**Thursday, October 9, 2025**
**2:45 PM – 3:45 PM**

**General Session 5**

# Adding Mixed Use to Retail: Ain't No Mountain High Enough – What Does It Take to Scale the Mountain to Add Mixed Use to Retail?

Presented to

2025 ICSC+U.S. LAW
Marriott Marquis San Diego Marina, San Diego, CA
October 8-10, 2025

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A. Introduction.

The integration of mixed-use developments into existing shopping centers presents a myriad of opportunities and challenges for developers, investors, lenders, shopping center owners and other stakeholders. As the retail landscape continues to evolve, the addition of residential, office, and entertainment components to traditional shopping centers has emerged as a strategy to revitalize these properties, enhance customer experience, and maximize asset value. However, the due diligence process for such complex projects is multifaceted and demands careful consideration of numerous factors.

We will explore the intricate due diligence process involved in adding mixed-use components to existing shopping center developments via a case study. We will examine the various legal challenges that arise, from use restrictions to zoning and regulatory compliance. Additionally, we will provide insights into the perspectives and concerns of the multiple parties involved, including developers, investors, tenants, lenders, and local authorities.

Each stakeholder brings a unique viewpoint and set of priorities to the table, making the due diligence process a delicate balancing act. Developers must navigate the logistical and financial complexities of construction and integration, while investors seek assurance of a sound return on investment. Tenants, both current and prospective, are concerned with the impact on foot traffic and the overall business environment. Lenders require confidence in the project's viability and risk mitigation, and local authorities must ensure that the development aligns with community goals and regulatory frameworks. Finally, shopping center owners are concerned with ensuring the success of the various other stakeholders while preserving the viability and value of its overall shopping center investment.

By delving into these diverse perspectives and the associated challenges, we aim to provide a comprehensive understanding of the due diligence process for mixed-use shopping center developments. Our goal is to equip legal professionals with the knowledge and tools needed to effectively navigate and manage the complexities inherent in these ambitious projects.

B. Operative Documents and Consents and Approvals Required.

Common operative documents and common key provisions that could impact the feasibility of the integration of mixed-use developments into existing shopping centers are discussed below. The type of mixed-use development being integrated into an existing shopping center can vary, but recently we have seen residential use being a frequent new addition into an existing shopping center, so for ease of discussion in this paper, we will refer to residential use as the new mixed use.

1. **Reciprocal Easement and Operating Agreements and Supplemental Agreements.**

*a.* *Reciprocal Easement and Operating Agreements.* A reciprocal easement agreement or reciprocal easement and operating agreement (commonly referred to as an "**REA**") is the legal agreement, typically recorded against an entire shopping center, that enables individually owned parcels to be assembled into one large contiguous and integrated property for specified purposes and uses, setting forth the responsibilities of the various owners and regulations governing each and its respective parcel. Said another way, in the retail shopping center context, REAs ensure that all parties and their respective parcels possess rights and abide by rules pertaining to all of the operations at the shopping center such as vehicular and pedestrian access via roadways and sidewalks, number, location and dimensions of parking spaces, permitted and unpermitted types of business operations, permitted and unpermitted common area uses, signage locations and specifications, initial and future construction and improvement locations, standards and responsibility for performance and cost of shopping center maintenance, and the like. In short, REAs are a shopping center's bible, setting forth the standards by which each component owner and operator (and their parcels) must abide to be a part of an orderly shopping center community.

*b.* *Supplemental Agreements.* While the REA is a multi-party public (i.e., recorded) agreement amongst the various owners of the land comprising the shopping center (with the parties often referred to as the "Developer" (i.e., the main shopping center owner) and the "Anchors" in the REA), a Supplemental Agreement (sometimes referred to as a Separate

