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# The ABCs of REAs: An Introduction to Shopping Center Reciprocal Easement Agreements

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# The ABCs of REAs: An Introduction to Shopping Center Reciprocal Easement Agreements

## I. Essential Purpose of an REA

An REA (reciprocal easement agreement) is the common name (although they go by many names, e.g., OEA - Operation and Easement Agreement; ECR - Easements, Covenants and Restrictions, COREA - Construction, Operation and Reciprocal Easement Agreement, etc.) for the governing agreement between multiple parties that own parcels that comprise a unified development project. The REA has several purposes, most notably:

A. granting certain easements for the benefit of the various stakeholders within a shopping center (without which the parties may not have the legal rights needed to effectively operate within the shopping center); and

B. establishing a governing regime for the shopping center relating to construction, maintenance obligations, architectural theme, prohibited, restricted and exclusive use protections, site plan controls, signage rights and other operational requirements.

## II. Scope of an REA; Approving Parties

Some REAs govern the entire shopping center and others are meant to cover rights related to a specific portion of the project. REAs that cover the entire shopping center often include all property owners within the shopping center as parties to the REA.

For more discreet REAs, say an REA governing a particular outparcel (maybe a restaurant pad) the parties might only include the master developer and the outparcel owner as parties. These types of REAs are typically designed to include certain necessary easements in favor of the outparcel owner, but they often provide a significant amount of governing control to the master developer. This can be compared to the broader REA that governs the entire shopping center, in which case the pad owners of large parcels (often department stores, large home improvement stores or other “big box” retailers) have significantly more negotiating strength and they often dictate much of the operational, construction, use and site plan controls that govern the shopping center. While a broader REA governing the entire shopping center may include multiple parcel owners, the so called “Approving Parties”, the parties with voting/approval rights over decisions under the REA are often limited to the master developer and the top few anchor retailers who own their own parcels.

## III. Overall Concerns of Parties to REAs

To begin to discuss and understand REAs, you have to understand the various parties who will own a portion of the shopping center or use the shopping center as a merchant or customer. As you understand their interests, you can draft the REA to address their concerns.

Consider an entity that owns a portion of the shopping center, they will want to know that their customers will have access from the public streets, that their parcel will be served by utilities and they will be able to have their building built up to their lot line. They will want to know the buildings and common areas in the shopping center are being built and maintained to certain standards. They may also be concerned with ensuring that the other uses at the shopping center are consistent with their vision for a successful retail experience.

Consider a customer who wants to access a shopping center, park their vehicle, walk through the common areas, enter one or more stores and enter the enclosed mall if there is an enclosed mall.

Consider the tenant who leases a portion of the shopping center and wants to ensure that their delivery vehicles will have access from the public roads.

With that background, let us discuss the various substantive issues the parties will seek to cover in the REA.

## IV. Substantive REA Issues

### A. Easements

#### 1. Access (ingress/egress)

The parties to the REA will want to grant and receive reciprocal easements for ingress and egress over the drive aisles located on the various tracts so that the owner, the owner's employees, customers and suppliers can travel between the public roads and the respective tracts of the owners in the shopping center. If an owner leases a portion of their property to tenants, such as the developer leasing a portion of its tract to a tenant, that owner will want its tenant to have the benefit of the cross access easement as well.

The parties will want to grant the access easements to the other owners in the shopping center, but will want to go on to say the customers and tenants of the owners will have the right to use the drive aisles too. The access easement should grant vehicular access over the drive aisles and pedestrian access over the walkways and parking areas.

Care should be taken decide whether or not to tie the easement to a specific location. Usually the grantor of the easement will want to grant the easement on the drive aisle as it may be constituted and moved from time to time. Consider that an owner might want to enlarge its building or demolish its existing building and rebuild a new building on its parcel. If the access easements were granted over specific area, the owner would have to obtain consent from each other owner benefitting from the easement to move the easement. Sometimes the parties will agree that certain specific access road, such as an access road leading from a ring road to a public road, will be granted based upon a specific location and the access road will not be relocated without the consent of all of the other owners.

An owner granting an access easement will want to retain the right to relocate the easement. In that case, the grantor should notify the benefitted owner(s) of the relocation and not close the existing access easement until the new access easement is ready to use. The benefitted owner(s) will want to specify that the new access easement shall not make access more inconvenient.

Remember that an owner will want to seek to keep its parcel to be taken by prescription, so the grantor will want the right to close off a portion of the access easement just to assert its control over the access area. If the owner wants to include that right in the REA, the other parties to the REA will want to coordinate the closing so that access is not totally impinged. Oftentimes the parties will agree that the closing will occur on Christmas Day when presumably the owners and tenants are closed for business. The owner will also want the right to temporarily suspend use of the easement area while the owner is constructing or maintaining the easement area.

Another type of access easement that might be encountered in an REA is an easement for an emergency exit door to open onto a sidewalk or hallway located on the tract of an adjacent owner. If such an easement is granted, the benefitted owner will want to prohibit the burdened owner from removing the sidewalk or hallway or building in a way that hinders egress.

**2. Parking**

The corollary to the access easement is the parking easement. The owners will grant to each other the right for their, tenants, customers, employees and suppliers the right to park in the designated parking area. Similar to the access easement, consideration should be given to the rights and limitations on the right to relocate parking areas.

Usually the parties will specify that parking can only be in the striped parking areas and not elsewhere. The owners will want to specify the parking ratio to be maintained on the various tracts of the shopping center. They might specify higher parking ratios for restaurant and theater uses. If it is a mixed use development, the owners might specify another parking ratio for office or residential space.

An important item to consider is whether each parcel has to be self-sufficient for parking or if one owner will be allowed to count parking on another owner's parking area to meet the parking ratio required on the first owner's tract. Usually owners are hesitant to allow another owner to "borrow" parking and will add language requiring each tract to be "self-parked".

As a practice consideration, newer lawyers should know that parking is considered the "holy grail" issue in REA negotiations. There can be diverging interests in determining parking requirements and the location of parking. Traditional anchor stores and big box retailers default to the thinking that they require

a sea of surface parking directing adjacent to their store. If you view a shopping center or mall site plan, you can see that the entire layout of the project is dictated by having massive amounts of surface parking.

On the other hand, in successful mixed-use projects, parking is often handled very differently, including in structured parking that may or may not be located directly adjacent to the anchor stores. As retail shifts toward experiential projects that involve numerous uses, parking needs an solutions will continue to evolve. One particularly challenging issue with structured parking is the enormous cost to construct a garage. Shoppers traditionally do not expect to pay for parking and retailers have long resisted any requirement that their customers pay for parking because it may deter traffic. There is also the consideration of whether the costs of maintaining structured parking garages should be passed through to the REA parties as common area maintenance expenses and how these costs should be allocated in a mixed use project where certain types of users (office, multi-family, hotel, retail, etc.) may have different impacts on the amount of parking used and the wear and tear on the parking facilities. These are more advanced topics than can be covered in an introductory session to REAs.

