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RECIPROCAL AGREEMENTS IN SHOPPING CENTER DEVELOPMENTS

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I. INTRODUCTION

The process of creating suburban shopping centers[1] from which retailers may conduct their business is a form of real estate development which became common in America only in the last forty years.[2] The retailing industry, itself, has existed for centuries;[3] nevertheless, only in the last 150 years or so has that industry flourished, a result of the evolution of our society into a more centralized structure and the emergence of a need for more refined and comprehensive retailing systems.[4] During the last forty years, changes in American transportation habits as well as residential patterns have greatly influenced the format of shopping areas, whose growth is directly tied to the proliferation of the automobile.[5] As this evolution took place, retailing centers located in central business districts became less popular, less profitable and, therefore, less common; in their place grew the suburban shopping center.[6] Along with the growth of this type of retailing environ-

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1. The term "shopping center" has been defined as:
> [A] group of architecturally unified commercial establishments built on a site which is planned, developed, owned, and managed as an operating unit in its location, size, and type of shops to the trade area that the unit serves. The unit provides on-site parking in definite relationship to the types and total size of the stores.

URBAN LAND INST., SHOPPING CENTER DEVELOPMENT HANDBOOK 1 (1977).

2. *See* H. CARPENTER, JR., SHOPPING CENTER MANAGEMENT 5 (1978); L. REDSTONE, NEW DIMENSIONS IN SHOPPING CENTERS AND STORES xviii (1973).

3. D. GOSLING & B. MAITLAND, DESIGN AND PLANNING OF RETAIL SYSTEMS 4-5 (1976). Shops and other environments of commerce have existed for thousands of years, but the industry of distributing goods on a high-volume basis did not truly develop until the nineteenth century when consumers began to congregate in cities creating mass markets and the technology of the Industrial Revolution provided the means to produce large quantities of goods and to transport them efficiently long distances to these newly created urban centers. *See id.* at 4-7.

4. *See id.* at 7.

5. *See id.* at 22-23.

6. *See* L. REDSTONE, NEW DIMENSIONS IN SHOPPING CENTERS AND STORES xviii-ix (1973). Whereas in 1949 only 49 suburban shopping centers were known to exist in the United States, by the early 1970's, there existed over 15,000 such centers and approximately forty-three percent of retail trade (excluding automobiles, service stations, and miscellaneous non-shopping center type retailing, such as hay, grain, and feed stores) in North America in 1973 was conducted in planned suburban shopping centers. *See* W. APPLEBAUM & S. KAYLIN, CASE

ment, a new actor was injected into the retailing business—the shopping center developer.[7]

The person creating the shopping center—the developer—participates, as the owner of the entire shopping center, in leases which are designed to regulate the rights of the various retailers occupying portions of the shopping center.[8] Another type of agreement, applicable to the situation in which the developer owns only a portion of the shopping center and retailers or other persons own the balance of the shopping center, may be referred to as a "Reciprocal Agreement," and is the subject of this article.[9] Because the interests of the various participants in the development process and the subsequent ongoing operations of a shopping center are adverse, lawyers representing each of the participants are often involved in preparing these documents.

Reciprocal Agreements are necesary because fee simple title to shopping centers is not always entirely owned by the developer. Although the developer generally prefers to retain ownership of the entire shopping center in order to maximize the capital asset base upon which his income is earned,[10] economic circumstances, as well

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STUDIES IN SHOPPING CENTER DEVELOPMENT AND OPERATION 1 (1974) (citing Kaylin, *Shopping Centers' Share of the Market*, SHOPPING CENTER WORLD, January, 1973, at 28). By the end of 1976, there were 17,523 shopping centers located in the United States, containing over 2.3 billion square feet of gross leasable area. Slightly in excess of two-thirds of that area was located in shopping centers of less than 100,000 square feet of gross leasable area. *See* H. CARPENTER, JR., SHOPPING CENTER MANAGEMENT 7-8 (1978).

7. *See* D. GOSLING, & B. MAITLAND, DESIGN AND PLANNING OF RETAIL SYSTEMS 28 (1976).

8. A lease necessarily involves a landlord-tenant relationship; conversely, a "Reciprocal Agreement" is an agreement between the developer, owning a portion of the shopping center, and retailers and other occupiers of the center, each owning their separate stores or offices within the shopping center. Differences between leases and Reciprocal Agreements are discussed in Section IX *infra*. Other agreements to which a developer will often be a party include agreements to buy and sell land, to borrow and lend money, to construct the shopping center, to obtain services and supplies necessary to the operation of the shopping center, as well as various agreements with municipal entities concerning zoning, planning, and platting regulations.

9. This article focuses exclusively on agreements between adjoining landowners in shopping centers; excluded from consideration are similar types of agreements used in residential developments, mixed use projects, and other types of real estate developments. Although applicable to shopping centers of all sizes, this article primarily considers the large neighborhood shopping centers. Such a shopping center will often count among its occupants grocery stores, discount department stores and consumer-oriented home improvement stores, as well as numerous smaller retailers.

10. A significant component of the value of the shopping center is the income generated

as the demands of major retailers, often conspire to force the developer to sell one or more portions of the shopping center.[11] With ownership comes far greater control over the shopping center and, by virtue of the developer's larger initial economic commitment to the shopping center,[12] a stronger negotiating position for the right to voice more control over the manner in which the other portions of the shopping center will be used. In addition to the developer, possible owners of the shopping center include the major retailers occupying portions of the shopping center, retailers occupying free-standing buildings unattached to any other buildings within the shopping center (referred to in this Article as "out parcels"), and investors who may own separable portions of the shopping center.[13] The interests of conventional mortgage lenders must also be considered, as they represent potential future owners of portions of the shopping center in the event of a foreclosure.[14] Each of these parties possesses considerable negotiating strength in relation to the developer by virtue of the value they will create in the developer's land by their respective participation in the shopping center. The major retailer is often especially aware of its indispensable role in making the developer's portion of the shopping center more attractive to the smaller retailers who desire to locate near major retailers.

The Reciprocal Agreement is designed to protect the premises

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by the shopping center. *See* R. GARRETT, H. HOGAN, & R. STANTON, VALUATION OF SHOPPING CENTERS 19-25 (1976). Consequently, if a developer is able to lease the shopping center at rents sufficient to amortize the entire land and construction costs, he is able to retain his entire investment, which to the extent inflation persists, will become more valuable. On the other hand, if current market rental rates are insufficient to allow the developer to service the land and construction debt, he may be forced to reduce that debt by selling a portion of the shopping center thereby relieving himself of the obligation to finance construction of the buildings to be placed on that portion of the shopping center. *See* W. APPLEBAUM & S. KAYLIN, CASE STUDIES IN SHOPPING CENTER DEVELOPMENT AND OPERATION 13-64 (1974).

11. *See* W. APPLEBAUM & S. KAYLIN, CASE STUDIES IN SHOPPING CENTER DEVELOPMENT AND OPERATION 13-64 (1974).

12. This large initial economic commitment refers to the developer's purchase of the land.

13. *See* W. APPLEBAUM & S. KAYLIN, CASE STUDIES IN SHOPPING CENTER DEVELOPMENT AND OPERATION 13-64 (1974); Barton & Morrison, *Equity Participation Arrangements Between Institutional Lenders and Real Estate Developers*, 12 ST. MARY'S L.J. 929, 950 (1981).

14. *See generally* Gunning, *A Lender's View on Operating Agreements*, in INTERNATIONAL COUNCIL OF SHOPPING CENTERS REPORT NO. 26 (1970); Annot., 45 A.L.R.2d 1197, 1197-1205 (1956).

and assumptions of each participant concerning the manner in which the shopping center should be developed and operated. The general principles of shopping center development and operation to be applied are often not disputed by the various participants. Nevertheless, the application of those principles typically will be negotiated at length as each participant seeks to preserve the greatest flexibility possible in the use of its land while seeking to restrict and define, as much as possible, the manner in which the other portions of the shopping center will be used. The term "Reciprocal Agreement,"[15] as used in this article, refers to comprehensive agreements between adjoining landowners concerning those easements, restrictions, and covenants necessary for the operation of their respective properties as an integrated shopping center.[16] Reciprocal Agreements may vary in size from simple contracts to extraordinarily complex and lengthy documents. Whatever their scope, the goal remains the same: to allow several owners of land to use the aggregate land owned by them as a unified, functionally integrated shopping center, thereby enhancing the individual retailers' opportunities to generate business by collectively providing a more complete retailing menu for the consumer appetite.[17]

Although the common law prescribes many of the rights and obligations of parties concerning the easements, restrictions, and covenants which collectively form the Reciprocal Agreement, virtually all of those rules may be supplanted by agreements between the parties provided the intention of the parties to the Reciprocal Agreement is adequately expressed.[18] Interestingly, a Reciprocal

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15. These agreements are known in the industry by many appellations: "Reciprocal Easement Agreements"; "Easements, Covenants and Restrictions"; "Reciprocal Easement and Operations Agreements"; and "Development and Operating Agreements."