Agreement) is a bilateral agreement between the "Developer" under the REA and a single Anchor under the REA, which sets forth the separate, non-public (i.e., unrecorded) agreements and understandings between them. The Supplemental Agreements are essentially bi-lateral amendments to the REA solely between the Developer under the REA, on the one hand, and the applicable Anchor party to the Supplemental Separate Agreement, on the other hand. As an example, the REA might provide that each Anchor is required to reimburse the Developer for the Anchor's prorata share of the costs the Developer incurs maintaining all of the common areas of the shopping center, while the Supplemental Agreement provides that the Anchor need not reimburse the Developer for such full prorata share and, instead, the Anchor need only reimburse the Developer for a portion of that amount. Similarly, the REA might be silent on whether a given Anchor is obligated to remain open and operating at its site, whereas the Supplemental Agreement might set forth a given Anchor's operating covenant, its duration and the conditions to its early termination (e.g., if certain co-tenancies are not met for specific periods of time).

c. *Impacted Provisions.* Examples of REA / Supplemental Agreement mandates that are likely to be violated by the integration of mixed-use developments into existing shopping centers include the following:

   i. The proposed location of the residential development will violate the typical requirements of the REA that (A) buildings may only be constructed in those permissible building areas ("**PBAs**") designated on the site plan attached to the REA, and (B) the shopping center's common areas may not be altered or improved.

   ii. The proposed residential use (for example) will likely violate the typical requirements in the REA that the uses at the shopping center be limited to retail operations or other uses customarily utilized at comparable first-class regional shopping centers, such as entertainment and restaurant usage.

   iii. The proposed residential redevelopment (for example) will likely cause the shopping center to fail to satisfy the REA mandated parking ratio (i.e., the number of parking spaces per 1,000 square feet of gross leasable area at the shopping center). Note that the shopping center parking ratio can be expressed in the REA as a so-called "blended parking ratio" covering the overall shopping center or as a so-called "per parcel parking ratio" applied solely to each individual parcel at the shopping center.

   iv. A residential redevelopment (for example) typically frustrates the customary REA provision in which the "Developer" under the REA maintains the common areas of all parcels and is reimbursed by the individual anchor and other parcel owners on a prorata basis. This REA maintenance norm does not work neatly in a non-retail setting, as the non-retail common areas are more complicated to maintain, cost more to maintain and pose a greater potential liability to the REA "Developer".

   v. The proposed retail redevelopment will likely violate the height limitations imposed on shopping center buildings and protected areas / view corridors created by the REA.

d. *Consent or Approval.* As noted above, the process of redeveloping a portion of an operating first-class regional shopping center to include residential building(s) and uses, together with ancillary uses, will inevitably result in conflicts with the provisions of the REA and Supplemental Agreements encumbering the shopping center as well as the main shopping center owner's leases (described in more detail below) at the center. Consequently, to resolve each such conflict, written consents or approvals will need to be obtained from the applicable REA parties. Typically, the main shopping center owner (i.e., the "Developer" under the REA) will want to control that consent or approval process, as it has ongoing relationships at the shopping center that it carefully protects.

   The first step in the consent process is to obtain a site plan from the residential developer depicting the buildings to be demolished, if any, and the new buildings being constructed,

any changes to the common areas on the redeveloped site, and depictions of the new building(s) elevations (the "**Site Plan / Elevations**").

With the Site Plan / Elevations, the main shopping center owner's development and legal teams can commence their analyses of how the proposed residential development conflicts with the shopping center requirements set forth in the REA / Supplemental Agreements, as well as the operational issues that the proposed new redevelopment project may pose. For instance:

- What is the impact on the parking ratios required by the REA?
- What changes are being proposed to the common areas on the residential redevelopment site that violate the REA?
- Do the residential building heights violate the REA limitations?
- Are there material ingress / egress points on the redevelopment site that are crucial for the retail portion of the shopping center to continue to have efficient access to?

Once that analysis has been performed, the main shopping center owner will have a basic idea of each party that has the right to consent to the residential development under the REA and those specific matters for which consent is needed in each instance.