**3. Utilities**

The parties will want to grant to each other and to the local utility provider the right to install, operate, maintain and repair utility lines on each owner's tract. The utility easements will include to the extent needed water, sewer, gas, electric, telephone and cable.

Consider stormwater drainage. Usually one owner will discharge stormwater onto the parcel of an adjacent parcel. The question is whether that discharge is to be by way of catch basins and pipes or sheet flowing across the burdened parcel. The parties should agree upon the design of any storm water system. Will stormwater flow to catch basins and then to underground lines, or will the stormwater flow across the surface of one lot onto another? However the stormwater is transmitted, the benefitted owner will want to make sure the burdened owner does not have the right to alter the common areas on the burdened tract in a way that will impeded the flow of stormwater from the benefitted tract.

Whether it is a utility easement or a stormwater easement, the burdened owner should have the right to consent to the location of the utility facilities. The burdened owner should have the right to prohibit utility lines from being installed under its building. If the benefitted owner is installing the utility lines, the burdened owner will want to require the benefitted owner to provide the burdened owner with as-built plans.

Usually the parties will agree that all utilities will be installed underground, although they will want to allow fire hydrants to be above ground and might consider allowing electrical transformers to be installed above ground.

As with an access easement, the burdened owner will want to reserve the right to relocate a utility easement. The relocation of a utility easement will have the same concerns as the relocation of an access easement, the burdened owner should give the benefitted owner(s) notice, not vacate the existing utility line until the new one is ready to use and not make it more difficult for the benefitted owner(s) to use the utility line.

If an interruption of service is necessary to relocate the utility line, the interruption should be scheduled with the benefitted parties so that their business is not interrupted.

If the benefitted owner is working on utility lines on the burdened owner's tract, the benefitted owner should be required to provide liability insurance and indemnify the burdened owner against liability claims. The benefitted owner should be required to pay all of the costs of the work and keep the burdened owner's tract free of liens. The burdened owner will want to consider requiring lien waivers. If the work is extensive enough, the burdened owner will want to require the benefitted owner to provide bonds or a construction escrow.

The burdened owner will want to require the benefitted owner to perform the work as quickly as possible, to schedule the work with the burdened owner and unless it is an emergency, not perform any utility work during the holiday, back to school or other important shopping periods.

As described below in the discussion of common area maintenance costs, consideration should be given

to who will maintain common utility lines. Will each owner maintain the line as it crosses its parcel, or will the parties appoint an operator to maintain the utility lines? How will the parties reimburse one another for the cost of maintaining common utility lines? Will there be a common area maintenance charge and who will collect it?

Whether it is the burdened owner or the benefitted owner performing the work, the owner performing the work should be required to use materials equal to or better than the current materials. The owner doing the work should also be required to obtain permits and coordinate its work with the local utility company to make sure the utility company's standards are met.

**4. Signage**

If there is a common sign such as a shopping center pylon or monument sign, the parties will want the owner upon whose tract the shopping center sign is located to grant to the other owners an easement for the other owners (and perhaps their tenants) to cross the burdened tract to access the shopping center sign and to maintain a panel on the shopping center sign.

If it is not a shopping center sign but one owner is erecting its own monument or pylon sign on the tract of another owner, the benefitted owner should also obtain a construction and maintenance easement to construct and maintain the sign. The benefitted owner will also want to obtain an easement to run an electric line from the tract of the benefitted owner to the sign to provide power to the sign. The benefitted owner will want to obtain an agreement from the burdened owner not to install any landscaping, signs or structures that will interfere with visibility of the benefited owner's sign.

As with other easements where work is being performed by one owner on the tract of another owner, the burdened owner should require the benefitted owner to indemnify the burdened owner and maintain liability insurance.

**5. Accent Lighting**

Analogous to a signage easement, there might be an easement for one owner to maintain accent lighting on the tract of another owner. Usually this is found in an enclosed mall where an anchor tenant will want to install lights in the mall area to illuminate the storefront and signage of the anchor tenant that faces the enclosed mall.

**6. Construction**

During the construction phase of a shopping center development the parties will want to grant to one another a temporary easement for an adjacent owner to access the tract of an adjacent owner to construct foundations and walls on the tract of the benefitted owner but where the work requires the workers to be on the burdened tract. If each owner is doing not only constructing a building on its tract, but also performing site work, the easement will include the right to install utility lines and grade the benefitted tract. If the developer is doing the site work and the parties are building their own buildings, the parties will want to grant to the developer an easement for the site work and a construction easement to the adjacent owners.

The granting owner will want to require the benefitted owner to work quickly to minimize any interference with the burdened tract. As with other easements authorizing one owner to work on the tract of another owner, the burdened owner will want the benefitted owner to agree to an indemnity, insurance and lien free construction.

Once the initial construction is completed, the parties will want the right to access the tract of an adjacent owner for maintenance and reconstruction. For subsequent maintenance or construction, the burdened owner will want to require the benefitted owner to schedule the work with the burdened owner to avoid interference with the burdened owner's business. If the work is a significant or total reconstruction, the burdened owner will want to consider prohibiting construction during the burdened owner's busy season such as Christmas or back to school.

The burdened owner might want to consider adding some self-help language so that it may complete the work on the burdened owner's tract if the benefitted owner delays or abandons the work. The burdened owner might want to consider language in the REA giving the burdened owner a lien on the benefitted owner's tract to ensure that the burdened owner is reimbursed for the cost of completing

the benefitted owner's work.

The corollary to this self-help right is an easement for self-help where the parties will agree to perform certain maintenance obligations on their own tract to maintain the desired condition of the shopping center. The parties will agree that the other parties will have a self-help right to perform maintenance on the negligent owner's tract. In that case the parties will want to require reciprocal access and construction easements on the negligent owner's tract to perform the maintenance.

**7. Minor encroachments**

Consider that most of the buildings in a shopping center are built one next to another. The parties will want to grant to each other easements for minor encroachments of common walls and foundations.

**8. Easements to Use the Enclosed Mall**

An easement that is unique to an enclosed mall is an easement for the anchors tenants to have their stores open onto the enclosed mall and for the customers of the anchor stores to enter the mall. The access easement will be reciprocal so that customers of the enclosed mall will have the right to enter the stores of the anchors.

**9. Duration of easements**

Consideration should be given to how long the easements should last. Some easements such as access, stormwater, party wall and utilities should probably last as long as improvements exist on the benefitted tract, although the burdened owner will want the right to relocate an access or utility easement to another portion of the burdened tract after a certain amount of time such as 50 or 60 years.

