Reciprocal Easements, Cost Sharing Agreements and CC&Rs:
The Blueprint for Ensuring a Successful Project

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Types of Agreements

• Reciprocal Easement Agreements
• Reciprocal Easement and Cost Sharing Agreements
• CC&Rs
• What are the differences?
• Reciprocal Easement Agreements:
  – Shared easements between two owners with no cost sharing

• Reciprocal Easement and Cost Sharing Agreement:
  – Shared Easements between two or more owners with cost sharing.

REAs may be between 2 or more owners or
• Can be established by the developer as Declarant before any property is conveyed
• It then becomes a Declaration Establishing Reciprocal Easements and Cost Sharing Agreement

But the concepts remain the same!
Declaration of Covenants, Conditions & Restrictions or “CC&Rs”

1. Established by Declarant
2. Typically (but not always) establish an Owners Association
3. May be subject to regulatory agency approval if there are residential interests

Whether it is an REA or CC&Rs

• Establish covenants running with the land
• May establish equitable servitudes
• Benefitted Property and Burdened Property
• Statutory Requirements
• Reference in Grant Deeds may be required
• Which type of Agreement or Declaration do you choose – it may depend upon your project and other factors!

REA or Declaration May Be Simple or Complex

• Shared Driveway – REA
Horizontal Mixed Use Residential/Retail/Office

- Mixed Use Residential & Retail Buildings
- Retail Parcels
- Office Parcels
- Hotel Parcels
- Shared surface, parking and other areas, main street, landscaping, drainage . . .

Vertical Mixed Use with Mixed Use Parcels

- Residential Condominiums with a Residential Association
- Vertical Parcel Line
- Retail/Hotel – One Owner
- Subterranean Parking

The Avenue -- “Chicago Model” REA or CC&Rs with an Association or Associations.
Factors in Selecting an REA or CC&Rs with an Owners Association

1. Nature of Easements
2. Statutory or Regulatory Issues
3. Objective for Control
4. Comparable Values of the Residential/Commercial Interests
5. Concern for balance and fairness
6. Lender issues
7. When do you want to impose the covenants?

Common Theme and Goal in a Mixed Use REA or CC&Rs

1. Divergent Interests: Mixed Marriage of Residential and Commercial – are not necessarily compatible!

2. Commercial Owners – One Goal
   • Minimize Contact with Residential Owners
1. What does an REA or CC&R need to address?

- Easement Rights
- Maintenance Obligations
- Cost Sharing Allocations (depends upon nature of easement areas)
- Damage & Destruction
- Cure Rights
- Use Restrictions

The Easement Process

Reserve (Declarant hereby reserves) or simply Grant (Declarant or Owner of Lot 1 hereby grants to)
The Easement Process

For Benefit of And its Permittees
(Easement in Gross)

For Benefit of Lot 1 / (Easement Appurtenant)

Pylon Sign with LED Reeder Board
Reserve Easement in Gross
• Where? On, over, under, through and across (the Burdened Property)

• For what purpose?
  – Emergency ingress and egress?
  – Maintenance and repair?
  – Exclusive use of an area or facility
• Then what you give, you may take away
Limitation on Easement Rights

- Rules
- Declarant or developer rights
- Entry into areas
- Closure
- Relocation

General Character of Easements

- Appurtenant or in Gross?
  - Example:
    LED READER Board or Vending Machine Operations may be an easement in gross

- Roadway easement -
  - An easement appurtenant
  - Elevator easement in a building-easement appurtenant
What Questions Do You Need to Ask?

<table>
<thead>
<tr>
<th>Issue</th>
<th>Language</th>
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</thead>
<tbody>
<tr>
<td>Who is reserving the easement?</td>
<td>Declarant hereby reserves…</td>
</tr>
<tr>
<td>Who is the easement being granted to?</td>
<td>Declarant hereby reserves for the benefit of the Residential Owners…</td>
</tr>
<tr>
<td>What is the easement over?</td>
<td>Or Declarant hereby reserves for the benefit of the Residential Owners…</td>
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<tr>
<td>For what purpose is the easement granted?</td>
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Title Issues

- Title Insurance
- Subordinations
- Review Title Reports – do you have the correct signatories?
- Duration – Survive Termination of REA or CC&Rs
Scope of Easements Will Vary Project by Project

- Ingress & egress over surface areas
- Utilities
- Drainage
- Signage
- Parking

Vertical Mixed Use Building

- Building Stairwells
- Elevators
- Roof Easements
- Walkways
- Pathways
- Lobby
- Trash Chutes
- Utility Rooms
- Loading Docks
- Emergency Areas
- Support
- Encroachment
- Parking
- Shared Facilities
Must identify each easement and do your analysis!