Consents to the residential redevelopment from the REA parties can take the form of either (i) a comprehensive REA amendment amongst all the REA parties ("**REA Amendment**"), or (ii) separate bi-lateral consent agreements amongst the residential redeveloper and each REA party ("**Consent Agreements**"). Additionally, note that since it is often challenging to get all of the REA parties to agree upon the form and content of an REA amendment within the same time-frame, it is often most efficient to enter into bi-lateral consent agreements with the anchors first, to be memorialized in a comprehensive REA Amendment thereafter.

**Practice Tip:**

In our experience, the most efficient way to address the fact that a non-retail use, such as residential redevelopment, simply does not work neatly within the construct of the customary retail REA, is to:

1. Remove the residential redevelopment parcel from the constraints of the REA (i.e., terminate the REA as to the residential redevelopment parcel);
2. Replace the REA encumbrance on the residential redevelopment parcel with a Covenants, Conditions and Restrictions Agreement ("**CC&R**") between the main shopping center owner, on the one hand, and the residential redeveloper, on the other hand, and cause the CC&R to be recorded against the main shopping center and the residential property; and
3. Terminate or amend the applicable Supplemental Agreements, as applicable.

**2. Covenants, Conditions, and Restrictions Agreements.**

Covenants, Conditions, and Restrictions Agreements ("**CC&Rs**") are agreements often used by adjacent landowners, most often on a bi-lateral basis, to regulate the use, appearance, maintenance and operation of their respective properties. CC&Rs are somewhat synonymous with REAs, except that, as mentioned, they are more often bi-lateral, instead of multi-party, agreements.

As noted above, there are primarily two (2) alternative ways to document a residential redeveloper's residential redevelopment project at an operating shopping center and the rights and obligations relating to it. The first option is to document it via an amendment to the REA. The second option is

to document it by releasing the residential redeveloper's parcel from the REA and creating a new CC&R between the main shopping center owner and the residential redeveloper.

We believe the second option is preferable and most efficient. Our preference for the second option is based on the fact that a shopping center REA is primarily a retail document and most of its content is simply inapplicable to a non-retail developer/operator, especially a residential developer/operator. For instance, provisions such as operating covenants and exclusives are simply inapplicable in the residential setting. Additionally, as mentioned above, the typical REA maintenance provisions pursuant to which the "Developer" under the REA (i.e., the main shopping center owner) maintains the common areas of all parcels and is reimbursed by the parcel owners pursuant to a common area maintenance provision in the REA ("**CAM**") on a prorata basis, is not practical in a non-retail setting. Finally, there is so much additional documentation needed to address the governance and operation of a residential redeveloper's construction, use and operation of its residential redevelopment that does not apply to retail operators, such as:

A. Use rights being limited to residential use, with limited ancillary retail benefiting the residential occupants (e.g., gym, coffee shop, clubhouse restaurant, resident movie showings).

   **Practice Tip**: Note that the main shopping center owner must ensure that those ancillary retail uses do not violate the shopping center exclusives granted to tenants.

B. Self-Maintenance of the residential redevelopment parcel, at the sole expense of the residential developer / owner / homeowner's association.

C. The residential parking ratio being vastly different than the parking ratio applied to the retail parcels.

D. Special easement issues that apply to residential parcels, but that traditionally do not apply to retail parcels, such as:

   - No cross-parking easements between the retail parcels and the residential parcels.
   - Limiting sharing of utility lines between the retail parcels and the residential parcels, given different utility line capacity needs for residential versus retail use.
   - The residential parcel's limited right to use the ring road and entry magazines on the retail parcel, without paying for ongoing maintenance of the ring road and entry magazines.

E. The main shopping center owner, who is primarily responsible for ensuring that the shopping center remains an open and operating business during the period of the residential redeveloper's construction and redevelopment, will often require the following construction-related protections to safeguard the on-going viability of the shopping center's operating business during construction:

   - Construction protections, such as the main shopping center owner's right to:
     - Review and approve the residential developer's plans and specifications for all exterior matters relating to the buildings and common areas;
     - Review and approve the residential developer's construction schedule, staging and phasing plans;
     - Require construction commencement obligations and, if not construction commencement obligations, then certainly construction completion obligations once construction has commenced;
     - Require purchase and repurchase rights (for failure to commence construction timely, subject to force majeure extensions); and

- Require a construction completion guaranty (if construction commences but is not completed in a timely manner, subject to force majeure extensions).