The parties will want to consider having other easements, such as parking accent lighting, construction and the right to use the enclosed mall (if applicable) expire after 50 or 60 years or sooner if the shopping center ceases to exist.

The burdened owner might want to consider including language in the REA giving the burdened owner the right to force an abandonment of certain easements such as an accent lighting easement if the benefitted owner has not used the easement for an extended period such as 3 years.

Just as important to granting easements is not granting easements. The parties will want to agree that the other parties will not have the right to grant similar easements to anyone not an owner to the REA. As mentioned above, the parties will also want the right to close off access and parking occasionally to keep the public from gaining proscriptive rights in the burdened owner's tract.

**B. Site Controls**

Site controls are often a hotly negotiated part of the REA between the developer of a shopping center and the retailers that own their own parcel.

In the context of an outparcel REA, it's possible that the only site plan controls in favor of the outparcel owner may be to restrict building in areas that would impact the outparcel owner's visibility, parking or access (either for the customers or delivery trucks). This can be accomplished generically through a general restriction against the construction of improvements that have a material, adverse effect on visibility, parking or access. Alternatively, the parties may designate a "no build" area and/or protected accessways, in which changes would require consent from the outparcel owner.

In broader REAs that govern the entire shopping center, the retail pad owners may have significantly more bargaining power, which can cause the dynamics of the negotiation to be reversed. In such situations, the anchor retailer approving parties may require the developer to propose certain "permissible building areas" in which buildings and other improvements may be constructed, and the remaining areas must remain common area, improved as shown on a site plan. The anchor retailers may also restrict changes to the roadways, internal drives, parking lot areas and access points to the shopping center without their consent. In phased development projects, the developer will want to build-in flexibility for where future development areas or outparcels may be created that do not exist in the early stages of the project. If a developer needs to go to the retailer approving parties for consent to construct a new building

or materially modify the site plan that is not permitted under the REA, the process can be time consuming and costly. It can be particularly difficult and complex when multiple retailer approving parties need to consent.

In addition to permissible building area and protected accessway restrictions, other common REA site plan controls include height limitations, requirements against creating concentrated uses (such as entertainment districts), restrictions against de-malling all or portions of enclosed malls, limitations on the location of free-standing signs, restrictions against cart corrals in parking areas, restrictions on re-configuration of parking lot striping and/or curb cuts and restrictions on outdoor sales areas.

In addition to use restrictions (discussed below), site plan controls are quite often the biggest contractual impediment to effecting much needed redevelopment projects at shopping centers. It is not uncommon for retailers to require significant economic concessions in connection with consenting to deviations from the site plan controls in REAs.

## C. Construction Requirements and Restrictions; Building Maintenance Architectural Theme Building Plan and Site Plan Approvals

### 1. General Construction Issues

The parties will want to agree that the improvements in the shopping center are developed in a unified manner. They will want to agree that plans for the improvements must be approved before construction begins. Usually the developer will want to review and approve plans for the buildings to be constructed by the owners. Depending on the relative bargaining position of the other owners the other owners might have a say in approving building plans. At the very least, the parties will want to agree that the buildings will have a common architectural theme.

Oftentimes it will be the developer who prepares the plans setting forth the architectural theme. Each owner will then incorporate that theme into the owner's plans for its building and submit its plans for the developer's review and approval.

The developer will develop plans for all of the site work including grading, utilities, drainage, paving, parking, line painting, lighting, landscaping, access roads, curb cuts and signs. If it is an enclosed mall the plans will also include plans for heating, ventilation and air conditioning for the enclosed mall and for the stores of the anchors if there is a common heating, ventilation and air conditioning facility.

The utility plans will have to show the sizes, capacities, locations and depths for the various utility lines. The plans will have to be very detailed to show where the developer's work will end and where the owner's work will pick up, such as where the utility lines will end near the owner's building pad.

Usually the plans are prepared in two stages. First, there are preliminary plans that show the improvements in general. The preliminary plans are submitted for the owner's review and approval. The developer will want to specify that the owners will have a certain amount of time such as 20 or 30 days to comment on the preliminary plans. The developer will want to go on to say that if an owner does not specify an objection to the preliminary plans within the 20 or 30 day period, the preliminary plans will be deemed approved, so that the developer is not stuck in limbo waiting for an owner to approve the preliminary plans.

Occasionally, an owner will object to having preliminary plans being deemed approved. In that case, the compromise is for the developer to send a second notice to the owner specifying that if the owner does not respond within a certain amount of time from the second notice, such as 5 or 10 days, the preliminary plans are deemed approved.

Once the preliminary plans are approved, the developer will have its architect prepare final plans based upon the preliminary plans. The final plans will have more complete details for the improvements and will be sufficient for the developer to solicit bids from contractors, obtain permits and allow the contractor to perform the work.

The process for approving the final improvements plans are the same as approving the preliminary plans where each owner will have a set amount of time such as 20 or 30 days to comment on the

final plans or the final plans will be deemed approved. As with the preliminary plans, if an owner is concerned with plans being deemed approved, a mechanism is built in for a second notice and a short time to respond before the plans are deemed approved.

If there are any objections to the final plans, the developer will require its architect to call a meeting of all of the owners to discuss and resolve any objections to the final plans. If the parties cannot resolve disputes regarding the final plans amongst themselves, the parties will want to agree to arbitrate their differences so that the project keeps moving forward. The arbitration will be the typical three party arbitration mechanism, but because each owner will already be represented by an architect and engineer, they will only need someone to break the deadlock. In that case they will want to apply to the local head of the particular profession such as architect or engineer to appoint the third party to resolve the dispute. The parties will want to be careful to define what is to be determined by architects and what is to be determined by engineers.

Once the final plans have been approved, the parties will want to be very restrictive on further changes to the plans. If an owner desires changes to the final plans, the developer's architect will obtain an estimate of the cost of the change and the developer will require the requesting owner to agree to pay for the change.

If it is an enclosed mall the anchor stores will want to review and approve the design of the court fronting on its store including column locations, décor, floor coverings, floor elevations and lighting.

**2. Construction Requirements and Timing**

Once the final plans have been approved, the developer will solicit bids for the work. Depending on the relative bargaining position of the various owners, the owners might participate in developing the bid specifications to be submitted to the contractors, they might be able to suggest or veto particular contractors to whom the bid packages will be sent and might have the right to review and approve the contractor to whom the bid is awarded.

If an owner wants to use a particular contractor or subcontractor rather than another, the developer might want to consider requiring the owner to pay the increased cost of using the preferred contractor rather than the contractor submitting the lowest bid meeting the bid specifications.