16. Although generally grouped together in one document for purposes of convenience, the various component agreements are not necessarily interdependent and on occasion it may be appropriate to separate the various types of agreements into distinct documents; for example, one may wish to separate the agreements to more conveniently accomodate differing termination proceedings. For an example of a Reciprocal Agreement which favors the retailer, see generally H. KENDRICK & J. KENDRICK, TEXAS TRANSACTION GUIDE—LEGAL FORMS § 87.20 (1981). A Reciprocal Agreement more favorable to the developer can be found in Terkel, *Selected Aspects of Shopping Center Development*, in STATE BAR OF TEX. REAL EST. CONTRACT INST. E-61 to 109 (1982).

17. *See* H. CARPENTER, JR., SHOPPING CENTER MANAGEMENT 6-7 (1978).

18. *See, e.g.*, Lo-Vaca Gathering Co. v. Missouri-K-T R.R., 476 S.W.2d 732, 741 (Tex. Civ. App.—Austin 1972, writ ref'd n.r.e.) (nothing in easement deed indicating intent of grantor to convey right to consumer pipeline); Kearny & Son v. Fancher, 401 S.W.2d 897,

Agreement is a hybrid between two legal disciplines, contracts and property. As between the original parties to the Reciprocal Agreement, the document creates primarily contractual relationships; but, with respect to subsequent owners, in the absence of subsequent agreements designed to preserve the existing contractual relationships, the doctrines of property law preserve most, if not all, of the agreements.[19] Inasmuch as a Reciprocal Agreement controls the subsequent operational quasi-partnership between the landowners, and their successors as well, the agreement should specify with particularity the respective obligations of the parties, leaving nothing to the vagaries of common law rules developed decades and centuries before the emergence of modern shopping centers.[20]

This article surveys easements, restrictions, covenants, and the legal principles applicable to their use as the principal components of Reciprocal Agreements. Further, this article reviews several issues which often arise in connection with Reciprocal Agreements and compares Reciprocal Agreements to leases as a vehicle for regulating use of portions of a shopping center.

II. EASEMENTS

One of the most essential elements of any Reciprocal Agreement, regardless of scope, is the grant of reciprocal easements between the various landowners. The inherent flexibility of easements

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903 (Tex. Civ. App.—Fort Worth 1966, writ ref'd n.r.e.) (where terms of easement specific, limits of use may not be enlarged); Kothe v. Harris County Flood Control Dist., 306 S.W.2d 390, 393-95 (Tex. Civ. App.—Houston 1957, no writ) (intention of parties ascertained from deed as whole).

19. The property law concerning easements, equitable servitudes, and real covenants running with the land all play a part in the drafting of Reciprocal Agreements. For a discussion of these concepts and how they relate to Reciprocal Agreements, see text accompanying notes 21-126 *infra*.

20. The rules of American property law devolve from the English common law which finds its roots in the Norman Conquest of England in the middle of the eleventh century. *See* 1 R. POWELL, POWELL ON REAL PROPERTY § 17 (1981). *See generally* Brake, *The Beginnings of Property Law*, 16 U. DET. L.J. 1 (1952); Hunard, *Did Edward I Reverse Henry II's Policy Upon Seisin*, 69 ENG. HIST. REV. 529 (1954). The laws of property adopted in Texas, although influenced by the civil law of Spain and Mexico, are fundamentally grounded in the English common law. *See* 1 R. POWELL, POWELL ON REAL PROPERTY § 82 (1981). *See generally* Hall, *Adoption of Common Law by Texas*, 28 TEX. L. REV. 801, 815 (1950) (Texas had adopted common law to extent applicable to local circumstances); Markham, *The Reception of the Common Law of England in Texas, and the Judicial Attitude Toward That Reception, 1840-1859*, 29 TEX. L. REV. 904, 904-12 (1951) (history of systems of law found in Texas before and at time of entry into union).

makes them an ideal vehicle for prescribing various legal rights and obligations;[21] therefore, easements are used for a variety of purposes in Reciprocal Agreements.

A. *Creation of Easements*

An easement is a liberty, privilege, or advantage without profit granted to a person, either personally or by virtue of his ownership of a specified parcel of land, to use another parcel of land for some limited purposes.[22] As to the owner of the servient estate,[23] an easement generally prohibits that owner from interfering with the rights of the owner of the dominant estate to use the servient estate for the purpose of the easement.[24] An easement may be distin-

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21. *See* Hamilton, *Recreational Estates in Land*, 41 TEX. B.J. 511, 515-16 (1978) (lot owners create express easement appurtenant for business and pleasure); Comment, *Dawning of Solar Law*, 29 BAYLOR L. REV. 1013, 1015-17 (1977) (easements allow maximum flexibility and can be expanded or limited according to need); Comment, *Avigation Easements and Clearance Easements*, 25 BAYLOR L. REV. 511, 517 (1973) (parties may create "avigation" and "clearance" easements in air-space above ground); Comment, *Alternatives to Destruction: New Developments in Historical Preservation*, 19 SANTA CLARA L. REV. 719, 734-45 (1979) (easement is useful device to preserve historic structures).

22. *See* Settegast v. Foley Bros. Dry Goods Co., 114 Tex. 452, 454, 270 S.W. 1014, 1016 (1925); Richter v. Hickman, 243 S.W.2d 466, 468 (Tex. Civ. App.—Galveston 1951, no writ); Cosby v. Armstrong, 205 S.W.2d 403, 407 (Tex. Civ. App.—Fort Worth 1947, writ ref'd n.r.e.); Callan v. Walters, 190 S.W. 829, 830 (Tex. Civ. App.—Austin 1916, no writ). *See generally* 3 R. POWELL, POWELL ON REAL PROPERTY § 405 (1981). Easements in which the benefits are personal to an individual without regard for his ownership of a specified parcel of land are "easements in gross," whereas easements in which the benefits are for a specified parcel of land regardless of the identity of the owner are "easements appurtenant." *See, e.g.*, Drye v. Eagle Rock Ranch, Inc., 364 S.W.2d 196, 207 (Tex. 1963) (for easement appurtenant, dominant and servient estates are required whereas easement in gross attaches to individual and does not depend on existence of dominant estate); Alley v. Carlton, 29 Tex. 74, 77 (1867) (easement in gross created as personal right; easement appurtenant is incident to estate); Stuart v. Larrabee, 14 S.W.2d 316, 319 (Tex. Civ. App.—Beaumont 1929, writ ref'd) (right of way can be in gross attaching to person or appurtenant which is incident to estate). Easements in gross seldom are created in Reciprocal Agreements as none of the parties are willing to grant control to a party not owning a portion of the shopping center. A strong constructional preference exists in the law to construe ambiguous easements as being easements appurtenant. *See* Ginther v. Bammel, 336 S.W.2d 759, 763 (Tex. Civ. App.—Waco 1960, no writ) (easement never presumed to be in gross).

23. The parcel owned by the grantor of the easement is called the servient estate and the parcel benefitted by the easement is called the dominant estate. Miller v. Babb, 263 S.W. 253, 254 (Tex. Comm'n. App. 1924, judgmt adopted); Pokorny v. Yudin, 188 S.W.2d 185, 193 (Tex. Civ. App.—El Paso 1945, no writ). *See generally* 3 R. POWELL, POWELL ON REAL PROPERTY § 405 (1981).

24. *See* Miller v. Babb, 263 S.W. 253, 254 (Tex. Comm'n. App. 1924, judgmt adopted); Pokorny v. Yudin, 188 S.W.2d 185, 193 (Tex. Civ. App.—El Paso 1945, no writ); *see also*

guished from a license in that the benefits of a license are personal in nature, freely assignable, and revocable at will,[25] whereas the benefit of easements attach to the dominant estate as interests in land;[26] when the ownership of the dominant estate is transferred, therefore, the right to enjoy the benefit of the easement is automatically transferred to the new owners unless the deed expressly provides otherwise.[27] Similarly, when ownership of the servient estate is conveyed, if the purchaser has actual or constructive notice of the existence of the easement, he is bound to honor the easement.[28] The rules controlling creation of easements are essentially the same as those governing deeds and conveyances of land.[29]

Bickler v. Bickler, 403 S.W.2d 354, 359 (Tex. 1966) (citing Drye v. Eagle Rock Ranch, Inc., 364 S.W.2d 196 (Tex. 1963)). *See generally* 3 R. POWELL, POWELL ON REAL PROPERTY § 405 (1981).