- The ability to expeditiously enforce its rights against the residential redeveloper to protect its adjacent shopping center asset. A bilateral CC&R makes the ability to enforce the shopping center's rights more readily attainable than a multi-party document such as an REA.

**3. Leases.**

a. *Shopping Center / Retail Leases.*

Just as a proposed residential redevelopment of a portion of a traditional first-class regional shopping center likely violates many of the provisions of the REA and Supplemental Agreements governing the shopping center, the proposed residential redevelopment will also likely violate many provisions of the shopping center's retail leases, especially those contained in larger in-line, big box and outlot leases. The categories of lease provisions that are likely to be violated by a proposed residential redevelopment include:

- **Permitted Uses**. Retail shopping center leases often provide that its landlord (i.e., the main shopping center owner) limit the uses in the shopping center to retail, restaurant and, most recently, entertainment uses that are consistent with first-class regional shopping centers, and specifically designate residential and "lodging" as unpermitted uses.

- **Protected Areas**. It is common for significant tenants, both inline and those unconnected to the enclosed mall, to exercise certain controls on limited portions of the shopping center specified in their leases. Some examples of ways that tenants maintain control over portions of the shopping center in their leases include:

  - "**No Build Zones**" which are limited areas near a tenant's demised premises in which above-grade construction is prohibited, to protect parking access and sight corridors to the tenant's demised premises and signage.

  - **Height Limitations** on nearby buildings with the intent of protecting sight corridors.

  - "**No Change Areas**" which are limited areas that the landlord is required to ensure do not change during the term of the lease, such as the portions of the shopping center's ring road near the demised premises and certain access points to public rights of way.

- **Parking Ratios**. Having parking ratios ensure sufficient parking for the retail tenants' customers.

- **Site Plan Control**. The lease often includes numerous references to the site plan of the shopping center, which is typically attached as an exhibit to the lease, and the lease often requires that the landlord ensure that specific shopping center elements (e.g., access points to the ring road and public rights of way) and common area configurations (e.g., drive aisle directions, parking space dimensions and locations) located in specified areas of the site plan remain unchanged during the lease term.

- **Exclusive Rights (also known as "Exclusives")**. Many tenants have exclusivity protections in their leases, requiring that the landlord prohibit other future tenants and occupants from operating for uses that are the same as (or similar to) a given tenant's primary use. For instance, a coffee shop tenant may require that no other coffee shops operate within a certain radius of its demised premises, a health club

tenant may require that no other health clubs be permitted to operate at the shopping center, and an Italian restaurant tenant may require that no other restaurants containing a menu of predominantly Italian cuisine operate in the shopping center. To the extent that a residential development has ancillary retail uses in its residential building (e.g., coffee shop, health club, a dry cleaner drop off / pick up, a recreation center that shows periodic movies), these ancillary uses potentially violate shopping center tenants' exclusives.

b. *Consent.* The process of redeveloping a portion of an operating first-class regional shopping center to include residential building(s) and uses, together with ancillary uses, will inevitably result in conflicts with the provisions of leases at the center. Consequently, written consents or approvals will need to be obtained from the applicable tenants under applicable leases. Typically, the main shopping center owner (i.e., the landlord under the leases or ground tenant under the ground lease) will want to control the consent process, as it has ongoing relationships at the shopping center, among other shopping centers nationally, with the anchors and tenants that it carefully protects.

As in the REA consent process, the first step in the consent process is to obtain the Site Plan / Elevations. With the Site Plan / Elevations, the main shopping center owner's development and legal teams can commence their analyses of how the proposed residential development conflicts with the shopping center requirements set forth in the leases, as well as the operational issues that the proposed new redevelopment project may pose. For instance:

- What is the impact on the parking ratios required by the leases?
- Do the residential building heights violate the lease limitations?
- Do the ancillary uses at the residential redevelopment site violate tenant exclusives?
- Will the various protected areas / no build areas under the leases be violated by the common area changes contemplated under proposed residential redevelopment?
- Are there material ingress / egress points on the redevelopment site that are crucial for the retail portion of the shopping center to continue to have efficient access to?