As part of preparing the bid packages the owners and developer will want to agree upon a construction schedule to which the contractor will have to adhere. Depending on the bargaining strength of the parties, the anchors will want to specify milestone dates by which certain tasks of construction must be completed. If those milestone dates are missed, the anchor tenants will want to consider taking over the work and completing the work on behalf of the developer. In agreeing upon the construction schedule the parties will want to agree upon any "blackout" periods when they will not perform any work, such as during holiday periods.

**3. Construction Staging Area; Safety and Cleanliness Requirements**

Consideration should be given to where each party will be allowed to have a construction trailers and stage materials for construction. Usually, the REA will specify an area on each owner's tract where the owner will be allowed to locate a construction trailer and stage its construction materials. If the REA does not specify a staging area on each owner's tract, the REA will specify the staging area cannot interfere with access and construction on adjacent tracts. The REA might go on to say the other owners have the right to approve the staging area on the constructing owner's tract. In addition, the REA might require the constructing owner to erect a fence around the staging area. Next, the REA might require the constructing owner to receive shipments of building materials via specified roadways to avoid interference with traffic on the tract of the other owner. If the developer is providing the staging area for the owner's benefit, the REA might require the developer to provide additional stone to the staging area if the staging area becomes too muddy. The REA might go on to require either the developer or the owner to sweep the access roads to eliminate mud. The REA will require each owner to provide its own construction dumpster, to regularly remove trash to the dumpster and have the dumpsters emptied to keep trash from accumulating. Finally, the REA will usually require the constructing owner to have its contractors and subcontractors park on the constructing owner's tract and use designated roadways and entrances.

**4. Ongoing Building Maintenance and Common Area Maintenance Requirements**

Usually an REA will break down maintenance obligations between building maintenance and common area maintenance. The owners will agree to maintain their buildings. When it comes to common area maintenance the owners have three choices:

1. each owner maintains the common areas on its own tract;
2. two owners appoint an operator to maintain all of the common areas; or
3. a combination of the foregoing where one or more owners maintain the common areas on its own tract and the remaining owners join in a common maintenance scheme.

For building and common area maintenance the owners will want to establish minimum standards for maintenance. Regardless of who maintains the common areas the owner performing the common area maintenance will be expected to meet those standards.

For building maintenance the REA will require the owners to maintain its building in good condition and in compliance with all laws. The language might go on the specify the building will be maintained in a first class condition and in compliance with the architectural theme established by the owners. The REA will require the owners to store all trash within dumpsters or compactors located in the owner's dock area or in a dumpster enclosure screened from public view.

For common area maintenance the parties will have much more extensive criteria specifying the criteria to be met when maintaining common areas on each owner's tract.

The criteria will start out with the same general statements as for building maintenance saying the common areas will be maintained in good condition and in compliance with all laws. Again, the criteria might go on to specify first class condition or say in keeping with similar centers in the market.

After that, the criteria will specify minimum standards for various portions of the common areas such as:

a. maintaining, repairing and replacing sidewalks, parking and roadway areas;

b. removing all papers, debris and other refuse from parking and road areas;

c. periodically sweeping all sidewalks, parking and road areas;

d. maintaining, repairing and replacing any exterior shipping or receiving dock area, truck ramp or truck parking area;

e. maintaining, repairing and replacing any recycling center or refuse, compactor or dumpster area;

f. removing snow and ice from sidewalk, parking and road areas;

g. maintaining repairing and replacing lighting fixtures for the parking areas and roadways, including light standards, wires, conduits, lamps, ballasts and lenses, time clocks and circuit breakers;

h. maintaining and replacing marking, directional signs, lines and striping;

i. maintaining and replacing landscaping;

j. maintaining repairing and replacing signage;

k. maintain and keeping in a sanitary condition public rest rooms;

l. maintaining repairing and replacing irrigation systems;

m. maintaining repairing and replacing common utility lines;

n. maintaining, repairing and replacing any stormwater drain lines or stormwater detention or retention areas;

o. keeping the Common Area free from any obstructions.

If the shopping center is located in an area that receives a lot of snow, the parties might specify how soon plowing should commence once snow has started falling and where snow is to be piled when as it is plowed.

If the shopping center is an enclosed mall the owners will want to specify criteria for maintenance of the interior of the mall. The REA will require the developer to adequately light, ventilate and air condition and provide sprinkler systems for the Enclosed Mall and keep and maintain all other components of the Enclosed Mall, including structure, roof, skylights, wall surfaces, doors and other appurtenances within the standards set forth in the REA.

Once the parties have established criteria for common area maintenance, they will want to allocate responsibility for maintaining the common areas. As noted above, the parties can each perform their own maintenance or appoint an operator to perform the maintenance.

If the owners appoint an operator the parties will want to require the operator to prepare an annual budget for each owner's approval. If an owner does not approve the budget, the owner will want the option to take over the maintenance on its own tract. Similarly, if one or more owners do not approve the budget, the operator might want the right to "put" the common area maintenance obligations on the disapproving owners and require them to perform their own maintenance.

If an owner has taken over maintenance of its own common areas, the owner will want the option to once again require the operator to maintain the owner's common areas. Before the owner can require the operator to resume responsibility for maintenance on the owner's tract, the REA will require the owner to put the common area on the owner's tract in the condition required in the REA and notify the operator at least 60 or 90 days before the operator is to resume maintenance on that owner's tract. Usually the REA will specify that the operator will only have to resume maintenance on an owner's tract at the beginning of a calendar quarter.

Consideration should be given to how common area maintenance costs are to be shared by the owners. If each owner is maintaining its own common areas, then usually each owner will pay its own cost. If an owner is maintaining an element that is used by other owners, such as a utility line, an access drive or stormwater area, the owner performing the maintenance will want to be reimbursed for the other owner's share of maintaining the jointly used element. Usually these costs are billed as a reimbursement where the owner performs the maintenance and then bills the other owners for their shares. The owner performing the work will want to have lien rights on the tracts of the other parties to ensure that the owner is reimbursed.

If an operator is performing the common area costs, the owners will want to include language similar to what is found in a lease specifying what can and cannot be included in the annual common area maintenance budget. Generally the REA will start out with a general definition of common area maintenance cost such as:

> "Common Area Maintenance Cost means the total of all moneys paid out during an Accounting Period for reasonable costs and expenses directly relating to the operation, maintenance, repair and management of the Common Area as provided in this REA."

The definition will go on to exclude certain charges such as:

a. real estate taxes and assessments and personal property taxes payable by the parties

b. wages or salaries paid to management or supervisory personnel;

c. late charges or fees;

d. costs for promotional, marketing, seasonal or holiday events;

e. costs to clean up or repair the Common Area from any promotional, marketing, seasonal or holiday activities, from construction, maintenance or replacement of an owner's buildings;

f. costs resulting from or arising out of the repair or replacement of items covered by warranties or guaranties;

g. real property taxes and assessments on the Common Area;

h. profit, administrative and overhead costs;

i. legal, accounting and administrative services;

j. management fees;

k. entertainment, transportation, meals and lodging;

l. salaries above the level of manager;

m. capital expenditures;

n. costs for construction, maintenance or replacement of buildings.

