Drafting Construction, Operation, and Reciprocal Easement Agreements for Vertical Mixed-Use Projects

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The success of a mixed-use building project depends on carefully drafted reciprocal agreements between the different developers.

THROUGHOUT THE COUNTRY, DEVELOPERS are building mixed-use projects in response to city planners’ desires to create “urban villages” where people can live, work, and be entertained in the same location. These projects frequently include buildings in which the ground floor is used for retail purposes and the upper floors are used for a different purpose, such as residential or office. Many times, most often with retail-residential buildings, the different improvements are built and owned by separate developers. Even if the original devel-

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oper intends to develop the entire building, it may want the flexibility to sell the improvements separately in the future.

A common approach to facilitating the separate ownership structure is for the original developer to create a three-dimensional subdivision that includes one or more street-level and air space or air rights parcels. In this situation, the subdivision map will depict not only the lateral boundaries of each parcel, but also the elevation at which a street-level parcel ends and the adjacent air space parcel begins.

Because the activities on a street-level parcel will affect those on the adjacent air space parcel, and vice versa, the owners will want to specify their respective rights and obligations in a recorded agreement that benefits and burdens both parcels. Typical titles for these agreements include Construction, Operation and Reciprocal Easement Agreement ("COREA"), Reciprocal Easement Agreement ("REA"), and Declaration of Covenants, Conditions and Restrictions and Grant of Easements ("CC&Rs"). This article uses the term COREA.

The scope and contents of COREAs will vary based on the parties involved, the nature of the planned project, and other factors. At a minimum, the parties should consider including provisions dealing with the following, each of which is discussed in more detail below:

- The creation of the necessary easements;
- Each owner's construction obligations;
- The use, operation, maintenance, and alteration of each component of the project;
- Insurance requirements and the owners' rights and obligations upon a casualty (or condemnation proceeding);
- Restrictions on transfer and preferential purchase rights;
- Remedies; and
- Mortgagee rights and protections.

**PRELIMINARY CONSIDERATIONS**

To draft an effective COREA, it is necessary to understand the various design elements of the project. It is particularly important to consider the following two points.

First, although the project will appear to be, and in many respects will function as, a single building, it is likely to be comprised of two separate physical structures. The upper-floor improvements will be constructed on a support structure, often referred to as a podium deck or platform, that is located immediately above the ground-floor improvements and is capable of supporting the upper-floor improvements independent of the ground-floor improvements.

Second, certain improvements on one parcel will benefit, and in some cases be used by the occupants of, the improvements on the other. As an example, consider a project with the following elements:

- The street-level parcel will be improved for retail uses and the air space parcel will be improved with an apartment complex;
- The apartment complex will be built on a horizontal podium deck within the air space parcel, but supported by vertical columns through or adjacent to the retail improvements;
- The apartment residents will enter and exit their complex using elevators and stairwells located within the retail improvements on the street-level parcel;
- Heating, air conditioning, and ventilation, ("HVAC") and satellite equipment and antennas for the retail improvements will be located on the roof of the apartment complex; and
- Both the retail improvements and the apartment complex will include utilities lines and equipment that will service the other project.

**Use Precise Definitions**

The COREA should describe all of the shared project components in a precise manner to help
ensure that it creates all of the necessary easements and properly allocates the maintenance responsibility for each component. A common way of doing this is through the use of defined terms.

For a project like the one described above, the COREA could use the terms Component, Common Building Component, Exclusive Residential Component, Exclusive Retail Component, and Shared Use Component (the foregoing project description is intended to illustrate only certain vertical and horizontal elements of a project; the COREA for an actual project will need to address all of the shared components, including parking, if applicable). The term Component would have the broadest definition and include any Common Building Component, Exclusive Residential Component, Exclusive Retail Component, or Shared Use Component, as described below.

**Common Building Component**

A Common Building Component is a building element that provides structural support or a similar benefit to the improvements on two or more parcels (e.g., a column or foundation) or separates one parcel from another. A Common Building Component may be located entirely within one parcel or portions may be located within each parcel.