Once that analysis has been performed, the main shopping center owner will have a basic idea of each party that has the right to consent to the residential development under the leases and those specific matters for which consent is needed in each instance.

**4. Ground Leases and Loan Documents.**

The concerns of ground lessors and lenders often overlap due to their shared interest in the stability, value, and success of the property in the context of adding mixed-use components to a shopping center development.

When a lender has provided financing to a developer who owns a retail shopping center or when a development has been developed on ground leased land, and there is a plan to integrate mixed-use components, several legal perspectives and concerns come to the forefront. These concerns are critical to ensuring the security of the loan or the value of the ground lease (and the underlying asset), the viability of the development, and the overall financial health of the project. To the extent the shopping center owner's lender or ground lessor has the leverage to protect its collateral, it will do so. Under the shopping center owner's loan documents or ground lease, there may be restrictions or prohibitions on (a) use, (b) amendments to leases, (c) alterations to the shopping center (even portions of the shopping center not owned by developer), (d) amendments to REAs or Supplemental Agreements, (e) adding new encumbrances to the site (e.g., CC&Rs), or (f) changes that impact environmental conditions, all of which will be required to be addressed as part of the residential redevelopment. These issues and lender or ground lessor's concerns about these issues will need to be addressed as part of the documentation of the redevelopment.

C. Municipal Regulations.

**1. Government Authority over Development Projects Generally.**

The regulation of uses and development standards on a specific parcel are typically the province of local government – generally an incorporated city or the county in unincorporated areas. However, there may be instances in which the state or a local regional body may play a role in the development process.

a. *Local Government Authority.*

The primary sources of government authority and regulations are found within the local agency's "General Plan" and the zoning regulations. The General Plan serves as the "constitution" for the local agency. It is typically divided into several "elements" that focus on different areas – land use, housing, circulation, open space, public safety, etc. Each element will contain different objectives and policy statements that serve to guide future development. While a General Plan is required to be internally consistent and harmonious, there are frequently competing policy perspectives within a General Plan such as: preserve as much open space as possible, develop as much housing as possible, preserve and expand job producing activities, and avoid siting competing uses in close proximity. A development project does not need to be consistent with every General Plan objective and policy to be consistent with the General Plan. Determinations of consistency are vested in the local governing body – City Council or Board of Supervisors – and receive significant deference from reviewing courts. That being said, sometimes a General Plan will have a mandatory and objective standard such as a height limit, minimum or maximum residential density, or Floor Area Ratio (FAR) cap which cannot be avoided absent a specific authorization or the approval of an amendment to the General Plan.

In California, the "Housing Element" is a mandatory element that must be included in every local agency's General Plan. Under California state law, the Housing Element must be updated every eight years and include sufficient areas planned for housing uses to accommodate the amount of that local agency's share of housing demand under the Regional Housing Needs Assessment (a California state-mandated process to determine the housing needs of a jurisdiction). Underperforming retail centers are frequently identified under these plans as opportunity sites for future housing development.

The City's zoning code is intended to implement the General Plan's policies and objectives and provide detailed standards as to uses and intensity of development. Typically, the zoning code will provide the standards against which a development will be considered. Local agencies are also empowered to adopt "Specific Plans," which can provide special regulations that supersede the zoning code in defined geographic areas. Major regional shopping centers are frequently governed by Specific Plans. Where the Specific Plan is silent on an issue, the local agency will default to the zoning code.

