Reducing Conflicts through Collaborative Land Use Easements (CLUE)

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Rooster ‘Was Just Being Himself’: Court Rules He Can Keep Crowing
The Conflict

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

- Nationwide and growing problem

- ULI article
  California Real Property Journal
  Mining.com
Examples

- Gravel quarry
- Port unloading facility
- Manufacturing plant
- Seafood processing plant
- Rodeo / horse grounds
Four Common Elements

1. Existing uses: fully-permitted and not deemed nuisances

2. Approach of residents created risk that these existing uses may be re-characterized as nuisances

3. Residential developers promised full disclosure to buyers and tenants and argued that disclosure would prevent future conflicts

4. 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

- Conditions of Approval
- Restrictions on Existing User
- Legislation
Conditions of Approval

- Required disclosures
- Deed restrictions / covenants / CC&R’s
- Mitigations on development site
Disadvantages of Conditions of Approval

Prior to approval of residential entitlement:

➢ Existing users are not assuaged and the housing proposal is often defeated or severely districted

(Collaborative Easements, discussed later, are designed to address this problem)
Other Disadvantages of COA

After approval of residential development:

➢ 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:

Mandatory disclosure forms in residential sales

Specific disclosure requirements

mining / airports / industry / farmland
Legislation (cont.)

“Right to operate” laws

- Right to Farm
- Preservation of manufacturing bases
- Protection of mined resources
- Protection of allowed uses in zoning districts
  (clarifying nuisance standard)
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

1. Existing user drafts disclosure statement

2. Existing user and developer agree on the draft easement

   Easement states that developer (and all future owners) will provide this disclosure form to all prospective buyers and tenants
3. Consultation with City

4. 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.)

5. The local government approves the housing development application with Condition of Approval requiring:

- the use of the easement and the disclosure form

- recordation of the easement prior to the recordation of the subdivision map (so that the easement would run with the land and appear on all future title reports).
Strategy (cont.)

6. 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 disclosures
  • minimize current and future conflicts among their constituents
Other Advantages of Collaborative Easements

- Flagged as exceptions in title report
- All future owners must provide disclosure documents
- Disclosures made to both buyers and tenants
- 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
Other Housing Conflicts

➢ Existing residential use conflicting with existing industrial use

➢ Existing residential use facing a proposed new industrial use
Sources

- Urban Land, Etnire, “Reducing Land Use Conflicts Through Collaborative Easements” Winter 2019, Volume 78, No. 1, Page 82 (copy attached)

- California Real Property Journal, Etnire, “Resolving Conflicts Through Collaborative Land Use Easements,” Volume 37, No. 2, 2019 (copy on request)

- CA Easements and Boundaries: Law and Litigation, Continuing Education of the Bar, Editor Bonnie C. Maly, 2019, Section 2.37B Collaborative Land Use Easements
“Location, location, location!”

(Attribution unclear - William Safire attributes this to a 1926 real estate classified ad in the Chicago Tribune and to Lord Harold Samuel of Great Britain)

“Location, entitlements, timing!”

(Geoff Etnire - 1989)