If it is an enclosed mall, the definition of common area maintenance costs will also exclude any cost pertaining to the enclosed mall and the anchor stores will pay their share of common area maintenance costs for the enclosed mall in a supplemental agreement as described below.

If management fees and overhead are excluded from the common area maintenance budget, the owners will usually agree that the operator will be allowed to charge an administrative fee equal to somewhere between 4% and 7% of the annual common area maintenance budget.

Once the owners have established what is in the common area maintenance budget, they will want to allocate how much each owner contributes to common area maintenance charges. Usually, the charges will be allocated on a straight pro rata share basis where the annual common area maintenance charges are multiplied by a fraction. Sometimes the fraction might be the square footage of the owner's store over the total square footage in the shopping center. Other times the fraction might be the acreage of each owner's parcel over the total acreage of the shopping center.

Enclosed malls are a unique circumstance because the anchor stores will usually contribute a pro rata share towards exterior maintenance, but will contribute a fixed amount to maintenance of the enclosed mall. The fixed amount will not be spelled out in the REA, instead it will be contained in a supplemental agreement. The supplemental agreement is between the developer and the anchor stores. Each anchor will have its owner supplemental agreement with the developer.

Usually each owner will pay its share of common area costs to the operator each month and then the operator will perform an annual reconciliation within 90 or 120 days after the year ends and submit a statement to each owner showing the costs incurred for the prior year, the payments made by the owner and any balance or credit due to or from the owner. The owners will want the right to audit the operator's books to ensure that the operator has charged the proper amounts. If a variance is found, the REA should require proper adjustments to be made. Depending on the relative bargaining positions of the owners, the REA might require the operator to reimburse the auditing owner if a discrepancy of 3% or 5% is found.

**D. Exclusive and Prohibited Uses**

The REA is often the governing document at a shopping center that dictates the uses that may be conducted at the project. The developer of the shopping center desires maximum flexibility to determine what uses may to be beneficial to the shopping center, while retailers typically desire more restrictive use requirements to ensure a "first-class" shopping center and prohibit uses that may be viewed to be detrimental to the success of the shopping center or which may not be consistent with maximizing sales at the retailer's store.

So-called "prohibited use" restrictions can take the form of restricting certain kinds of retailers (e.g., second-hand or thrift stores, head shops, stores that sell pornographic material) or they may restrict uses that are not consistent with a traditional retail-only center (e.g., fitness centers, entertainment uses, bars,

office uses, hotels, residential uses). For the readers' reference, attached as **Exhibit A** is a sample list of use restrictions and limitations from the form of REA (Target's REA form is actually called an OEA, but that is just a naming variation) used when Target is an anchor retailer at a shopping center. The Target OEA is widely considered to be a very well-reasoned and thoughtfully prepared REA template governing open air shopping centers. Consider, however, whether these limitations on uses in what is considered a top form of REA permit the types of uses that may allow for retail to reinvent itself and stay relevant the in current times and moving into the future. Historic REAs (especially those governing enclosed malls) are far more restrictive and did not adequately contemplate the evolution of retail.

In addition to prohibited use restrictions, a retailer that is party to a shopping center REA may also desire to protect its store from competition by imposing an exclusive use restriction. This is common in outparcel REAs where a restaurant with a particular theme or type of cuisine (e.g., a fast food restaurant that serves primarily chicken sandwiches, subs, or a specific themed cuisine such as Italian, Chinese or Mexican food) will often seek to impose an exclusive use protection against some or all of the other portions of the shopping center. Likewise, big-box users such as grocery stores, home improvement stores, discount club stores, and even some department stores will impose certain exclusive use restrictions, just like they would in a lease if they didn't' own their pad.

From the developer's perspective, one critical item to try to negotiate in REA exclusive uses is a "use it or lose it" clause. This means that if the retailer/user that benefits from the exclusive use provision either closes for business (other than certain temporary closures) or changes its use, then the exclusive use protection is extinguished automatically. For example, say a restaurant with the exclusive right to serve Chinese food closes and sells its property to a bank branch, then the Chinese food exclusive should no longer encumber the shopping center. Without a use it or lose it clause, old exclusive uses that may no longer be applicable to protect the use for which they were intended may linger as clouds on title and may even be used inappropriately by a successor party that doesn't need such protection just to have leverage against the developer.

It is important to consider the very long-term nature of REAs when establishing use restrictions. Creators of shopping center REAs often suffer from an affliction of thinking that the current consumer preferences that drive a type of development will always remain the same, so they have historically built in little flexibility for the evolution of retail. For example, if one reads an enclosed-mall REA from the 1960s-80s (the heyday for malls), it is quite clear that the drafters of those documents thought the enclosed mall would always be the highest and best shopping experience. For more than a decade there has been significant discussion at ICSC conferences about the evolution of retail and the need to revisit the types of uses that are typically prohibited at a shopping center. Yet, little has changed in actual use restrictions (as noted above and as seen in **Exhibit A**).

Cynically, the developer side of the business might think that retailers prefer little flexibility because it puts the approving party retailer in the position of strength when their consent is needed for a use that does not fit squarely in the uses allowed under an REA. While that advantage may be helpful in some instances, antiquated prohibited use restrictions in REAs are actually causing many shopping centers (especially enclosed malls) to decline more rapidly or even fail. For retail to survive the threats from e-commerce, there needs to be a significant evolution of shopping experience, and it may be the case that the successful retail projects will have uses that would previously been disfavored by the retail community.

### F. Casualty and Condemnation

Thought should be given to what obligations should exist if a party's improvements are impacted by casualty (a physically damaging event) or condemnation event (a taking of a portion of the property which may require some portion of the improvements to be demolished or removed). REA parties typically do not want to have an absolute obligation to completely re-build a building following a casualty or condemnation event if it does not make economic sense to do so. For example, consider a department store party or an outparcel operator that is struggling and may have already been considering closing its store for business. Or, consider a casualty event that impacts a portion of the shopping center that is very difficult to lease and which the developer would rather not re-construct. The REA should make clear what happens following such a casualty or condemnation event.

First, the REA party that is impacted by a casualty or condemnation event should be required to promptly remove any debris and return the property to a safe and slightly condition. That is not a controversial concept but it is important since the impacted property is adjacent to and can impact the safety and

attractiveness of the overall property.