25. *See, e.g.*, Drye v. Eagle Rock Ranch, Inc., 364 S.W.2d 196, 203 (Tex. 1963) (licenses are revocable, transferable, and assignable); Davis v. Clark, 271 S.W. 190, 192 (Tex. Civ. App.—Fort Worth 1925, writ dism'd) (easement always interest in land whereas license carries no such interest); Chicago, R.I. & G. Ry. v. Johnson, 156 S.W. 253, 256 (Tex. Civ. App.—Amarillo 1913, writ ref'd) (easement is permanent interest in land while license is personal privilege to do some act without possessing any estate). *See generally* 3 R. POWELL, POWELL ON REAL PROPERTY §§ 427-428 (1981) (discussing revocable nature of license); Conard, *An Analysis of Licenses in Land*, 42 COLUM. L. REV. 809, 814 (1942) (mere license is revocable).

26. *See, e.g.*, Drye v. Eagle Rock Ranch, Inc., 364 S.W.2d 196, 203 (Tex. 1963) (easement is interest in land and rights acquired thereby attach to land); Davis v. Clark, 271 S.W. 190, 193-94 (Tex. Civ. App.—Fort Worth 1925, writ dism'd) (easement always implies interest in land); Chicago, R.I. & G. Ry. v. Johnson, 156 S.W. 253, 256 (Tex. Civ. App.—Amarillo 1913, writ ref'd) (easement is interest in land).

27. First Nat'l Bank of Amarillo v. Amarillo Nat'l Bank, 531 S.W.2d 905, 906 (Tex. Civ. App.—Amarillo 1975, no writ); Stuart v. Larrabee, 146 S.W.2d 316, 319 (Tex. Civ. App.—Beaumont 1929, writ ref'd). This is so even if the deed is silent as to the easement rights. *See* Storms v. Tuck, 579 S.W.2d 447, 451 (Tex. 1979); *see also* Cox v. Campbell, 143 S.W.2d 361, 364 (Tex. 1940); Rio Bravo Oil Co. v. Weed, 121 Tex. 427, 437-39, 50 S.W.2d 1080, 1085 (1932); Lo-Vaca Gathering Co. v. Missouri-K-T R.R., 476 S.W.2d 732, 741 (Tex. Civ. App.—Austin 1972, writ ref'd n.r.e.).

28. *See* Williams v. Thompson, 152 Tex. 270, 278, 256 S.W.2d 399, 403 (1953); Stark v. Morgan, 602 S.W.2d 298, 305 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.); Latimer v. Hess, 183 S.W.2d 996, 997-98 (Tex. Civ. App.—Texarkana 1945, writ ref'd). Recordation of the easement supplies constructive notice. *See* TEX. REV. CIV. STAT. ANN. art. 6646 (Vernon 1969). In order to assure that constructive notice is given to subsequent purchasers, the Reciprocal Agreement must be recorded in the county in which the shopping center is located. *See* TEX. REV. CIV. STAT. ANN. art. 6626 (Vernon Supp. 1982-1983) (may be recorded) & art. 6646 (Vernon 1969) (recording is notice).

29. *See, e.g.*, Lo-Vaca Gathering Co. v. Missouri-K-T R.R., 476 S.W.2d 732, 741 (Tex. Civ. App.—Austin 1972, writ ref'd n.r.e.); Kearney & Son v. Fancher, 401 S.W.2d 897, 903 (Tex. Civ. App.—Fort Worth 1966, writ ref'd n.r.e.); Knox v. Pioneer Natural Gas Co., 321 S.W.2d 596, 602 (Tex. Civ. App.—El Paso 1959, writ ref'd n.r.e.). The creation of easements

B. *Purposes for Which Easements are Used*

Each party to a Reciprocal Agreement will require access from his parcel to all of the public roads surrounding the shopping center. Thus, easements should be granted for such purpose, either encumbering specifically identified driveways and walkways or structured as a blanket easement over the driveways and walkways, as they may appear from time to time, over the land owned by the grantor.[30] There may be little difference between the two

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in a Reciprocal Agreement should be phrased as conveyances of interests in property, for that is precisely what they are. It follows that the statute of frauds is generally applicable to the creation of express easements. Anderson v. Tall Timbers Corp., 378 S.W.2d 16, 23 (Tex. 1964); Vrabel v. Donahoe Creek Watershed Auth., 545 S.W.2d 53, 54 (Tex. Civ. App.—Austin 1976, no writ); Lewis v. Midgett, 448 S.W.2d 548, 551 (Tex. Civ. App.—Tyler 1969, no writ); City of Port Arthur v. Badeaux, 425 S.W.2d 658, 659 (Tex. Civ. App.—Beaumont 1968, writ ref'd n.r.e.). Parol evidence is, however, admissible under certain circumstances to aid in the description of the servient estate and the location of the easement. *See* Elliot v. Elliot, 597 S.W.2d 795, 802 (Tex. Civ. App.—Corpus Christi 1980, no writ) (parol evidence admissible in unsuccessful attempt to establish servient estate and location of easement); Fry v. Harkey, 141 S.W.2d 662, 665 (Tex. Civ. App.—San Antonio 1940, writ dism'd judgmt cor.) (use of well, ditches, and conduits for five years determined location of easement). Moreover, where no location or width for an access easement is specified, the grantee is entitled to a convenient, reasonable, and accessible right of way designated by the owner of the servient estate. *See* Austin Lakes Estates Recreation Club, Inc. v. Gilliam, 493 S.W.2d 343, 348 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.); Crawford v. Tennessee Gas Transmission Co., 250 S.W.2d 237, 240 (Tex. Civ. App.—Beaumont 1952, writ ref'd). Also, if a roadway is in existence at the time of the grant, it will be construed as the location of the easement. Cozby v. Armstrong, 205 S.W.2d 403, 407 (Tex. Civ. App.—Fort Worth 1947, writ ref'd n.r.e.). Where no right of way exists when the easement is created, but the grantee of the easement subsequently selects the location of the easement and the grantor agrees or acquiesces therein, that selection will be enforced. *See, e.g.* Houston Pipeline Co. v. Dwyer, 374 S.W.2d 662, 666 (Tex. 1964) (construing gas pipeline easement); Elliot v. Elliot, 597 S.W.2d 795, 802 (Tex. Civ. App.—Corpus Christi 1980, no writ) (construing access easement); Preston Del Norte Villas Ass'n v. Pepper Mill Apartments, Ltd., 579 S.W.2d 267, 270 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.) (construing access easement); *see also* Matlock v. Humble Oil & Ref. Co., 284 S.W.2d 407, 411 (Tex. Civ. App.—Beaumont 1955, writ ref'd n.r.e.) (construing an access, pipeline, and incidental equipment lease). *See generally* Annot., 80 A.L.R.2d 743, 748-82 (1961) (analysis of general principle that location of easement, once established by agreement or by subsequent acts, may be relocated only by mutual consent).

30. The entire area encumbered by the blanket easement should be identified by a metes and bounds description. It is also often helpful, in generally depicting the location of easement areas and other areas to which reference is made in the Reciprocal Agreement, to attach a site plan to visually represent the physical relationship of such areas; however, care should be taken in Harris County to assure that the site plan will be accepted by the Harris County recorder's office for recordation. As of the date of this article, it is the procedure of that office not to accept plats for recordation without written approval from the Harris County Commissioners' Court. To the author's knowledge, no other county clerk's office

approaches; once an invitee enters the grantor's parcel on an identified driveway, he will be able, as a practical matter, to drive over and across the entire parcel at his will.[31] The parties may wish to provide shopping center customers with the ability to park anywhere within the shopping center without regard for which particular stores they are visiting; easements for parking of automobiles should be granted to accomplish this goal.[32] Access easements should be granted for the benefit of not only the landowners, but also their tenants, customers, and invitees for they are the persons for whom access is truly needed.[33] It is not unusual to provide in a Reciprocal Agreement that the use of the easements may be interrupted periodically for temporary periods[34] to allow construction, or to prevent the accrual of prescriptive rights in the public.[35] In

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takes a similar position. *Query:* whether such a position is legally sustainable in light of TEX. REV. CIV. STAT. ANN. art. 6595 (Vernon 1969) (requiring each recorder of documents to record, without delay each instrument authorized to be recorded). Article 6595 has been partially repealed to allow recording by microfilm. *See* TEX. REV. CIV. STAT. ANN. art. 1941a (Vernon Supp. 1982-1983).

