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Collaborative Land Use Easements: Resolving Conflicts between New Residential Development and Existing Nuisances

Best Practices in Negotiating Collaborative Land Use Easements

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Today's faculty features:

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When New Housing Conflicts with Existing Uses

Strafford CLE

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1. What is your profession?

- Lawyer
- Real Estate Professional
- Other

2. What is your level of experience in real estate and real estate entitlements?

- Light
- Medium
- Heavy

3. What are your primary markets?

- Urban
- Suburban
- X-urban and fringe cities

The Conflict

In response to housing shortages, developers are expanding into areas close to existing industrial plants, ports and quarries.

Nationwide and growing problem

Gravel quarry

Batch plants

Distribution centers

Sports fields

Port facility

Food processing

Horse grounds

Ag facility

Publications

ULI Quarterly Magazine (Winter 2019)

Presentation at ULI 2019 national convention

California Real Property Journal (Summer 2019)

Presentation at 2019 California Bar Real Estate retreat

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Four Common Elements

- Existing uses: fully-permitted and not deemed nuisances
- Approach of residents created risk that these existing uses may be re-characterized as nuisances
- Residential developers promised full disclosure to buyers and tenants and argued that disclosure would prevent future conflicts
- Existing users and the city governments did not believe the developer and knew that, despite disclosures, there would be future conflicts

“Bet-the-Company” Opposition

Existing users fear that their operations will be restricted or ended and make powerful arguments to the city (and prevail more often than not)

- Existing use serves an important need in the community
- Shuttering the plant would eliminate jobs
- Vested rights and regulatory taking (and the threat of well-funded litigation)
- Powerful political allies

Traditional Responses to Conflicts

1. Conditions of Approval
2. Restrictions on Existing User
3. Legislation

Conditions of Approval

- Required disclosures
- Deed restrictions / covenants / CC&R's
- Mitigations on development site

Disadvantages of Conditions of Approval

- Not thorough and not well-drafted
- Often over-looked by buyer and tenants

COA not customarily recorded

Deed restrictions are recorded, but are not flagged

- Not easily modified in the future
- Unclear remedies for future violations

Restriction(s) on Existing User

Local jurisdictions often:

- Examine existing permits
 - Current level of use
 - Renewal dates, if any
- Audit current level of use, including operating hours and traffic impacts

Legislation

- Disclosure requirements:
 - State and local mandatory disclosure forms
 - Specific disclosure requirements (e.g., airports & quarries)

Legislation (cont.)

- “Right to operate” laws
 - Right to Farm
 - Quarries may be a “resource of regional significance”
 - Clarification of nuisance definitions and rules

Collaborative Easements

Simple easement agreement granting the existing user the affirmative right to pass noise, dust, odor, vapor, vibration and illumination (or some combination) across the proposed residential development site.

The Collaborative Easement Strategy

- Existing user drafts disclosure statement
- Existing user and developer agree on the draft easement agreement

Agreement requires that developer (and all future owners)
provide the disclosure form to all prospective buyers and
tenants

Strategy (cont.)

- Consultation with City
- Existing user agrees not to take any action to defeat the developer's application for housing entitlements (or even goes on the public record as not opposing the project).

Strategy (cont.)

- The local government approves the housing development application with Conditions of Approval requiring:
 - the use of the easement form and the disclosure
 - recordation of the easement prior to the recordation of the subdivision map (so that the easement runs with the land and appear on all future title reports).

Strategy (cont.)

- The developer records the full easement agreement and the mandatory disclosure form (not just a brief memorandum of agreement) before recording the subdivision

Benefits to the Three Major Actors

Existing user addresses the inexorable approach of housing while securing the right to continue existing uses.

Residential developer, initially reluctant, accepts this strategy as a way to:

- eliminate opposition
- get projects approved
- properly inform prospective buyers and tenants
- protect the developer itself from liability to future buyers and tenants

Benefits to the Three Major Actors (Cont.)

- Local government staff and politicians accept this joint strategy as a way to:
 - add housing
 - assure that future buyers and tenants receive full disclosures
 - minimize current and future conflicts among their constituents

Other Advantages of Collaborative Easements

- Flagged as exceptions in title report
- Requires that future owners must provide disclosure document to buyers and tenants – and assures that through title reports
- Bilateral contract can be modified easily
- No admission or finding that the existing use is a nuisance

Limitations of Collaborative Easements

- Do not bind any neighboring property that is not covered by the recorded easement
- Not effective against the members of the public, including those using public land, streets, and rights-of-way
- Not effective against public nuisance claims and certainly not against criminal nuisance claims
- Existing user is still subject to established legal standards relating to clean water, clean air, noise limits, and other environmental measures
- Government always retains police powers over health and safety issues

Lawyer Role

- Find strategies that allow more housing while protecting existing users
- Few attorneys are experienced with this issue
- Resolving these conflicts requires a combination of traditional real estate transactional work and land use work

CLUE's commonly include the following:

- Recitals identifying the parcels involved and describing the existing use, the development proposal, and the purpose of the agreement.
- Grant of a non-exclusive easement to the existing use for noise, dust, odor, vapor, vibration, illumination and/or other factors (taking into account possible successor uses).
- Negotiated restrictions on the scope of the easement (such as hours of operation, decibel levels, and traffic).
- Term of the easement (perpetual, fixed years, or terminating with end of the current use).

- Waiver and release of future claims that are based on grantee's permitted activities within the defined scope of the easement.
- Indemnity and limitation of damages.
- Requirement that grantor (and all future owners) make the written disclosures (a copy of which is attached to the recorded easement) to all successors-in-interest (including both buyers and tenants) and obtain written receipts for the disclosures.
- Reservation of grantor's right to use the servient property for all permitted uses not inconsistent with the purposes of the easement.

- Subordination of senior interests in the real property (title searches and insurance should be considered).
- Clear statement that the easement is a covenant running with the land.
- Requirement that each party cooperate with future requests for estoppel certificates.
- Other standard contractual provisions, such as clauses relating to signing authority, notices, integration/merger, and to “further acts and assurances.”
- Requirement that the easement be notarized and recorded prior to the recordation of the developer’s subdivision map.

CLUE's often include the following:

- Naming the local government entity as an express third-party beneficiary. The parties also may provide that the easement cannot be modified without the consent of that beneficiary.
- References to the COA imposed by the local government.
- Mediation and arbitration provisions for future conflict.
- Provisions for the recovery of legal fees and costs.



“Location, location, location!”

“Location, entitlements, timing!”

Q & A

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