

## Structuring Mixed-Use Retail Development Agreements for Urban Infill Projects

Addressing Unique Legal Issues Related to Cost Sharing, Signage, Use Restrictions, Future Developments and More

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Thursday, January 22, 2015

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

Kathleen Boyle, of Counsel, **Pircher Nichols & Meeks**, Chicago

M. Rosie Rees, Partner, **Pircher Nichols & Meeks**, Chicago

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**Structuring Mixed-Use Retail  
Development Agreements for  
Urban Infill Projects:**

Addressing Unique Legal Issues Related  
To Cost Sharing, Signage, Use Restrictions,  
Future Developments and More

Presented by:

**M. Rosie Rees**

Pircher, Nichols & Meeks  
Chicago, IL

900 N. Michigan Avenue, Suite 1000  
Chicago, IL 60611

T: 312.915.3127

F: 312.276.8727

E: [RRees@pircher.com](mailto:RRees@pircher.com)

[www.pircher.com](http://www.pircher.com)

**Kathleen D. Boyle**

Pircher, Nichols & Meeks  
Chicago, IL

900 N. Michigan Avenue, Suite 1000  
Chicago, IL 60611

T: 312.915-3182

F: 312.276.8734

E: [kboyle@pircher.com](mailto:kboyle@pircher.com)

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Pircher, Nichols & Meeks

*The Real Estate Law Firm*

**I. Negotiating and drafting operating agreements and leases for urban infill mixed-use projects can be challenging because a number of different variables are involved, some of them relating to unknowable future events**

- A. Potential multiple phases.
- B. Potential use changes; including change from retail only to mixed-use.
- C. Potential entitlement risks.
- D. Potential changes in density mix.
- E. Potential separate ownerships of different parcels (often devoted to different uses).

## II. Trends in Urban Mixed-Use Retail Developments

- A. High Street Retail.
- B. City centers – back from recession.
- C. Suburban downtowns or city neighborhoods.
- D. Transportation Oriented Developments.

### **III. Need for REA if separate ownerships (or even separate parcels, to plan for future separate ownerships)**

- A. A rose is a rose; other names for similar documents.
- B. Purpose of REAs and topics frequently included.
- C. Plan for future conveyances to third parties.
- D. REA may serve as recorded operational guidelines for project.

## IV. Exclusives and Prohibited Uses

- A. Dealing with breach of exclusive or prohibited uses on parcel that has been conveyed.
1. Even if lease allows landlord to be released upon a sale, many forms do not provide for a release if only a portion of a project is sold.
  2. How about reduced rent or % rent only provision in lease?
  3. Similar liability issues arise as to other rights of existing tenants, like approval rights over design, use, parking, site plan – who is liable for breach on another parcel?
  4. Application of exclusives and prohibited uses in retail leases to other non-retail uses in project.
  5. Be careful not to include standard list of prohibited uses in retail lease if part of (or in future may be part of) mixed use project: no residential use, no sleeping accommodations, no office use. Even reference in form to “shopping center” could be a problem.

## V. Operating Expenses and Taxes Pass Throughs

- A. Potential gap can occur upon conveyance when an REA allocates operating expenses to a parcel in a different manner than the lease or leases on that parcel.
- B. Different types of tenants use different services, or they use some services more than other types of tenants.
- C. Base allocation of taxes and expenses on landlord's determination – can say equitable allocation, or use industry standard.
- D. Industry standards for method of determining pro rata share differ among different uses.
- E. It is helpful from landlord's perspective to include a provision that permits landlord to create different categories ("pools") of expenses that can be allocated to different categories of tenants.

## VI. Co-tenancy rights

- A. If a tenant's co-tenancy rights are based on a percentage of tenants or (floor area) in a project being operated, what happens when a parcel is sold?
- B. Retail tenants may want to prevent a non-retail use to be deemed an anchor for co-tenancy purposes:  
e.g., hotel or office building.

## **VII. Impact of use, design and similar restrictions in future REAs on existing tenants**

- A. Do restrictions in a future REA bind a tenant without its consent to the restrictions?
  - 1. Consent issues.
  - 2. Material Impact on tenant.
  - 3. Control Area.
- B. Municipality as zoning and design enforcer.

## **VIII. Drafting leases for a project that is subject to an existing REA**

- A. Enforcement issues: consider whether a tenant should:
  - 1. Have direct enforcement rights.
  - 2. Have the right to cause the landlord to (use commercially reasonable efforts to) enforce.
- B. Tenant's right to review underlying documents, including REAs.

## **IX. Air rights subdivisions and condominiums**

- A. Should a tenant have the right to approve future imposition of a condominium regime? Approve the condominium documents themselves?
- B. From the developer's perspective, whether to utilize air rights subdivisions or condominiums is substantially impacted by state law, but there are a few generic considerations.
- C. Many real estate transactional or leasing attorneys are not conversant with condominium statutes.
- D. Tenants must be subject to the condo association rules and regulations, perhaps drafted as mini-REA's.
- E. Impact of ground leases and municipal development agreements.

## X. Signage

- A. Major impact on urban infill projects, particularly vertical retail.
- B. Identification vs. advertising signage.
- C. Size and coverage of building signs.
- D. Aesthetics and architectural harmony.
- E. Temporary vs. “permanent” signage.

## XI. Parking Issues

- A. Each category of tenants will have concerns that there is sufficient parking available for its use.
1. Residential users will want exclusive parking; be sure retail leases don't preclude reserved or exclusive parking.
  2. Hotel users will want valet services; be sure retail leases don't preclude designation of parking areas for valet.
  3. Retail users (particularly anchors) are concerned about poaching by office users who might otherwise have to pay higher office parking rates.
  4. Other users – restaurant, theaters.
  5. Enforcement of REA parking regulations.
  6. Off-site parking agreements.

## **XII. Loading Issues**

- A. Shared docks.
- B. Shared compactors.
- C. Shared vendors.
- D. People loading – valet and cabs.