

WHAT MIXED-USE DEVELOPERS NEED TO KNOW ABOUT CC&RS NOW (PART 2 OF A 3-PART SERIES)



Hartman Simons' partner, [Jeremy Cohen](#), discusses provisions to consider when drafting CC&Rs for mixed-use developments. The following is part 2 of a 3-part series.

Cohen discusses the following critical factors:

Q: Are there any other CC&R provisions that are important for mixed-use developments?

A: Yes, there are several other important provisions. For example, the provisions which address how the individual buildings located within the project will be developed as well as the signage that will be installed on such buildings are crucial to the CC&Rs and the effective development of the mixed-use project.

Most of the time, the developer wants the project to have a certain look and feel and, as a result, they will need to control the design of the buildings such as the elevations, as well as the design of the specific signage. Having a good architect engaged at the beginning is extremely helpful in that the architect can help the attorney draft these provisions and include examples of allowable elevations and/or signage.

Another important set of provisions are the restrictions on future construction. At the beginning of the project, everything is being constructed at the same time. There aren't concerns about the power lines being cut or the water being turned off. However, as the initial portions of the project open, limiting what occurs from a construction standpoint is essential. If you are a resident, you would not want jack hammering to start at 6 am or, if you operate a restaurant, having the water shut off would be extremely detrimental to your operations. As a result, the CC&Rs must address what happens when the mixed-use projects are developed in phases and what steps are taken in order to protect the original occupants of the project from construction mishaps.

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Q: What are the usual duration terms for CC&Rs, and what language should be included to prevent CC&Rs from expiring within a certain term?

A: The term of a CC&R is often dictated by applicable state laws, which vary from state to state. As a result, the provision often says CC&Rs will remain in place as long as allowed under applicable state laws.

A standard starting point is to have a term of anywhere from 30 to 50 years with automatic renewals of 10-year periods thereafter. The CC&Rs should include provisions that allow for the automatic expiration of the term under CC&Rs without the parties having to take action until such time it runs up against state laws that limit such term. In addition, it is also common to see CC&Rs provide that the access and utility easements set forth therein survive any termination of the underlying CC&Rs so as to allow the owners of the different components of the project to have continued use of the roadways and utility lines.

Q: What are the most common restrictions in CC&Rs which anchor retail tenants want to impose?

A: First, anchor retail tenants are most concerned with imposing use restrictions on the remainder of the project. These tenants want to know what other tenants will be a part of the project and, to the extent they are able to control the development, they want to try and keep out their competitors.

Developers of mixed-use projects often try and temper exclusive uses so as to preserve as much flexibility for the leasing of the retail component of their project as possible as exclusives have often been a death sentence to other centers. Second, retail anchors want to know what their annual costs of operation will be.

Retailers always want to know and understand what their annual operational costs will be and, to the extent they are able to do so, will want to cap these annual costs so they can accurately plan for and budget the same. Finally, for retail anchors, co-tenancy provisions are extremely important because the tenants want to be reassured the retail component of the project will remain open and continue operating. Mixed-use projects, by their nature, often have smaller retail components and, as a result, the co-tenancy provisions are sometimes much more limited because there simply isn't the space available in the project for a number of big boxes.