Second, if the casualty or condemnation event causes damage to a portion of a building, and the impacted party does not elect to demolish the remainder of the building, there should be an obligation for that party to restore the building to a complete architectural unit. This would likely be a requirement under applicable building codes and ordinances, but the other parties to the REA will want a contractual right to enforce the obligation as well.

Third, often the REA parties will have the right to elect to either rebuild the building or demolish the remainder of the partially demolished building. If the party elects to demolish the remainder of the building improvements, the REA should address the condition to which the impacted property owner must return the property following such demolition. For an integrated shopping center environment, the other parties will want the impacted property be returned to either a neatly landscaped condition or to a clean hard surface condition. If the building is re-constructed, such restoration work will likely be subject to the construction provisions of the REA governing architectural harmony and may even require plan approval by the approving parties under the REA.

### G. Lighting Requirements

As part of the design criteria for the common areas the REA will require the parties to specify the location for the parking lot light fixtures and specify the lighting intensity to be maintained in various parts of the parking area, along the sidewalks and along the entrance roads.

Usually, the parties will specify one or two foot candles of lighting at grade in the parking area, one or two foot candles at the perimeter of the parking areas; two foot candles at entry drives to the Shopping Center; five foot candles at the front entrance to the anchor stores and enclosed mall if there is one; and four or five foot candles at the entrance to any building on an outparcels.

The REA will go on to require the lights to be on timers or photoelectric cells that will turn the lights on at dusk. The owners will want to require the lights to be left on at least an hour after all of the stores have closed for the evening. This will allow the owner's employees to close the store and safely get to their cars. Even after that later hour, the REA will require the parking lot lights to remain on at some level to provide security for the shopping center. The REA might say the parking lot lights can be reduced by 50% or 75% during the overnight hours.

Occasionally an owner might want to stay open after the other owners have closed for the evening. In that case, the REA will allow an owner to request the developer or other owners to keep their lights on later. In that case the owner requesting the later lighting will reimburse the other owners for the additional power used to provide the later lighting.

## V. Term of an REA; REA Priority; Default Remedies

### A. Term

How long should an REA last? This seems like an esoteric question when the parties are initially negotiating a new REA. Most often, we see REA terms that are in the range of 50-80 years in duration. However, careful drafters of REAs will consider whether certain provisions in an REA (most notably, the easements) last in perpetuity if that is the initial intent. While 50-80 years may seem like an eternity to newer vintages of lawyers, we are now entering into a time when the early mall REAs are coming close to expiring.

As a result of the antiquated concepts in old REAs (e.g., the mall will always remain an enclosed mall, old use restrictions that no longer make sense, strong site plan controls in favor of the department store anchors, etc.), parties are starting to consider whether it would be better to let these historic REAs expire, rather than negotiating an extension of the term. This would have seemed absurd not long ago, due to the extreme importance of having an organized governance regime for the operation of an integrated shopping center. Now, however, if the parties are comfortable that the essential reciprocal easements will remain in effect following expiration of the REA, there is at least an analysis and discussion about whether the benefits of freedom from outdated restrictions, construction and operational limitations outweigh the downside of losing the benefit of having similar limitations and restrictions on the other parties of the REA.

In an ideal world, the parties to an REA nearing expiration would come together to revisit the agreement and

amend and restate the REA to a more modern form that is viewed to promote the best interests of the REA parties in the modern shopping world. Time will tell if the typical REA parties will come around to this approach, but as of the date of this presentation, we have not seen consensus on this issue by the various REA participants at shopping centers.

## B. Priority of an REA

REAs are vital real property interests and the intent of REA parties is that the rights and restrictions contained therein must not be subject to being extinguished by third parties (e.g., lenders). Accordingly, if a mortgage loan happens to encumber any portion of the property that is intended to be governed by or subject to an REA at the time the REA is established, then such mortgage will need to be subordinated to the REA.

Likewise, future mortgage loans encumbering the property must remain subject and subordinate to the REA. This may sound controversial because lenders abhor title encumbrances that are superior to their mortgage interest; however, lenders understand that that the rights in the REA in favor of the mortgaged property are often critical to the property in which they have an interest, so lenders are comfortable with not having priority over an REA.

It helps to think about the concept in reverse. A mortgage lender (or property owner) would not want another lender with a mortgage on another portion of the shopping center to have the right to extinguish the REA if the other lender forecloses (or otherwise exercises its rights) due to a default by the other property owner.

As a practice point, when representing a party obtaining an interest in an existing shopping center that is encumbered by an REA (whether as a buyer or lender), it is important to have the rights under the REA be part of the property insured under the title policy.

## C. Limitations on REA Default Remedies

REAs include many obligations and restrictions on the parties thereto, which necessitates provisions relating to default and remedies. These materials will not go into great detail regarding the ways an REA party can be in default although there are many (violating restrictions, not maintaining insurance, not paying real estate taxes, not paying for reimbursable expenses, failing to properly maintain buildings or common areas, among several others).

The fundamental thing to understand about REAs is that while there may be several remedies in favor of the non-defaulting parties (e.g., monetary damages, self-help rights, lien rights, etc.), it is critical that the non-defaulting parties not have the right to terminate the REA as result of a default by another party. Much like the priority discussion above, the importance of protecting the property rights established in the REA require that no party has a termination right as a consequence or remedy for default by another party.

**EXHIBIT A**

**SAMPLE REA USE RESTRICTIONS/LIMITATIONS**

ARTICLE V - OPERATION OF THE SHOPPING CENTER

5.1 Uses

5.1.1 The Shopping Center may be used only for retail sales, offices, Restaurants or other commercial purposes permitted by this OEA. "**Business Office**" means an office which does not provide services directly to consumers; "**Retail Office**" means an office which provides services directly to consumers, including financial institutions, real estate, stock brokerage and title companies, travel and insurance agencies, and medical, dental and legal clinics. No more than fifteen percent (15%) of the total Floor Area on the Developer Tract, and no more than fifteen percent (15%) of the total Floor Area of the Target Tract, may be used for Retail Office and/or Business Office purposes; provided, however, that office space used by an Occupant for administrative purposes, and which is not open to the general public, is not considered Retail Office or Business Office for the purpose of this limitation.

5.1.2 No use is permitted in the Shopping Center that is inconsistent with the operation of a first class retail shopping center. Without limiting the generality of the foregoing, the following uses are not permitted:

(A) Any use that emits an obnoxious odor, obnoxious noise, or obnoxious sound that can be heard or smelled outside of any Building in the Shopping Center.

(B) An operation primarily used as a storage warehouse operation and any assembling, manufacturing, distilling (other than a microbrewery associated with a restaurant), refining, smelting, agricultural, or mining operation.

(C) Any "second hand" store, "surplus" store, or pawn shop.