Deciding the Balance of Power (i.e. Maintenance) in REA or CC&Rs

• Who should maintain the easement areas?
• He who maintains has the power!
**Owner/Operator REA:**

**Protecting Other Ownership Interests**

- Designate a primary owner to maintain and operate
- If you shift the balance of power to one owner, how do you protect the other owners?
- Establish the rules of the game in the REA or CC&Rs
- Approval of other owners on certain issues
- Covenant of good faith and fair dealing
- Operational Disputes – establishing a process to resolve disputes

**Maintaining the Easement Areas**

- Ensuring easement areas are properly maintained
  - Standard of Maintenance
    - General
      - Good condition of maintenance and repair
    - Specific
      - Repave shared parking lots every 7 years
      - Clean, remove trash on a weekly basis
Maintaining the Easement Areas
(continued)

• What happens when things go wrong?
  – Cure Rights
  – Take Over Rights

• To whom do you want to give cure and take over rights?

• May vary depending upon project
  – A simple REA for a roadway – cure and take over rights to the other owner
  – Mixed use buildings

• Not a multitude of small landowners
• Condominium Association – maybe
• Majors or other Big Guys
Allocation of Expenses - REA or CC&Rs

- Establish Allocation Formulas
  - Can vary . . . may have multiple formulas

- Determining a proportionate share
  - Land Area
  - Floor Area
  - Square Footage
  - Other Factors

- Control of increases – statutory or contractual

- Fund Reserves

- Flexibility to change formulas and amounts based on first year operations

Defining Expenses

- General
  - Shared Expenses, include the costs of maintaining, repairing and replacing the shared easement area

- Specific Approach
  - Shared Expenses means the following: (a) expenses directly related to the maintenance, management, operation, repair and replacement of the Shared Building Elements; (b) any expenses related to inspections required under the Maintenance Program; (c) any expense related to Property Insurance which the Operator is required to obtain as provided in Article ___; (d) a management fee in a reasonable and customary amount but not to exceed ____(__) percent of ___ Shared Expenses; (e) any other categories of costs delineated in the Shared Expenses Budget; and reasonable reserves required to be funded under Section ___.

How do you protect against substantial increases?

- Examine records
- Approval rights over budget
- Requiring maintenance to a Project Quality Standard
- Reserves and protecting against a bankruptcy

Use Restrictions in REA/CC&Rs

<table>
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<tr>
<th>Restrictive</th>
<th>Permissive</th>
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<tr>
<td>- No obstruction of roadway</td>
<td>- Can operate from 7 am to 1 pm</td>
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<tr>
<td>- No use of common area for outdoor sales areas</td>
<td>- Can have access at all times</td>
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<tr>
<td>- No access to shared stairwells except for emergency ingress or egress</td>
<td>- Can have an outdoor sales area</td>
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**Insuring the Easement Areas**

- Easy in a Horizontal REA
  - Operator or Owner
  - Easement areas will probably not include the building
  - Easement Area is rebuilt if Building is rebuilt
  - If no rebuilding, Benefitted Easement Holder can rebuild

- Complex in CC&Rs or REA for a Single Building
  - Association or one owner
  - Do not divide property insurance obligation
  - Named Insured - controls insurance issues
  - Additional Insureds – gives other owners rights

**Damage and Destruction**

Address it in REA or CC&Rs

- What happens when insurance is not adequate to repair?
Issues to Consider

- Requirement to rebuild essential easement areas
- Will Commercial Owner control rebuilding?
- Lender concerns
- Purchase rights upon an election not to build

Duration of Easements and Other Customary Provisions

1. In perpetuity
2. Do they survive termination of CC&Rs?
3. Amendments
4. Relocation
5. Mortgagee Protection
6. Condemnation
7. Covenant of Cooperation
Lessons Learned / Lessons Shared

- Meet with architect or engineers if easement areas are complex
- Understand scope of all required easements above ground and below ground
- Analyze the pendulum of control
- Do not create a dictatorship (at least if you have residential interests)
- Flexibility for change