31. In this regard, especially in conjunction with "out parcel" agreements, care should be taken to preserve the right to curb certain areas for traffic routing purposes.

32. Under some municipal zoning ordinances, exclusive parking easements may be granted for the purpose of complying with minimum parking space to building area ratios. For example, DALLAS, TEX., CODE § 51-4.301(a)(11) (1981), requires that the lot on which the parking spaces subject to the easement are located: (i) be dedicated to parking use by an instrument filed with a city official and consolidated with the building to which it relates under one certificate of occupancy, (ii) be located within the same zoning district as the main use or in a zoning district which permits a commercial parking lot or garage, and (iii) be located within 300 feet (including streets and alleys) of the property upon which the related building is located, measuring the shortest distance between the two lots. *Id.*

33. The author has been unable to find any case law in Texas identifying the parties entitled to the use and enjoyment of an easement in a shopping center context; however, as a general matter any person in actual possession of the benefitted parcel may enforce the easement. 3 R. POWELL, POWELL ON REAL PROPERTY § 420 (1981). In the absence of express terms relating to identification of permitted users of an easement, the general rules governing construction of conveyances control the issue. *See* Kothe v. Harris County Flood Control Dist., 306 S.W.2d 390, 393 (Tex. Civ. App.—Houston 1957, no writ); *see also* Lo-Vaca Gathering Co. v. Missouri-K-T R.R., 476 S.W.2d 732, 741 (Tex. Civ. App.—Austin 1972, writ ref'd n.r.e.). It is, therefore, important to specify with particularity who such permitted users will be—tenants, subtenants, licensees, concessionaires and their customers, employees, agents, contractors, and other invitees.

34. The interruption should not completely terminate access nor should it be allowed during peak selling periods, such as before Christmas.

35. These provisions are included only out of an abundance of caution, since a use which begins as permissive, as opposed to adverse, is presumed to remain as such until a distinct and positive assertion of rights hostile to the owner is brought to the owner's attention. *See* Miller v. Pellizzari, 342 S.W.2d 48, 51 (Tex. Civ. App.—Eastland 1960, no writ).

addition, each party may want to preserve flexibility in the layout of the portions of the shopping center on his property which are available for common use (the "common area") and will, therefore, reserve the right to make nonmaterial changes in the location of driveways and parking areas located on its parcel. It may be necessary to bring utility lines coming from the main municipal utility trunk lines across a neighboring landowner's property. These easements may be permitted in specific, identified areas; more typically, since the parties may not yet have developed a utility plan, the easements may be permitted over and across any portion of the neighbor's parcel (other than under buildings),[36] subject to the reasonable approval of the granting party. Special consideration by the parties to the Reciprocal Agreement should be given to maintenance of the utility lines placed in the easement[37] as well as the desirability of restricting the placement of electrical and telephone lines to an underground location.

Each party to the Reciprocal Agreement may wish to erect pylon sign structures on the parcel of another party, if it is perceived that, by doing so, their signs will obtain better visibility. An easement for any signs to be placed on a parcel owned by another party will be necessary in such event.[38]

The parties may wish to grant to one another temporary construction, maintenance, and repair easements. These are essentially ingress and egress easements necessary to construct the parties' respective buildings, parking areas, signs, utilities, and the other components of the shopping center and to effectuate their respective maintenance and repair obligations.[39]

If the shopping center is to be developed as an integrated in-line

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36. Utility easements should never be permitted to exist underneath buildings because when the utility lines placed in the easement require servicing, such repair work could either prove to be impractical or very damaging to the building over the easement area.

37. This issue is discussed in Section II, C *infra*.

38. Incidental electrical easements for illumination or maintenance of signs are also important factors to be considered in connection with sign easements.

39. If one party is obligated to maintain an easement area, either expressly or impliedly by virtue of his enjoyment of the easement, even if the easement does not expressly permit ingress and egress for the purpose of maintenance and repair, such additional rights will be deemed to have been impliedly granted. *See* Coleman v. Forister, 514 S.W.2d 899, 903 (Tex. 1974); Wall v. Lower Colo. River Auth., 536 S.W.2d 688, 691 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.); San Jacinto Sand Co. v. Southwestern Bell Tel. Co., 426 S.W.2d 338, 344-45 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.); Bland Lake Fishing & Hunting Club v. Fisher, 311 S.W.2d 710, 716 (Tex. Civ. App.—Beaumont 1958, no writ). *See*

center,[40] it may be necessary for the parties to grant to one another the right to have canopies and other aerial encroachments created by protrusions extending from their buildings over each others' parcels. Likewise, easements for foundation footings and other similar subsurface encroachments of the others' parcels may be required. The parties may even wish to require that the other parties situate their buildings along the common boundary lines, thereby helping to create an appearance of an integrated strip shopping center. If party walls or shared foundation footings are used, easements for lateral support are appropriate.[41] In particular, consideration should be given to the initial installation cost of the shared facilities, approval of plans and specifications for the initial installation, and ongoing maintenance obligations.

If the grade levels of the shopping center are such that water run-off will occur from one parcel to another, the party whose tract drains on the parcel of the other party should obtain an easement for drainage purposes. The party upon whose parcel the drainage occurs should consult with an engineer or other qualified specialist to develop restrictions limiting the volume and velocity of permitted drainage to a specified number of cubic feet per second assuming a 100-year flood design (or whatever alternative assumptions may be appropriate) to prevent excessive drainage onto its parcel.

C. *Miscellaneous*

As a general proposition, no rights pass by implication as incidental to the grant of an express easement except those which are reasonably necessary to the fair enjoyment of the easement.[42] If the easement granted is prescribed as an exclusive easement, only

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generally Annot., 3 A.L.R.3d 1256, 1258-91 (1965) (discussion of reasonableness of use of easements granted in general terms).

40. An integrated in-line shopping center may be defined as one which gives the appearance of one contiguous strip of buildings.

41. For a discussion of easements for lateral support for walls and shared foundation footings, see generally 5 R. POWELL, POWELL ON REAL PROPERTY §§ 687-691 (1981).

42. *See* Coleman v. Forister, 514 S.W.2d 899, 903 (Tex. 1974); Wall v. Lower Colo. River Auth., 536 S.W.2d 688, 691 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.); San Jacinto Sand Co. v. Southwestern Bell Tel. Co., 426 S.W.2d 338, 344-45 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.); Bland Lake Fishing & Hunting Club v. Fisher, 311 S.W.2d 710, 716 (Tex. Civ. App.—Beaumont 1958, no writ). *See generally* Annot., 3 A.L.R.3d 1256, 1258-91 (1965) (discussing scope of reasonable use of private right-of-way).

the grantor and the other intended beneficiaries of the easement will be entitled to use the easement area; otherwise, the easement area may be used by any other person, including the owner of the servient estate.[43] The owner of the dominant estate may reasonably use the easement rights, but in so doing must reasonably limit interference with the property rights of the owner of the servient estate.[44] To avoid ambiguity, the purpose for which each easement is granted should be clearly spelled out in the Reciprocal Agreement. If an expressly granted easement gives the grantee a right in excess of the right actually used, the grantee retains the right to use the easement to the full extent granted notwithstanding his exercise of a lesser privilege.[45] Although the owner of the dominant estate may not use an easement for the benefit of premises other than the dominant estate owned by him,[46] the benefits of ease-

43. MGJ Corp. v. City of Houston, 544 S.W.2d 171, 174 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.); *cf.* Capitol Rod & Gun Club v. Lower Colo. River Auth., 622 S.W.2d 887, 893-94 (Tex. Civ. App.—Austin 1981, writ ref'd n.r.e.) (right of exclusive use not implied from express easement unless necessary to enjoyment of easement); Pajestka v. Viscardi, 562 S.W.2d 13, 16 (Tex. Civ. App.—Austin) (easement does not confer exclusivity unless necessary to enjoyment of easement), *rev'd on other grounds*, 576 S.W.2d 16 (Tex. 1978).

44. *See* Pokorny v. Yudin, 188 S.W.2d 185, 189 (Tex. Civ. App.—El Paso 1945, no writ). Thus, by example, the owner of the dominant estate of an access easement has the right to grade, pave, and make such other alterations as may be reasonably necessary to use the entire right-of-way, and to park cars within the easement if, by doing so, he does not interfere with its use by the owner of the servient estate. *See* Williams v. Thompson, 152 Tex. 270, 278, 256 S.W.2d 399, 405 (1953) (owner of exclusive access easement has right to construct road if done without negligently destroying lateral support of servient estate); Baer v. Dallas Theatre Center, 330 S.W.2d 214, 218-19 (Tex. Civ. App.—Waco 1959, writ ref'd n.r.e.) (owner of dominant and owner of servient estates each have right to park on easement if done in manner consistent with other's rights). *But see* Colborn v. Bailey, 408 S.W.2d 327, 329 (Tex. Civ. App.—Austin 1966, no writ) (construing phrase "drive way purposes" as not including right to park within easement area). *See generally* Annot., 3 A.L.R.3d 1256, 1258-91 (1965) (discussion of reasonableness of use of easements granted in general terms).