**Exclusive Components**

An Exclusive Component is an improvement or piece of equipment that benefits or will be used exclusively by the owner, occupants or invitees of one parcel, but is located on another parcel. In the project described above, any elevator shaft or pipe, wire or other utilities equipment that is located within the retail parcel but serves only the apartment complex would be an Exclusive Residential Component. Each rooftop HVAC unit that services the retail improvements and any related ductwork located within the apartment complex would be an Exclusive Retail Component.

**Shared Use Component**

A Shared Use Component is an improvement or piece of equipment that benefits or will be used by the owners, occupants or invitees of more than one parcel. A Shared Use Component may be located entirely within one parcel or portions may be located within multiple parcels. Examples of Shared Use Components might include, depending on the particular project, parking facilities, loading docks, and service elevators.

**EASEMENTS** • On account of the integrated nature of the project, each owner will need easements over the other owner’s parcel to construct, access, operate, and maintain its improvements. At the same time, the grantor of any such easement will want to preclude the grantee from exercising its easement rights in a manner that will adversely affect the construction and operation of the grantor’s project.

**Types of Easements**

The easements that each owner will need will depend on the project’s design and the intended uses, but most vertical mixed-use projects will require, and the COREA should create, easements for the following purposes.

**Construction and Maintenance**

Each owner will need an easement in, through, over, under and across the other owner’s parcel for the purpose of constructing its initial improvements (as discussed below, in accordance with plans approved by the grantor) and for maintaining, making repairs to and reconstructing (after a casualty) those improvements. Additionally, if an owner will be responsible for constructing or maintaining a Component that is located within the other owner’s parcel, then the COREA should grant the applicable owner the necessary easement.

For construction or maintenance activities to be undertaken after the completion of the pro-
ject, the grantor will want to require the grantee to give the grantor advance notice of its need to enter the grantor’s improvements and to schedule the work at a time that is likely to cause the least disruption to the operations at the grantor’s improvements. Of course, there will need to be an exception for emergency repairs.

Support and Encroachment

Each owner will need an exclusive easement to attach its improvements to, and receive support from, the improvements on the other owner’s parcel. Each owner also will need an exclusive easement for its improvements to encroach into portions of the grantor’s parcel located above, below or adjacent to, as applicable, the grantee’s improvements to the extent necessary to allow the grantee to make full use of its improvements in accordance with the intent of the COREA. The grantor of an encroachment easement will want to provide that the grantee must construct its improvements substantially in accordance with plans approved by the grantor and that the easement is not intended to permit any encroachment that would interfere with the operation of the grantor’s improvements.

Exclusive Components

The owner or beneficiary of each Exclusive Component will need an exclusive easement over the other owner’s parcel to install and use the particular component. The grantor will want to ensure that the easement may be used only for its intended purpose (e.g., an elevator or stairway lobby, utilities equipment, and so forth) and that the Exclusive Component is installed in the location depicted on the approved plans or another location approved by the grantor.

Access to Other Components and Amenities

The COREA should provide each owner with any other easements that are necessary for it to access and use its improvements and any Shared Use Components owned by the other owner (assuming that the grantor has agreed to such use), such as, for example, parking facilities, loading docks and service elevators. Additionally, if the project will contain multiple buildings, the owner of the air space improvements will want an easement to use any street-level “common areas,” such as an outdoor plaza or courtyard.

Revisions and Future Grants

For practical reasons, the owners probably will want the COREA to describe most or all of the easements in general terms (e.g., an easement to construct an Exclusive Component in the location depicted on the approved plans), as opposed to depicting the precise location of each easement by attaching detailed construction drawings to the COREA as exhibits. At the same time, however, the owners may want to provide that upon the request of either owner after completion, the COREA will be amended to identify and depict the location and nature of each easement and the related improvements.

Similarly, the owners should consider including a provision that recites that each owner acknowledges that an owner’s improvements may not be constructed entirely within its parcel on account of design and construction errors and that if it is later discovered (perhaps after the preparation of an as-built survey) that one owner’s improvements encroach into the other owner’s parcel, then, provided that the encroachment is within normal tolerances, the non-encroaching owner will grant the encroaching owner an encroachment easement. The parties also could consider providing for a lot line adjustment or for the conveyance of title to the encroachment area to the encroaching owner.