

LEGAL ISSUES

Expiring REAs: To Extend Or Not To Extend

Kathleen A. Furlong and Sheldon A. Halpern

Shopping centers have been part of the fabric of American society for decades. Many shopping centers constructed in the 1950s, 1960s and 1970s are subject to reciprocal easement agreements (REAs) with terms of 50 to 75 years. As the expiration dates of these REAs approach, the parties will need to determine whether extending the REA is preferable, and, if so, the length and other terms of the extension.

Each situation will require the parties to weigh their options with the specific provisions of the REA in mind. Rarely will the answer be simple. This article raises some of the key considerations to be analyzed and various approaches the parties may choose depending on the outcome of their analysis.

Financial Analysis: Do the provisions in the REA still make sense for each party from a financial perspective? How are common area maintenance costs allocated to the parties? Would it be better to pay these expenses separately instead of continuing any cost sharing approach provided for under the REA and supplemental agreements? The answers may differ for each party. If the developer ceases to provide joint common area maintenance services, an anchor may find it more costly and less efficient to separately maintain its parcel. Does it make sense for the developer to continue anchor store CAM subsidies that were negotiated years ago?

How are real property taxes handled? If the anchors currently pay taxes based on separate assessments, this will not change when the REA expires. However, if the anchors pay a share of taxes on all common areas, the REA expiration throws this arrangement into question.

Is there a joint common area liability insurance policy? If so, how does the party's share of the premium compare to the cost

of obtaining an individual policy? Does it make sense for the developer to obtain a joint policy if it is no longer maintaining the parcels of all anchors?

Parking: Each party must analyze the parking on the land it controls (by fee ownership or leasehold) when determining whether to extend the REA. An anchor which leases only its building footprint may find itself without parking when the REA expires (unless the anchor's lease term continues and the lease provides for parking rights). Each party must also determine whether its site contains sufficient parking to support the appropriate parking ratio. Typically, the parking ratio in the REA is higher than that required by local codes. When the REA expires, that higher parking ratio becomes obsolete, so "poaching" can occur by an adjoining parcel with insufficient parking to satisfy the needs of its customers. An adjoining parcel may even convert to a use with a heavier parking load than the former use — remember that REA use restrictions will have also expired. Fencing may be an option, but having a legal right can be cold comfort if enforcement causes a rift with local authorities or annoys customers.

Perhaps the most challenging parking issue arises when multiple parcels rely on one parking structure. A party not owning the structure is likely to face a parking shortfall upon REA expiration. If the owner of the structure grants an easement to use the structure that extends after the REA expires, the easement should allocate responsibility for parking structure maintenance and related costs. If a parking structure straddles two parcels, what happens to the split structure upon REA expiration? Who can park there? Who is responsible for operating it? Who is responsible for maintaining and insuring it? What if one party continues to operate a

store, while the other party does not? Must the structure be replaced following damage by casualty? How are condemnation proceeds allocated? What if one party wants to close or demolish the structure but the other does not?

Many REAs provide for an overall shopping center ratio instead of a parking ratio for each party's site. If the developer built an expansion which relies on parking located on an anchor store's site (or vice versa), the REA expiration ends this arrangement abruptly. The party with insufficient parking will be in a precarious situation (perhaps even in violation of code) if it loses the right to park on the other parties' sites upon the expiration of the REA.

Access and Utilities: Each party should determine whether it will have direct access to a public street following the expiration of the REA. Suddenly finding one's store landlocked due to poor drafting 50 years ago is a very uncomfortable position. Each party must also investigate whether it will have access to the utility facilities required to serve its parcel. If not, the party could face significant expenses to relocate its utilities. Many comprehensive REAs provide for permanent access easements (at least over significant internal roadways) and permanent utility easements. If an REA does so, extending the REA may not be as critical. However, many of these permanent easement provisions fail to deal with the cost, maintenance and insurance issues described earlier.

Use and Operation: Each party should analyze whether the expiration of REA use restrictions will benefit or adversely impact its property. Additionally, the anchors with operating covenants should analyze whether the REA expiration will affect their operating covenants and whether those covenants

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would be extended by virtue of an REA term extension. Operating covenants by anchors (usually only given by department stores) typically expire earlier than the REA term. However, older REAs may provide otherwise. Each party should also determine if its service facilities are completely within its parcel boundaries. Facilities like truck turn-around areas, trash areas, storm drains, retention ponds, fire exit corridors and canopies may have been built, at least partially, on another's land. Although this is not a concern while the REA term continues (if there are appropriate easements), when it ends, the other party could cut off access to essential facilities.

Other Considerations: There are various other considerations that need to be taken into account when determining whether to extend an expiring REA. For instance, restrictions on permitted building areas, building height limitations, rights to approve construction plans and rights to approve signage that fails to comply with signage criteria will cease upon expiration. Also, a party may lose its pylon sign and other signage easements upon expiration.

Options: After analyzing the issues discussed above, the parties will need to decide whether to extend the REA or let it expire. If the parties allow the term to

expire, they might co-exist as neighboring landowners, continuing to act as if the REA remained in force, but this could be a lawsuit waiting to happen.

If the parties desire to extend the REA, they must agree as to the length of the extension. They might decide to extend the REA for a new term of several decades or agree to a short extension, perhaps while negotiating a longer extension. The parties could extend the REA and simultaneously revise or eliminate outdated or unsatisfactory provisions. They could agree to extend the term with a bare-bones document that deals with only the essential items needed to operate an integrated shopping center, such as parking and access easements and joint maintenance provisions (with or without subsidy from the developer). A short extension may merely postpone much of the analysis, whereas a longer extension forces the parties to think through issues more carefully.

External Factors: There may be third-party requirements that force a party to address the extension issue. For example, lenders may have certain minimum requirements as to an REA term before they are willing to refinance. Additionally, a grant of entitlements by a governmental authority may require an REA, with little

or no guidance as to the length of such requirement.

The consolidation of both developers and anchor parties may also affect the approach to dealing with an extension. There is a greater chance that the issues surrounding REA extensions will be negotiated as part of deal packages involving other mutual projects rather than as stand-alone deals.

Many of the potential problems raised in this article might be solved by thoughtful drafting of the initial REA. For example, cost and operational issues as to permanent easements could be addressed up front. However, many REA parties are (a) uncomfortable looking into their crystal ball that far into the future and (b) reluctant to divert time, energy and legal costs to an issue likely to affect only their successors. **SCB**

Kathleen A. Furlong is group vice president and assistant general counsel of Macy's, Inc., and Sheldon A. Halpern (shalpern@pircher.com) is a partner in the Los Angeles office of Pircher, Nichols & Meeks, a national real estate law firm. Jennifer A. White (jwhite@pircher.com), an associate in the Los Angeles office of Pircher, Nichols & Meeks, also provided assistance in writing this article.

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