45. Lower Colo. River Auth. v. Ashby, 530 S.W.2d 628, 632-33 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.); Knox v. Pioneer Natural Gas Co., 321 S.W.2d 596, 600 (Tex. Civ. App.—El Paso 1959, writ ref'd n.r.e.); *see also* Central Power & Light Co. v. Holloway, 431 S.W.2d 436, 439-40 (Tex. Civ. App.—Corpus Christi 1968, no writ). *But see* Houston Pipe Line Co. v. Dwyer, 374 S.W.2d 662, 666 (Tex. 1964) (in pipeline easement granted in general terms, once pipe of one size has been installed, grantee has no right to replace with larger pipes); Pioneer Natural Gas Co. v. Russell, 453 S.W.2d 882, 884-86 (Tex. Civ. App.—Amarillo 1970, writ ref'd n.r.e.) (original grant of pipeline easement would support laying two lines but by installing only one line, grantee lost right to second line).

46. Bickler v. Bickler, 403 S.W.2d 354, 359 (Tex. 1966).

ments appurtenant are generally apportionable upon a subdivision of the original dominant estate.[47] This rule is qualified, however, in that the subdivision and the greater use resulting therefrom may not materially increase the burden on the servient estate.[48] The question of land other than the identified dominant estate benefitting from and using an easement becomes an issue of practical significance where one party (typically, the developer) desires to add additional land to the shopping center.

The owner of the servient estate is not, unless by express agreement, under any obligation to maintain or repair the surface of the easement area.[49] To the contrary, the owner of the dominant estate has the duty, unless otherwise agreed, to maintain the easement so as not to interfere with the servient owner's right to make reasonable use of his land.[50] The maintenance obligations of the parties should be clearly spelled out in the Reciprocal Agreement; often, each party will maintain the common areas on its parcel. With easements that benefit only one party, however, such as a sign or utility easement, the benefitted owner typically will maintain the structures or utility lines erected pursuant to the easement. On the other hand, with utility easements that serve more than one parcel, the parties may agree to share the total cost of maintaining such utility lines.

Unless otherwise provided, an easement terminates when the purpose and reason for which it was granted becomes impossible to execute,[51] or when the right to use the easement has been aban-

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47. Storms v. Tuck, 579 S.W.2d 447, 451 (Tex. 1979). *See generally* 3 R. POWELL, POWELL ON REAL PROPERTY § 418 (1981); RESTATEMENT OF PROPERTY § 488 (1944).

48. *See* Stout v. Christian, 593 S.W.2d 146, 150 (Tex. Civ. App.—Austin 1980, no writ) (cannot alter extent of easement). *See generally* 3 R. POWELL, POWELL ON REAL PROPERTY § 418 (1981); RESTATEMENT OF PROPERTY § 488 comment d (1944).

49. Parker v. Bains, 194 S.W.2d 569, 577 (Tex. Civ. App.—Galveston 1946, writ ref'd n.r.e.); West v. Giesen, 242 S.W. 312, 321 (Tex. Civ. App.—Austin 1922, no writ).

50. Cozby v. Armstrong, 205 S.W.2d 403, 408 (Tex. Civ. App.—Fort Worth 1947, writ ref'd n.r.e.). *See generally* 3 R. POWELL, POWELL ON REAL PROPERTY § 418 (1981) (important to set forth in agreement who has duties of maintaining easement, to avoid presumption that duties are on dominant owner); Annot., 20 A.L.R.3d 1026, 1026-27 (1968) (analysis of cases in which servient owner had right to recover cost of repair from dominant owner).

51. *See, e.g.*, Adams v. Rowles, 149 Tex. 52, 58-59, 228 S.W.2d 849, 852 (1950) (easement did not terminate because contemplated easement use of irrigation still possible); Kearney & Son v. Fancher, 401 S.W.2d 897, 906 (Tex. Civ. App.—Fort Worth 1966, writ ref'd n.r.e.) (railroad easement terminated when physically impossible for trains to get to easement); Shaw v. Williams, 332 S.W.2d 797, 800 (Tex. Civ. App.—Eastland 1960, writ

doned;[52] mere abuse or misuse of an easement will not terminate it unless the misuse renders impossible further use of the easement.[53] In order to avoid such a common law termination, the parties may specify the duration of the easements and provide that an abandonment occurs only if an easement is not used for a specified continuous period, and then only after notice has been delivered to the beneficiary of the easement that an abandonment is asserted and an opportunity to rebut the presumption of abandonment is afforded.

Easements may also be terminated by operation of the doctrine of merger of estates.[54] Since separate dominant and servient estates are essential to easements appurtenant, if both become owned by one person, the estates are merged and the easement extinguished.[55] An easement may not be granted by a landowner over one portion of his property for the benefit of another portion of that property owned by him, for that person necessarily owns the rights granted in the easement.[56]

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ref'd n.r.e.) (easement for reservoir use terminated when use for particular purposes in easement grant ceased). *See generally* Annot., 16 A.L.R.2d 609, 610-16 (1951) (discussing forfeiture of easement for misuse).

52. The material issue with respect to abandonment is the intention to abandon the easement. *See* Dallas County v. Miller, 140 Tex. 242, 247-48, 166 S.W.2d 922, 924 (1942); McCraw v. Dallas, 420 S.W.2d 793, 797 (Tex. Civ. App.—Dallas 1967, writ ref'd n.r.e.); Plunkett v. Young, 375 S.W.2d 776, 779 (Tex. Civ. App.—Eastland 1964, writ ref'd n.r.e.).

53. *See, e.g.*, Adams v. Rowles, 149 Tex. 52, 58-59, 228 S.W.2d 849, 852 (1950) (non-use does not constitute abandonment); Perry v. City of Gainesville, 267 S.W.2d 270, 273 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.) (significant increase in amount taken from easement in water well did not terminate it); Hoak v. Ferguson, 255 S.W.2d 258, 261 (Tex. Civ. App.—Fort Worth 1953, writ ref'd n.r.e.) (remedy for misuse of easement is injunction, not forfeiture); *cf.* Crimmins v. Gould, 308 P.2d 786, 791-93 (Cal. Dist. Ct. App. 1957) (holding that easement extinguished by misuse where injunctive relief not available). *See generally* 3 R. POWELL, POWELL ON REAL PROPERTY § 423 (1981) (termination of easement not an available remedy for misuse).

54. *See, e.g.*, Howell v. Estes, 71 Tex. 690, 693, 12 S.W. 62, 62 (1888) (if both dominant and servient estate owned by one person, easement extinguished); Tirado v. Tirado, 357 S.W.2d 468, 474 (Tex. Civ. App.—Texarkana 1962, writ dism'd) (acquisition of surrounding property extinguished access easements); Parker v. Bains, 194 S.W.2d 569, 574 (Tex. Civ. App.—Galveston 1946, writ ref'd n.r.e.) (access easement terminates by merger when dominant and servient estates owned by one person).

55. *See* Tirado v. Tirado, 357 S.W.2d 468, 474 (Tex. Civ. App.—Texarkana 1962, writ dism'd) (acquisition of surrounding property extinguished access easement); Parker v. Bains, 194 S.W.2d 569, 574 (Tex. Civ. App.—Galveston 1946, writ ref'd n.r.e.) (access easement terminates by merger when dominant and servient estates owned by one person).