In addition, there may be special areas in which a local regional body may also play a role in local land use determinations. One such example is areas proximate to airports. In those areas, there is a regional "Airport Land Use Commission," which plays a role in evaluating what uses and the intensity of development that should be allowed near airports. For example, residential uses may be discouraged in areas that are routinely subjected to higher levels of airport noise and building heights are typically limited in the flight approach and take-off areas.

b. *State Authority.*

While local regulations typically provide the beginning and the end of the story for retail development, there have been increasing efforts by states to incentivize the development of additional housing. A few examples of state-level incentives in California, for example, include:

i. **Density Bonus Law.** California's Density Bonus Law is likely the most commonly used tool for development of new housing. The Density Bonus Law permits a significant increase in the maximum permitted density (currently up to a 100%

increase) in exchange for providing certain levels of deed restricted affordable housing. The amount of the bonus is determined based on a sliding scale established in state law based on the amount and level of affordability being provided. In addition, the Density Bonus Law mandates that the local agency must approve "incentives" and "waivers/concessions" of local development regulations that are necessary to support the proposed housing development project. Granted incentives frequently include increases in height limits and FAR caps and decreases in required setbacks and open space. In addition, the Density Bonus Law limits the amount of parking that can be required.

ii. **Construction in Normally Unpermitted Areas.** California has also adopted several laws that mandate that local agencies permit the construction of residential housing in areas that normally would not permit such uses under applicable zoning regulations. AB 2011 and SB 6, each adopted in 2022, allow residential development in most commercial areas; however, these laws have been used infrequently given the myriad of requirements to qualify projects, in particular the requirement that the projects use union labor, which has limited their utility in most markets.

iii. **Exemption from Minimum Parking Requirements in Certain Areas.** Another area in which California has usurped local authority relates to parking requirements proximate to "Major Transit Stops." Major Transit Stops are defined under California state law as including fixed rail stations, ferry terminals, and intersections of two bus lines that have 20-minute headways during peak service hours. All uses – residential, commercial (except hotels and Event Centers), and industrial – within one-half mile of a Major Transit Stop are exempt from all minimum parking requirements.

iv. **Unenforceability of CC&Rs Against 100% Affordable Housing Developers.** Finally, in 2021, California adopted AB 721, which makes any CC&Rs that limit residential development unenforceable against the developer of a 100% affordable housing development project. This, of course, can be a significant issue for a shopping center development that did not plan for residential uses as a 100% affordable project can ignore any applicable CC&Rs, and, when combined with the benefits of the Density Bonus Law are essentially unbound by zoning and parking regulations.

**2. Key Issues for Government Review of Residential Project.**

a. *Government Regulations/Development Standards.*

As discussed above, the primary governing standards will be the local agency's General Plan and either the applicable Specific Plan or zoning ordinance. All parties should review and understand the applicable regulations to understand what is permitted on site. Are residential uses allowed? What are the requirements and limitations on densities, FAR, height, setbacks, open space, and parking.

The parties should evaluate early what can be accommodated on the portion of the site that is slated for residential development and how that can be permitted under both local and state law, as well as what, if any, modifications to development standards will be needed to accommodate the proposed development.

As noted above, as an example, California law has been changing to accommodate increased residential density, particularly on what are seen as underutilized urban infill sites. Sometimes these programs can change during or even after the original concept was developed and approved, which can result in conflicts between the primary mall and other retail owners that seek to continue retail operations and the residential developers that may seek to maximize the potential residential densities. For the time being, California state law has not overridden private agreements related to mixed use housing, but there have been calls to make such changes.

b. *Government Review of Residential Projects.*

A project may qualify for a number of entitlements and the developer may need these, financially, to develop a residential project in an existing shopping center. Unless the approval is "ministerial", meaning that the local agency has no authority to condition or deny the proposed project, then these approvals will likely trigger a planning process that can require administrative approvals by local agency staff as well as public hearings before a planning commission or the agency's elected political body – the City Council or Board of Supervisors.

i. **Subdivision approvals**. One of the first considerations is whether there is a "legal lot" that can be sold or financed separately from the balance of the mall site. Frequently, there are multiple lots that have been created for different uses within the mall – various anchor parcels, out pads/parcels, one or more parcels for the primary mall, parcels for parking facilities, and others. Generally speaking, these parcels are intended for their prior specific purposes and will frequently need to be modified to facilitate the new development. In California, as an example:

- If minor changes to four or fewer parcels are contemplated, it may be possible to process a ministerial lot line adjustment. Lot line adjustments generally do not require the exercise of any discretion by agency staff – they are limited to looking at whether the resulting lots are consistent with all applicable laws and will not result in building conditions that are inconsistent with the required standards. If a newly configured lot would result in a zoning inconsistency such as a substandard setback or an exceedance of FAR limitations, then the lot line adjustment cannot be approved. Though, there may be covenants that can be recorded, such as no-build restrictions on adjoining lots that can address certain concerns.

