

# RETAIL PROPERTIES

## Quarterly

### Law

## Reciprocal easement agreements are evolving

Typically, reciprocal easement agreements are devices used for a property that is intended to be separated into parcels owned by more than one person or entity. The REA serves as a mechanism to establish a contractual agreement integrating the property parcels and their existing and future owners and users, through the development process (if applicable) and beyond, and sets forth the rights and obligations of such owners and users. The REA is meant to consider the property's physical attributes, anticipated improvements and intended users. At the outset of a development, the project developer, and possibly the anchors, will seek to maintain as much control over the project and the development as they can, but what happens once the project has been established and the next generation of tenants or owners replace the original parties and seek to modernize the development?

REAs traditionally were used in shopping centers to preserve the rights and obligations in connection with an older generation of anchor tenants (i.e., movie theaters, discount department stores and traditional big-box stores). The COVID-19 pandemic has hastened economic changes and spending decisions of individual consumers that already were playing out across the country prior to the pandemic. As the popularity of these original anchor tenants diminished, new, unique users sought to occupy these vacant spaces, including med-



**Tal Diamant**  
Shareholder,  
Brownstein Hyatt  
Farber Schreck LLP

ical centers, fitness studios, multifamily housing and smaller versions of the national grocery stores. However, there was an inherent issue at play with these new users: older and overly burdensome restrictions on permissible uses contained within REAs. Nationwide, we have seen a growing trend to reduce use restrictions contained within REAs, as well as liberalize the mechanics by which building alterations may be approved. Overall, the general move has been to allow for greater flexibility of permitting the evolution of current uses and new popular uses. There remains a concern about noxious or illegal uses, but what once was verboten could be the next economic boom. Look no further than the increased legalization of cannabis as a test case to follow.

Two additional commonly considered changes are connected to control of architectural changes and the distribution of common area maintenance. At the commencement of construction of a development, there is great value in uniformity in both the building façades and the landscaping of individual parcels. Initially, it is common for the declarant to have an autocratic approach to what is permissible and lay out strict guide-

lines for what will not be permitted in an effort to stick to rigid symmetry. After the initial build-out of a development, this control often is not as necessary, and many REAs will be modified to ensure that future improvements merely maintain some architectural harmony and transfer the approval of such changes to a decision-making body representing the best interests of the development as a whole. In addition, prior to a development's build-out, it is essential that the cost and expenses of common area maintenance are distributed via a formula that prevents cost overages for the operator, creates a fair and reasonable allocation and ensures that all areas are maintained uniformly. After the initial build-out, the responsibility of exterior maintenance may be transferred to each tract owner with shared maintenance responsibilities remaining only for those facilities that are better maintained by a single source, such as outdoor lighting utilities, and essential roadways and access points.



**Blake Hansen**  
Associate,  
Brownstein Hyatt  
Farber Schreck LLP

As demonstrated above, the current challenge for real estate attorneys in connection with REAs is how to promote flexibility and more widely distribute decision-making authority in a way that better

anticipates future trends and tastes rather than adhere to the restrictive nature of the past. As always, the prudent client will seek out the services of an attorney with a significant REA background who can predict issues based on past experience.

This brings us to a final consideration: Are REAs relics of the past or will they continue to serve a useful purpose? When contemplating a mixed-use development, an approach that is gaining popularity is the adoption of a more limited master REA along with multiple sub-REAs dealing with issues unique to individual parcels. This approach allows for balancing the needs of a mixed-use community with distinct uses and varying priorities for tenants and parcel owners alike. Another approach is not to utilize a REA at all but instead weave together various easements, cost-sharing agreements, use covenants and good-neighbor agreements. This approach allows for more surgical precision in drafting that can avoid overreaching, as compared to a general approach that can create unintended consequences. While we are not predicting the end of REAs in the immediate future, we do anticipate that developers, anchors, tenants, consumers and other stakeholders will continue to demand creative approaches that increase flexibility and are more forward looking. ▲

tdiamant@bhfs.com  
bhansen@bhfs.com