56. *See* Fleming v. Adams, 392 S.W.2d 491, 495 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.) (easement could not be created because no separate owners of dominant and

The use of one portion of a parcel for the benefit of another portion of the same parcel when both portions are owned by the same person is referred to as a quasi-easement and may form the basis for a claim of an implied easement.[57] These rules take on practical significance in phased developments where different lenders have, as security for their loans, liens over distinct portions of a shopping center owned entirely by one person. Each lender is concerned about access over the balance of the shopping center in the event of a foreclosure of its lien, since it will then own only a portion of the shopping center. One often attempted way to afford the lenders some protection is to grant an easement over one phase of the shopping center for the benefit of another phase; however, until the creation of distinct ownership of the two portions, the purported creation of an easement is not effective.[58] Upon a transfer which creates the requisite severance of estates, the easement becomes enforceable.[59] Prior to such a transfer, though, the grantor may be able to terminate the easement since he owns the dominant and servient estates and any subsequent bona fide purchasers for value of the entire parcel will not be bound by the quasi-easement since it is not, at the time of the conveyance, a valid and subsisting easement.[60] The grantor should, perhaps, agree not to modify or

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servient estates); Brown v. Woods, 300 S.W.2d 364, 366 (Tex. Civ. App.—Waco 1957, no writ) (different owners of dominant and servient estate essential to valid easement); *see also* Garrity v. Snyder, 186 N.E.2d 464, 467 (Mass. 1962) (no easement between parcels of land commonly owned until title severed); Rusk v. Grande, 52 N.W.2d 548, 551 (Mich. 1952) (an owner has no easement in own property). *See generally* G. GALE, EASEMENTS 15-16 (11th ed. 1932); 3 R. POWELL, POWELL ON REAL PROPERTY § 405 (1981) (analysis of requirements for creation of easement).

57. *See* Drye v. Eagle Rock Ranch, Inc., 364 S.W.2d 196, 207-09 (Tex. 1963) (no implied easement unless prior, necessary use by common owner); Ulbrict v. Friedsan, 159 Tex. 607, 618-20, 325 S.W.2d 669, 676-77 (1959) (right of access to lake implied easement because of such use by prior common owner, necessary to enjoyment of land sold); Mitchell v. Castellaw, 151 Tex. 56, 64-66, 246 S.W.2d 163, 167 (1952) (implied easement may benefit land sold and burden land retained by seller, or vice versa). *See generally* 3 H. TIFFANY, REAL PROPERTY § 781 (3d ed. 1970).

58. *See, e.g.*, Howell v. Estes, 71 Tex. 690, 693, 12 S.W. 62, 62 (1888) (easement ineffective unless two separate owners); Tirado v. Tirado, 357 S.W.2d 468, 474 (Tex. Civ. App.—Texarkana 1962, writ dism'd) (no easement where surrounding land acquired by easement owner); Parker v. Bains, 194 S.W.2d 569, 574 (Tex. Civ. App.—Galveston 1946, writ ref'd n.r.e.) (no easement where dominant and servient tracts commonly owned).

59. *See* Preston Del Norte Villas Ass'n v. Pepper Mill Apartments, Ltd., 579 S.W.2d 267, 270 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.).

60. *See* Fleming v. Adams, 392 S.W.2d 491, 495 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.).

terminate the prescribed quasi-easement and agree that a breach of such covenant would constitute a default under the deed of trust. Although the quasi-easement itself is not enforceable while the dominant and servient estates are owned by one person as a property interest,[61] the agreement not to modify or terminate the easement would be enforceable under contract theories. To give the lender further assurance, the lender may be named as a third party beneficiary of the easement, thereby bolstering the enforceability of the easement under contract theories.

III. Promises Concerning the Use of Land

The law concerning the unfortunately complicated area of property covenants has largely developed in relation to residential subdivisions;[62] there is, therefore, little or no direct authority dealing with the covenants portion of a Reciprocal Agreement.

A. *Creation of Covenants*

A property covenant differs from a mere contractual agreement or a personal covenant to refrain from certain actions, in that a property covenant, properly created, will bind successor owners of all or any portion of the land so restricted, or of any interest therein,[63] and may be enforced by successor owners of all or any portion of the land intended to be benefitted thereby.[64] To the contrary, if the burdens of a contract or a personal covenant are

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61. *See id.* at 495.

62. *See, e.g.*, Davis v. Huey, 620 S.W.2d 561, 562 (Tex. 1981) (residential subdivision covenant dispute); Curlee v. Walker, 112 Tex. 40, 42, 244 S.W. 497, 497 (1922) (covenant of subdivision in dispute); Collum v. Neuhoff, 507 S.W.2d 920, 921 (Tex. Civ. App.—Dallas 1974, no writ) (dispute over residential covenant).

63. *See, e.g.*, Brite v. Gray, 377 S.W.2d 223, 225 (Tex. Civ. App.—Beaumont 1964, no writ); Nicholls v. Barnett, 374 S.W.2d 770, 772 (Tex. Civ. App.—Austin 1964, writ ref'd n.r.e.); Morton v. Sayles, 304 S.W.2d 759, 763 (Tex. Civ. App.—Eastland 1957, writ ref'd n.r.e.); *cf.* Billington v. Riffe, 492 S.W.2d 343, 346 (Tex. Civ. App.—Amarillo 1973, no writ) (covenant did not run with land because such intention not expressed in instrument purporting to create restriction). *See generally* Williams, *Restrictions on the Use of Land: Equitable Servitudes*, 28 Tex. L. Rev. 194, 194-200 (1949); Williams, *Restrictions on the Use of Land: Covenants Running With the Land at Law*, 27 Tex. L. Rev. 419, 420-23 (1949).

64. *See, e.g.*, Ortiz v. Jeter, 479 S.W.2d 752, 759 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.); Eakens v. Garrison, 278 S.W.2d 510, 514 (Tex. Civ. App.—Amarillo 1955, writ ref'd n.r.e.); Faubion v. Busch, 240 S.W.2d 361, 365 (Tex. Civ. App.—Amarillo 1951, writ ref'd n.r.e.).

not assumed by the new owner, that new owner will not be obligated to comply with the promises;[65] similarly, the benefits of a contract or personal covenant must be specifically assigned to a third party to enable him to enforce the terms of the contract or covenant.[66] To properly create an enforceable property covenant, the covenant must derive from a written instrument,[67] be intended by the parties to bind successor owners of the burdened land[68] and to benefit successor owners of the benefitted land,[69] be noticed to the party against whom enforcement is sought,[70] and respect the use of the land.[71] A covenant that meets these tests is an equitable

65. Blasser v. Cass, 158 Tex. 560, 562-63, 314 S.W.2d 807, 809 (1958); *see* Young v. Harbin Citrus Groves, 130 S.W.2d 896, 899 (Tex. Civ. App.—San Antonio 1939, writ ref'd n.r.e.); Montgomery v. Creager, 22 S.W.2d 463, 466 (Tex. Civ. App.—Eastland 1929, no writ).

66. Baker v. Henderson, 137 Tex. 266, 275-78, 153 S.W.2d 465, 470 (1941); *see* Interstate Circuit, Inc. v. Pine Forest Country Club, 409 S.W.2d 922, 927 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e.); Lakewood Heights v. McCuistion, 226 S.W. 1109, 1111 (Tex. Civ. App.—Dallas 1920, no writ).

67. *See, e.g.*, Miller v. Babb, 263 S.W. 253, 254 (Tex. Comm'n. App. 1924, judgm't adopted) (building restriction may not be created by oral agreement); Brazell v. Tschirhart, 438 S.W.2d 603, 606-07 (Tex. Civ. App.—San Antonio 1969, no writ) (easement unenforceable unless comply with statute of frauds); Pierson v. Canfield, 272 S.W. 231, 233-34 (Tex. Civ. App.—Dallas 1925, no writ) (parol evidence may not be used to establish easements). *See generally* 5 R. POWELL, POWELL ON REAL PROPERTY § 671 (1981). An exception to this rule applicable to residential subdivisions exists in the doctrine of implied negative reciprocal easements which may be impliedly created by virtue of a common building scheme. *See* Burns v. Wood, 492 S.W.2d 940, 943 (Tex. 1973) (in dicta); Saccomanno v. Farb, 492 S.W.2d 709, 713 (Tex. Civ. App.—Waco 1973, writ ref'd n.r.e.).

68. Collum v. Neuhoff, 507 S.W.2d 920, 923 (Tex. Civ. App.—Dallas 1974, no writ); Beckham v. Ward County Irrigation Dist. No. 1, 278 S.W. 316, 318 (Tex. Civ. App.—El Paso 1925, writ ref'd); Hopper v. Lottman, 171 S.W. 270, 271-72 (Tex. Civ. App.—El Paso 1914, no writ).

69. Baker v. Henderson, 137 Tex. 266, 275-78, 153 S.W.2d 465, 470 (1941); *see* Interstate Circuit, Inc. v. Pine Forest Country Club, 409 S.W.2d 922, 927 (Tex. Civ. App.—Houston 1966, writ ref'd n.r.e.); Lakewood Heights v. McCuistion, 226 S.W. 1109, 1111 (Tex. Civ. App.—Dallas 1920, no writ).