(D) Any mobile home park, trailer court, labor camp, junkyard, or stockyard; provided, however, this prohibition is not applicable to the temporary use of construction trailers during periods of construction, reconstruction, or maintenance.

(E) Any dumping, disposing, incineration, or reduction of garbage; provided, however, this prohibition is not applicable to garbage dumpsters or garbage compactors located near the rear of any Building and within such Building's Building Area.

(F) Any fire sale, bankruptcy sale (unless pursuant to a court order), or auction house operation.

(G) Any central laundry, dry cleaning plant, or laundromat; provided, however, this prohibition is not applicable to (i) nominal supportive

facilities for on-site service oriented to pickup and delivery by the ultimate consumer as the same may be found in retail shopping centers in the metropolitan area where the Shopping Center is located, and (ii) subject to the indemnity/insurance provision below, a store located on the Developer Tract (at least one hundred (100) feet away from the Target Tract) with dry cleaning processes, using dry cleaning solvents that are biodegradable, non-chlorinated and are not hydrocarbons, and are not Hazardous Materials. Before any dry cleaning store being permitted under subsection (ii) above, Developer (and Developer's successors or assigns) must deliver to Target, in a form reasonably acceptable to Target, either (x) environmental insurance reasonably acceptable to Target, or (y) an environmental indemnity from both the Occupant and an indemnitor reasonably acceptable to Target.

(H) Any (i) automobile, truck, trailer, or recreational vehicle sales, leasing, or display operation, (ii) car wash, or (iii) body shop repair operation, except that the following uses are permitted on the Target Tract or on the Developer Tract at least three hundred (300) feet from the Target Tract:

(i) A display of automobiles in connection with marketing partnerships or sponsorships for a period not to exceed seven (7) consecutive days, and not more than four (4) times per calendar year; and

(ii) The following upscale recreational retail concepts, provided they take place solely in a fully enclosed retail space: Harley Davidson, Vespa, and/or Ducati.

(I) Any bowling alley (unless it is at least two hundred fifty (250) feet away from the Target Tract) or skating rink.

(J) Any movie theater or live performance theater. Notwithstanding the foregoing, a movie theater or live performance theater is permitted on the Developer Tract at least One Thousand (1,000) feet from the Target Tract. A movie theater or live performance theater must have one (1) parking stall for each three (3) seats available for viewing a screen in such theater; and a movie theater may not be used for any purpose except showing (i) motion pictures which are generally considered "first run" in the movie theater industry, or (ii) digital broadcasts of: live or simulcast theatrical performances, sporting events, musical performances, or other digital broadcasts of theatrical events.

(K) Any hotel, motel, short or long term residential use, including: single family dwellings, townhouses, condominiums, other multi-family units, and other forms of living quarters, sleeping apartments, or lodging rooms.

(L) Any veterinary hospital or animal raising or boarding facility; provided, however, this prohibition shall not be applicable to pet shops. Notwithstanding the foregoing exception, any veterinary or boarding services provided in connection with the operation of a pet shop may only be incidental to such operation; the boarding of pets as a separate customer service is prohibited; all kennels, runs and pens must be located inside the Building; and the combined incidental veterinary and boarding facilities may occupy no more than fifteen percent (15%) of the Floor Area of the pet shop.

(M) Any mortuary or funeral home.

(N) Any establishment selling or exhibiting "obscene" material, except that this provision does not prohibit:

(i) first class national or regional (having at least fifty (50) retail locations) videotape retailers (for purposes hereof, the term "videotape" includes DVDs, CDs, and other media used to show motion pictures now or in the future) with a national presence and that primarily rent or sell "G" to "R"-rated videotapes but which may also rent or sell "non rated" or "NC-17"-rated videotapes for off-premises viewing only, provided such retailers do not rent or sell "X"-rated videotapes and provided further that such "non rated" or "NC-17"-rated video tapes are clearly marked that minors are restricted from selecting such videotapes and do not visibly depict nudity or sexuality on their covers or labels and the retailer employs some method of restricting purchasing of such materials by minors, or

(ii) first class national or regional book stores that are not perceived to be, nor hold themselves out as "adult" book stores, but which may incidentally sell books, magazines or other periodicals that may contain pornographic materials, so long as such sale is not from any special or segregated section in the store but that, nonetheless, employ some method of restricting the viewing or purchasing of such materials by minors, and provided further that such pornographic materials are not considered objectionable or offensive to accepted standards of decency within the local community.

(O) Any establishment selling or exhibiting drug-related paraphernalia or which exhibits either live or by other means to any degree, nude or partially clothed dancers or wait staff. In addition, no Restaurant use is permitted that requires personnel to wear a uniform that a reasonable person would consider to be sexually provocative (e.g., so-called hot pants

and short shorts, shorts not covering the entire buttocks, tight-fitting or otherwise revealing tank tops or halter tops).

(P) Any bar, tavern, restaurant, or other establishment whose reasonably projected annual gross revenues from the sale of alcoholic beverages for on-premises consumption exceeds thirty percent (30%) of the gross revenues of such business, except that a first class national or regional sit-down restaurant is permitted provided its reasonably project annual gross revenues from the sale of alcoholic beverages for on premises consumption does not exceed thirty-five percent (35%) of the gross revenues of such business.

(Q) Any massage parlor or similar establishment, except that (i) a Massage Envy or similar operator of good moral nature is permitted if it is at least two hundred (200) feet away from the Target Tract, and (ii) an ULTA Cosmetics store is permitted on Developer Tract Parcel 11.

(R) Any health spa, fitness center, or workout facility within one thousand (1,000) feet of the Building Area on the Target Tract.

(S) Any flea market.

(T) Any amusement or video arcade, pool or billiard hall or dance hall, unless incidental (less than 10% of Floor Area) to a restaurant otherwise permitted. A store selling video games for home use is not considered a "video arcade".

(U) Any training or educational facility, including: beauty schools, barber colleges, reading rooms, places of instruction or other operations catering primarily to students or trainees rather than to customers; provided, however, this prohibition is not applicable to on-site employee training by an Occupant incidental to the conduct of its business at the Shopping Center. This prohibition is not applicable to a children's learning center, such as Sylvan Learning Center, which (i) does not exceed two thousand (2,000) square feet of Floor Area, and (ii) is not located on Developer Tract Parcel 1, Developer Tract Parcel 2, Developer Tract Parcel 3 or Developer Tract Parcel 11.

(V) Any gambling facility or operation, including: off-track or sports betting parlor; table games such as blackjack or poker; slot machines, video poker/blackjack/keno machines or similar devices; or bingo hall. Notwithstanding the foregoing, this prohibition is not applicable to government sponsored gambling activities or charitable gambling

activities, so long as such activities are incidental to the business operation being conducted by the Occupant.