- For larger subdivisions involving more than four lots, then an entirely new subdivision mapping process will likely be required. In this context, the City can exercise its discretion to condition or deny the proposed subdivision. These conditions can affect all parcels that are being subdivided and could result in new conditions being imposed on the remaining retail parcels. The retail owners will want to ensure that they can review draft conditions before they are approved to ensure that they will not negatively impact long term retail operations.

ii. **Conditional Use Permits**. Local zoning codes will often "conditionally" allow certain uses in certain zones. In those cases, a conditional use permit (a "**CUP**") or similar type of approval is required. As the name implies, a CUP includes a list of conditions that will apply prospectively to the future development, including conditions that apply to different phases of development – e.g., some may apply only to construction while others apply to continued operations.

There are often one or more prior CUPs that were approved in conjunction with the original mall development. It is important to understand whether any of the conditions will need to be modified in conjunction with the new development. The existing owners may not want to "open up" a CUP that has been in effect for many years, sometimes decades, as it may incentivize the local agency to review the prior conditions and determine if there are any modifications that need to be made. If so, this can turn into a battle over the existing improvements more than the future residential improvements. Again, existing owners should make sure that they limit their exposure on this front and retain the right to review and object to any new or modified conditions that will affect the retail operations.

iii. **Design Review or Site Plan Permits**. Even where a local zoning code allows all uses as a "permitted" use, the agency may also have a requirement to receive a "Design Review" or "Site Plan" permit. While seemingly more limited than a CUP, these permits often function in virtually the same manner by giving the local agency the ability to review both the proposed use and the site improvements. As such, the same concerns that apply to CUPs often apply to these permits as well.

c. *Development Agreements, Owner Participation Agreements, and Disposition and Development Agreements.*

There are a number of agreements with public entitles that can appear on title for an existing, developed shopping center that will need to be considered in any future redevelopment, including, in California, as an example: Development Agreements, Owner Participation Agreements (an "**OPA**"), or Disposition and Development Agreements (a "**DDA**").

California has a unique statutory provision that permits a local agency to enter into a "Development Agreement" (a "**DA**") with a developer related to a development proposal. A DA has the effect of vesting local laws (sometimes including the amount of fees that may be applied to a project) for a period of time, as stated in the DA. In exchange for these vested rights, the local agency may be able to secure additional public benefits beyond what can be required through the normal power to condition a project under the agency's police power. Specifically, the agency can extract negotiated, bargained-for exactions that go beyond the constitutional limitations of nexus and rough proportionality.

OPAs and DDAs are generally creatures of California Redevelopment Law. Though the state dissolved all redevelopment agencies statewide in 2011, many OPAs and DDAs remain binding on all parties as enforceable obligations of the cities or counties in which they are located.

Regardless of the form, whenever there is a DA, an OPA, or a DDA recorded on title, it is important to understand what the agreement's purpose was, what it permits (or does not permit), and how much of the term remains. In the context of OPAs and DDAs, because these were associated with redevelopment activities, there are frequently limitations related to economic activity and the generation of additional property or sales taxes. As a result, frequently, there are use limitations or even certain consent rights in favor of the redevelopment agency that could limit the ability to develop the land as contemplated. The parties involved as soon as possible what changes may be required and what consents or approvals are required to make those changes to ensure that the appropriate public hearing process is factored into the decision-making process. For example, an amendment to a DA may require a hearing by the City Council or Board of Supervisors that would normally not be required otherwise. Further, an amendment to an OPA or DDA may require approval by county or state bodies charged with successor redevelopment agency responsibilities.

d. *Utilities.*

Utilities can involve both on-site and off-site considerations that should be explored as early as possible in the development process.