70. *See, e.g.*, Davis v. Huey, 620 S.W.2d 561, 566 (Tex. 1981) (purchaser for value without notice of restriction not bound thereby); Cullum v. Neuhoff, 507 S.W.2d 920, 922-23 (Tex. Civ. App.—Dallas 1974, no writ) (notice is key to enforcement of equitable servitude against successors in interest); Smith v. Bowers, 463 S.W.2d 222, 224 (Tex. Civ. App.—Waco 1970, no writ) (purchaser bound by all valid restrictions in chain of title).

71. *See, e.g.*, Clear Lake City Water Auth. v. Clear Lake Utils. Co., 549 S.W.2d 385, 388 (Tex. 1977) (grant of exclusive service franchise to water utility did not "respect the use of the land" and therefore not equitable servitude transferred automatically with land); Blasser v. Cass, 158 Tex. 560, 562-63, 314 S.W.2d 807, 809 (1958) (obligation to pay brokerage fees contained in lease was purely for benefit of one having no interest in land and did not respect use of land); International Ass'n of Machinists Lodge No. 6 v. Falstaff Brewing

servitude, as opposed to a real covenant running with the land.[72] Every covenant which is negative in nature,[73] properly drafted,[74] and recorded in the appropriate public records,[75] and not violative

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Corp., 328 S.W.2d 778, 782 (Tex. Civ. App.—Houston 1959, no writ) (contract relating to wages and working conditions between employer and union did not relate to use of land); *cf.* Prochemco, Inc. v. Clajon Gas Co., 555 S.W.2d 189, 191 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.) (contract to buy natural gas for irrigation purposes clearly related to land so as to create covenant running with land). Texas courts have not clearly distingusihed between the benefits and the burdens of covenants in connection with the requirements that a covenant respect the use of land. If the burden of the covenant is such that it respects the use of land, then the owner of the benefitted parcel may enforce the covenant against subsequent owners of the burdened parcel. *See* International Ass'n of Machinists Lodge No. 6 v. Falstaff Brewing Corp., 328 S.W.2d 778, 782 (Tex. Civ. App.—Houston 1959, no writ). If the burden of the covenant is personal (i.e., it does not run with the land), most courts would permit the benefit to run with the land if it respects the use of land. 5 R. POWELL, POWELL ON REAL PROPERTY § 673[2] (1981). If the benefit of the covenant fails to respect the use of the land, however, the burden of the covenant will not run with the land. *See* Clear Lake City Water Auth. v. Clear Lake Utils. Co., 549 S.W.2d 385, 388 (Tex. 1977); Blasser v. Cass, 158 Tex. 560, 563, 314 S.W.2d 807, 809 (1958); *see also* Interstate Circuit, Inc. v. Pine Forest Country Club, 409 S.W.2d 922, 927 (Tex. Civ. App.—Houston 1956, writ ref'd n.r.e.); 5 R. POWELL, POWELL ON REAL PROPERTY § 673[2] (1981).

72. For a covenant to run with the land at law, two additional requirements are generally imposed: (i) there must be privity of estate between the covenanting parties and (ii) the covenant must relate to something *in esse* (i.e., something in existence) or the covenant must be made expressly applicable to assignees of the original covenantor. *See, e.g.*, Gulf & S.F. Ry. v. Smith, 72 Tex. 122, 123-24, 9 S.W. 865, 866 (1888) (covenant to build fence did not concern thing in being, so did not run with land); Billington v. Riffe, 492 S.W.2d 343, 346 (Tex. Civ. App.—Amarillo 1973, no writ) (covenant does not run with the land unless concerns thing in being and there was privity of estate between covenants); Panhandle S.F. Ry. v. Wiggins, 161 S.W.2d 501, 504-05 (Tex. Civ. App.—Amarillo 1942, writ ref'd) (real covenant requires privity of estate between covenantors and if does not concern thing in being it must name assignees); *see also* Comment, *Covenants Running with the Land: The "In Esse" Requirement*, 28 BAYLOR L. REV. 109, 114-19 (1976) (questioning manner in which Texas courts have applied *in esse* requirement). *See generally* 5 R. POWELL, POWELL ON REAL PROPERTY § 673[2][b], [c] (1981); Williams, *Restrictions on the Use of Land: Covenants Running With the Land at Law*, 27 TEX. L. REV. 419, 423-29, 440-46 (1949). The *in esse* test is no longer required for covenants running with the land in a majority of states. 5 R. POWELL, POWELL ON REAL PROPERTY § 673[2] (1981).

73. A covenant "negative in nature" is a covenant which imposes a restriction on the burdened landowner.

74. The restriction must clearly manifest the intention of the parties that both the benefits and the burdens of the restriction run with the land. *See, e.g.*, Clear Lake City Water Auth. v. Clear Lake Utils. Co., 549 S.W.2d 385, 388 (Tex. 1977) (equitable servitude only applies to promises respecting use of land); Blasser v. Cass, 158 Tex. 560, 562-63, 314 S.W.2d 807, 809 (1958) (promise must benefit use of land and burden on land must bear reasonable relation to benefit received); International Ass'n of Machinists Lodge No. 6 v. Falstaff Brewing Corp., 328 S.W.2d 778, 782 (Tex. Civ. App.—Houston 1959, no writ) (restrictions must concern land or its use).

75. Generally, recordation in the the county clerk's office of the county in which the

of public policy[76] will be binding upon subsequent owners of the restricted property, since restrictions upon the use of land necessarily respect the use of the land.[77]

Covenants must be drafted as precisely as possible, for if a court is unable to issue an injunction which is specific in nature, it may refuse to afford the complaining party equitable relief.[78] In the event of an ambiguity, the public policy preference for the free and unrestricted use of land will likely render the covenant unenforceable.[79] Although not applicable with respect to covenants which are mutual in nature,[80] covenants are generally construed in favor of the grantee, consistent with the policy preference for unrestricted

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burdened property is located satisfies the requirement for constructive notice. *See, e.g.*, Bein v. McPhaul, 357 S.W.2d 420, 426 (Tex. Civ. App.—Amarillo 1962, no writ) (purchasers bound by restrictions in chain of title); Clements v. Taylor, 184 S.W.2d 485, 488 (Tex. Civ. App.—Eastland 1944, no writ) (easement is interest in land authorized by statute to be recorded and as such is constructive notice); TEX. REV. CIV. STAT. ANN. art. 6646 (Vernon 1969) (any recordable instrument recorded in proper county is notice); *cf.* Davis v. Huey, 620 S.W.2d 561, 567-68 (Tex. 1981) (restrictions, even though recorded in proper chain of title, not drafted in manner so as to place purchaser on notice that lot was subject to placement limitations sought to be enforced through provision of review and approval of architectural plans); Fleming v. Adams, 392 S.W.2d 491, 495 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.) (restrictions imposed in deed of trust released when deed of trust lien released; consequently, recordation of deed of trust did not impart constructive notice to purchaser subsequent to release of deed of trust lien).

76. *See* Shelley v. Kraemer, 334 U.S. 1, 8-23 (1948) (agreements to exclude persons from occupancy or use of real estate on basis of race or color violative of equal protection clause of fourteenth amendment); Dalmo Sales Co. v. Tysons Corner Regional Shopping Center, 429 F.2d 206, 208-09 (D.C. Cir. 1970) (where intent to monopolize provokes veto of prospective tenant, such veto power under lease is void as violative of anti-trust laws). *See generally* Halper, *The Antitrust Laws Visit Shopping Center "Use Restrictions,"* 4 REAL EST. L.J. 3, 7-34 (1975).

77. Even so, some restrictions may not run with the land for other reasons, such as when they violate public policy. *See* Shelley v. Kraemer, 334 U.S. 1, 8-23 (1948) (covenants to exclude from occupancy on basis of race); Dalmo Sales Co. v. Tysons Corner Regional Shopping Center, 429 F.2d 206, 208-09 (D.C. Cir. 1970) (veto power in covenant cannot be used to monopolize).

78. Johnson v. Linton, 491 S.W.2d 189, 197 (Tex. Civ. App.—Dallas 1973, no writ). *See generally* 11 BAYLOR L. REV. 320, 320-23 (1959) (discussion of injunctive enforcement of real property restrictions).

79. *See, e.g.*, MacDonald v. Painter, 441 S.W.2d 179, 183 (Tex. 1969) (restriction "for residence purposes" did not limit use to single family residences); Southampton Civic Club v. Couch, 322 S.W.2d 516, 518 (Tex. 1958) (restriction to single family use not violated by renting out room in private home); Baker v. Henderson, 137 Tex. 266, 276, 153 S.W.2d 465, 470 (1941) (restriction ambiguous on location of house interpreted in least restrictive manner).