5.1.3 No Party shall use, or knowingly permit the use of, Hazardous Materials on, about, under or in its Parcel, or the balance of the Shopping Center, except in the ordinary course of its usual business operations conducted thereon, and any such use shall at all times be in compliance with all Environmental Laws. Notwithstanding the indemnity set forth in Section 5.4.1 below, each Party shall defend, protect, indemnify and hold harmless each other Party from and against all claims or demands, including any action or proceeding brought thereon, and all costs, damages, expenses and liabilities of any kind relating thereto (excluding last profits or punitive damages), including costs of investigation, remedial or removal response, and reasonable attorneys' fees and cost of suit, arising out of or resulting from any Hazardous Material used or permitted to be used by such Party, whether or not in the ordinary course of business. If, after such indemnity, a court of law determines that the indemnified Party was negligent or committed intentional malfeasance, then the indemnified Party must reimburse the indemnifying Party for the out-of-pocket costs incurred by the indemnifying Party for such indemnity, but only to the extent of such negligence or intentional malfeasance by the indemnified Party.

For the purpose of this Section 5.1.3, the term (i) "Hazardous Materials" means and refer to the following: petroleum products and fractions thereof, asbestos, asbestos containing materials, urea formaldehyde, polychlorinated biphenyls, radioactive materials and all other dangerous, toxic or hazardous pollutants, contaminants, chemicals, materials, substances and wastes listed or identified in, or regulated by, any Environmental Law, and (ii) "Environmental Laws" means and refer to the following: all federal, state, county, municipal, local and other statutes, laws, ordinances and regulations which relate to or deal with human health or the environment, all as may be amended from time to time.

5.1.4 No merchandise, equipment or services, including vending machines, promotional devices and similar items, may be displayed, offered for sale or lease, or stored within the Common Area; provided, however, the foregoing prohibition is not applicable to:

(A) the storage of shopping carts on (i) the Target Tract, or (ii) on the Developer Tract in front of an Occupant that is a national retailer whose prototype operation includes shopping carts, provided such shopping carts are (x) stored in a sightly manner, (y) regularly collected, and (z) adequately cleaned and maintained;

(B) the installation of an "ATM" banking facility within an exterior wall of any Building;

(C) the seasonal display and sale of bedding plants on the sidewalk in front of any Building located on the Target Tract;

(D) the placement of bicycle racks and landscaping planters on the sidewalk in front of any Building;

(E) the placement of spherical bollards (Target's brand) on the sidewalk in front of any Building on the Target Tract or the placement of other bollards, that have been approved by the Approving Parties, on the sidewalk in front of any Building on the Developer Tract;

(F) temporary Shopping Center promotions, except that no promotional activities are allowed in the Common Area without the prior written approval of the Approving Parties;

(G) any recycling center required by law, the location of which is subject to the approval of the Approving Parties;

(H) outdoor seating shown on the Site Plan;

(I) any designated Outside Sales Area; provided, however, with respect to any Outside Sales Area not included within a Building Area, such space may be used not more than three (3) times per calendar year, and the duration of such use is subject to the following limitations: during the period commencing on October 15th and ending on December 27th -- no limitation on the number of days of consecutive use; during the period commencing February 15th and ending on July 10th -- not more than one hundred twenty-five (125) consecutive days of use; and, during any other period -- not more than thirty (30) consecutive days of use. The foregoing calendar year restrictions will not apply to an Outside Sales Area that is operated by a national home improvement retailer and at least one thousand (1,000) feet from the Target Tract.

5.1.5 The following use and occupancy restrictions are applicable only to the Developer Tract:

(A) No Restaurant (except a Quick Service Restaurant) is permitted within two hundred seventy-five (275) feet of the Building Area located on the Target Tract, except one (1) fast-food restaurant with a drive-through, not exceeding four thousand three hundred (4,300) square feet of Floor Area, may be located on Developer Tract Parcel 2. No Quick Service Restaurant is permitted within two hundred (200) feet of the Building Area located on the Target Tract.

(B) No store, department, or operation of any size selling or offering for sale any pharmaceutical drugs requiring the services of a licensed pharmacist is permitted. If Target (or its successor) does not operate a pharmacy on the

Target Tract (at any time after December 31, 2015) for longer than two (2) continuous years, this restriction will no longer apply.

(C) No pet shop is permitted within three hundred (300) feet of the Building Area located on the Target Tract.

(D) No gas station and/or other facility that dispenses gasoline, diesel, or other petroleum products as fuel is permitted.

(E) No automotive service/repair station or any other facility that both sells and installs any lubricants, tires, batteries, transmissions, brake shoes, or any other similar vehicle accessories is permitted.

(F) No more than one (1) Occupant that is primarily a liquor store is permitted on the Developer Tract, and no liquor store is permitted that offers the sale of alcoholic beverages for off-premises consumption within five hundred (500) feet of the Building Area on the Target Tract, nor is any liquor store permitted offering the sale of alcoholic beverages for off-premises consumption exceeding twenty thousand (20,000) square feet of Floor Area (or exceeding twenty five thousand (25,000) square feet of Floor Area if such store is operated by a national or regional liquor store retailer located in similar first class shopping centers). Notwithstanding the foregoing, as Developer's one (1) permitted liquor store, a first class wine store (for example, Total Wine) is permitted if it is located only on the northwestern one-half (½) of the Building Area on Developer Tract Parcel 1.

(G) No freestanding convenience store is permitted.

(H) No "Dollar Store" or other similar variety type discount store is permitted.

(I) Subject to Section 2.5(B)(viii) as to the Phase II Property, no store, department, or operation of any size that is:

(i) owned, managed, or operated by Wal-Mart Stores, Inc., or a parent, subsidiary, or other affiliate of Wal-Mart Stores, Inc. ("**Wal-Mart**"), or

(ii) branded or marketed as a Wal-Mart, Sam's Club, Neighborhood Market, Wal-Mart Express, or any other concept that identifies Wal-Mart or any Wal-Mart brand in its name, signage, or advertising.

5.1.6 The name "Target" or any variation using the name "Target" may not be used to identify the Shopping Center or any business or trade conducted on the Developer Tract. Until the Approving Parties agree upon a name change, the Shopping Center must be called "Marketplace at El Paseo."

5.1.7 Except to the extent required by law, no Permittee shall be charged for the right to use the Common Area; provided, however, for the purpose of this provision, a tax assessment or other form of governmental charge applicable to parking spaces or parking lots shall be deemed by the Approving Parties an imposition required by law.

5.1.8 Each Party shall use reasonable efforts to cause the employees of the Occupants of its Parcel to park their vehicles only on such Parcel.

5.1.9 This OEA is not intended to, and does not, create or impose any obligation on a Party to operate, or continuously operate, a business or any particular business at the Shopping Center or on any Parcel.