Utilities in existing shopping centers tend to take the path of least resistance, generally through large open parking lots, to get from the nearest public connection in the adjacent right of way to the users on site. These existing lines, however, tend to frequently interfere with the potential new development sites. As part of the redevelopment process, utilities will need to be abandoned, and new lines will need to be installed. In conjunction with these new lines, new easements will need to be documented on-site.

In addition, off-site utilities will need to be evaluated to confirm that there is sufficient capacity to handle any increased demands whether it be electric, natural gas, domestic water, or sewer. Any additional off-site infrastructure needs should be determined as early in the process as possible to limit financial surprises down the road.

APPENDIX A

## CASE STUDY BACKGROUND

You are an in-house attorney at Brick-and-Mortar Retail Properties Inc. ("**B&M**"). B&M owns, among other shopping centers, the main shopping center property (including the enclosed mall) at ICSC Shopping Center, a first-class regional shopping center located in San Diego, California (the "**ICSC Center**").

A site plan depiction of ICSC Center is attached as **Exhibit 1** ("**Site Plan**"). ICSC Center is comprised of:

- The main shopping center parcel owned by B&M (the "**B&M Parcel**") which is shaded green on the Site Plan and includes the enclosed mall, various surrounding parcels, the majority of the ICSC Center's ring roads and access points to external rights-of-way and some outlots located outside of the ring road.

- Anchor Parcels A, B and C owned in fee by separate national department store retailers ("**Department Store Owner A**," "**Department Store Owner B** and "**Department Store Owner C**", respectively). Anchor Parcel B and Anchor Parcel C are open and operating. Anchor Parcel A, whose operating covenant has long expired, has gone dark and has not been open and operating for over a year now. Anchor Parcel A is shaded white and cross-hatched on the Site Plan. Anchor Parcels B and C are shaded white (without cross-hatching) on the Site Plan.

The entire site (i.e., the B&M Parcel, Anchor Parcel A, Anchor Parcel B and Anchor Parcel C) is encumbered by a Reciprocal Easement and Operating Agreement (the "**B&M REA**") that was executed and placed of record in 1971 and expires in 2046.

Yesterday afternoon, B&M's Chief Development Officer ("**Mr. CDO**") stopped by your office and explained that he received a call from the Head of Development for Department Store Owner A, who informed him that Department Store Owner A had just entered into a purchase and sale agreement (the "**PSA**") with a residential developer (the "**Resi Developer**") to sell Anchor Parcel A to Resi Developer, who intends to redevelop Anchor Parcel A by demolishing the existing retail box located on Anchor Parcel A and constructing a single high-rise condominium or apartment building (to be determined based on market studies and City discussions that will occur during the due diligence and governmental approval contingency periods under the PSA) in the middle of Anchor Parcel A's existing parking lot (the "**Residential Redevelopment**"). The Residential Redevelopment, while primarily a residential redevelopment, will reportedly also likely include ancillary amenities such as couple of small retail uses on the first floor (e.g., a coffee shop and a small grocery market serving food staples and prepared foods), a fitness center and dry-cleaner drop-off / pick-up for residents of the Residential Redevelopment and a social center for residents' social gatherings such as movie nights and happy hours.

Mr. CDO mentioned that B&M's C-suite is supportive of the Residential Redevelopment project as a part of B&M's overall goal to revitalize the ICSC Center.

Mr. CDO has asked that you consult with your legal team and brief him in two weeks concerning the main challenges that need to be addressed and satisfied by both Resi Developer and B&M for Resi Developer to achieve its redevelopment goal of ICSC Center, with the understanding that, although B&M supports the Residential Redevelopment project, B&M must first and foremost protect B&M's operating shopping center business at the ICSC Center and that of its tenants.

**EXHIBIT 1 TO APPENDIX A**

SITE PLAN

