH CONDOMINIUMS**

Mixed-use projects more frequent- ly involve condominiums than retail projects. The entire project could be divided into condominium units (and sometimes subunits), or the only con- dominium structure may be the resi- dential condominium portion of the entire project. In either event, more frequent collaboration by both "con- do" and "dirt" lawyers is required in mixed-use projects. Different back- grounds often result in different per- spectives on documentation. One example is that condo lawyers often have significant experience dealing with residential developments, are re- tained by the developer and are most comfortable giving the developer (declarant) almost all of the authority, especially until the units are substan- tially sold and an association formed.

Dirt lawyers often have significant experience dealing with retail proj- ects and, whether representing the developer or an anchor, are comfort- able giving the anchor much of the ultimate authority. Mixed-use projects that involve condos often contain multiple declarations that deal differ- ently with the same issues (for exam- ple, restoration after casualty), with little guidance as to which document controls in the event of a conflict.

### **LOOKING TOWARD THE FUTURE**

The issues to be reevaluated are likely to increase in number and scope when there are more frequent transfers of troubled projects that re- quire repositioning if not completion. Issues will presumably continue to revolve around mutual (and conflict- ing) requirements of flexibility and control. Before the anticipated wave of such transactions, discussion of issues like those highlighted in this article during panels at retail real es- tate and law conferences should give us a good head start.



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