80. Wald v. West MacGregor Protective Assoc., 332 S.W.2d 338, 343 (Tex. Civ. App.—Houston 1960, writ ref'd n.r.e.).

use of land.[81]

B. *Differences Between Equitable Servitudes and Real Covenants*

The concept of equitable servitudes arose in the English courts of equity, whereas covenants running with the land were legal rights enforceable only in the courts of law.[82] Although generally without analysis and without regard for the lack of substantive distinction, some Texas courts continue to recognize distinctions in form between equitable servitudes and real covenants running with the land[83] even though distinctions between courts at law and eq-

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81. *See, e.g.*, MacDonald v. Painter, 441 S.W.2d 179, 183 (Tex. 1969) (restriction "for resident purposes" construed in favor of grantee, allowing multiple dwellings); Baker v. Henderson, 137 Tex. 266, 276, 153 S.W.2d 465, 470 (1941) (restriction on location interpreted in manner least restrictive to grantee); Settegast v. Foley Bros. Dry Goods Co., 114 Tex. 452, 454, 270 S.W. 1014, 1016 (1925) (all doubts concerning covenant must be resolved in favor of grantee and his unrestricted use); *cf.* Knopf v. Standard Fixtures Co., 581 S.W.2d 504, 506 (Tex. Civ. App.—Dallas 1979, no writ) (rule applies only where intent ascertainable from terms of covenant).

82. *See* Tulk v. Moxhay, 41 Eng. Rep. 1143, 1144 (Ch. 1848) (equity will enforce restrictive covenant that does not run with land against purchaser with notice). *See generally* 5 R. POWELL, POWELL ON REAL PROPERTY § 670[2] (1981) (tracing development of restrictive covenants and equitable servitudes); Reno, *The Enforcement of Equitable Servitudes on Land*, 28 VA. L. REV. 951, 970-79 (1942) (discussing history and theories for enforcing equitable servitudes).

83. *See* Collum v. Neuhoff, 507 S.W.2d 920, 922 (Tex. Civ. App.—Dallas 1974, no writ). In *Collum*, the court quotes Williams, *Restrictions on the Use of Land: Covenants Running With the Land at Law*, 28 TEX. L. REV. 419, 420 (1949), as stating that there are "two somewhat different theories, requirements of creation, and means of enforcement and termination." Collum v. Neuhoff, 507 S.W.2d 920, 922 (Tex. Civ. App.—Dallas 1974, no writ); Williams, *Restrictions on the Use of Land: Covenants Running With the Land at Law*, 28 TEX. L. REV. 419, 420 (1949) (with no authority for such statement). As an example of the lack of analysis employed by the courts with respect to this issue, the court in *Collum* cites the following as cases which have recognized the distinction between equitable servitudes and real covenants: Blasser v. Cass, 158 Tex. 560, 562-63, 314 S.W.2d 807, 809 (1958) (applying touch and concern requirements to a covenant to pay lease commissions and finding such covenant a personal one which does not run with land); Ortiz v. Jeter, 479 S.W.2d 752, 759 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.) (equating equitable servitudes to easements, without discussion of real covenants); Painter v. MacDonald, 427 S.W.2d 127, 135 (Tex. Civ. App.—Austin 1968) (discussing concept of inquiry notice as it relates to restrictive covenants without mention of equitable servitudes), *rev'd*, 441 S.W.2d 179 (Tex. 1969); Nicholls v. Barnett, 374 S.W.2d 770, 772 (Tex. Civ. App.—Austin 1964, writ ref'd n.r.e.) (enforcing restrictions as covenants running with land without discussion of equitable servitudes). *See* Collum v. Neuhoff, 507 S.W.2d 920, 922 (Tex. Civ. App.—Dallas 1974, no writ); *cf.* Alexander Schroder Lumber Co. v. Corona, 288 S.W.2d 829, 834 (Tex. Civ. App.—Galveston 1956, writ ref'd n.r.e.) (suggesting in passing that covenants running with

uity have greatly diminished in American jurisprudence.[84] Some jurisdictions have questioned whether affirmative covenants (as opposed to restrictions on the use of land) may be enforced against remote grantees based on equitable theories;[85] nevertheless, the vast majority of jurisdictions no longer recognize such distinctions.[86] The policy issue to be addressed is which covenants should be enforced against subsequent purchasers of the burdened land; that is, not whether a covenant is a legal right or equitable right, but whether it is an enforceable right. This determination should ultimately be based on the perceived utility and value to society of that type of covenant.[87] Having decided in any given case that a promise is enforceable, a court may then apply the law of remedies to fashion appropriate sanctions.

The focus should be whether one believes that privately created land-use controls and obligations are useful planning tools which

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land at law may not be subject to equitable defenses).

84. *See* 5 R. POWELL, POWELL ON REAL PROPERTY § 670[2] (1981) (merger of law and equity has not resulted in unified theory of covenants); Newman & Losey, *Covenants Running With the Land, and Equitable Servitudes; Two Concepts, or One?* 21 HASTINGS L.J. 1319, 1339-45 (1970) (noting similarity between real covenants and equitable servitudes and advocating harmonization of law).

85. *See, e.g.*, Merchant's Union Trust Co. v. New Philadelphia Graphite Co., 83 A. 520, 528 (Del. Ch. 1912) (rule of *Tulk v. Moxhay* limited to restrictive use); Kettle River R. Co. v. Eastern Ry., 43 N.W. 469, 475 (Minn. 1889) (legal trend is to limit affirmative covenants); Miller v. Clary, 103 N.E. 1114, 1116-17 (N.Y. 1913) (affirmative covenants not enforced unless run with land); *see also* Raintree Corp. v. Rowe, 248 S.E.2d 904, 908 (N.C. Ct. App. 1978) (affirmative covenant to pay money generally not enforceable because does not touch and concern land).

86. *See, e.g.*, Anthony v. Brea Glenbrook Club, 130 Cal. Rptr. 32, 35 (Ct. App. 1976) (tendancy is to disregard question of running with land and enforce at equity if assignee took with notice); Peterson v. Beekmere, Inc., 283 A.2d 911, 918 (N.J. Super. Ct. Ch. Div. 1971) (affirmative covenant enforceable in equity as equitable servitude); Nicholson v. 300 Broadway Realty Corp., 164 N.E.2d 832, 835, 196 N.Y.S.2d 945, 949 (1959) (affirmative covenants enforced under liberalized "touch and concern" test). *Peterson* contains a lucid analysis of these issues. *See* Peterson v. Beekmere, Inc., 283 A.2d 911, 913-18 (N.J. Super. Ct. Ch. Div. 1971) (noted in Note, *Real Property—Covenants—Equitable Relief Made Applicable to Affirmative Covenants*, 26 RUTGERS L. REV. 929 (1973)). *See generally* Berger, *A Policy Analysis of Promises Respecting the Use of Land*, 55 MINN. L. REV. 167, 185-87 (1970) (discussing historical reasons for distinction between affirmative and negative easements); Walsh, *Covenants Running With the Land*, 21 N.Y.U.L.Q. 28, 46-47 (1946) (affirmative as well as negative easements valid); Note, *Enforcement of Affirmative Agreements Respecting the Use of Land*, 14 VA. L. REV. 419, 422-30 (1928) (noting difference in law of affirmative restrictions in various jurisdictions).

87. *See* Note, *Covenants Running With the Land: Their Desirability and Utility*, 32 NOTRE DAME LAW. 502, 508-11, 517-18 (1957).

promote the orderly and efficient development of land.[88] Distinctions between equitable servitudes and real covenants or between affirmative and negative covenants merely muddy the water and needlessly add extraordinary confusion to this area of the law.[89] Even historically, other than the nature of the remedy available[90] and the requirements for their creation, little practical difference existed between equitable servitudes and real covenants, thereby creating a senseless trap for the unwary, and upon occasion, even the sophisticated.[91] Many jurisdictions have abolished the distinc-

88. A significant judicial trend favors the use of restrictive covenants as tools to develop urban land which will preserve the value of surrounding land. *See, e.g.*, Davis v. Huey, 620 S.W.2d 561, 565 (Tex. 1981) (recognizing that restrictive covenants can preserve value and attractiveness of subdivision property); Wald v. West MacGregor Protective Ass'n, 332 S.W.2d 338, 343 (Tex. Civ. App.—Houston 1960, writ ref'd n.r.e.) (restrictions to protect residential nature are exceptions to general policy disfavoring restrictions); Finley v. Carr, 273 S.W.2d 439, 443 (Tex. Civ. App.—Waco 1954, writ ref'd) (restrictions imposed as part of general plan to make development attractive as residence upheld). *But cf.* MacDonald v. Painter, 441 S.W.2d 179, 182-84 (Tex. 1969) (residence restrictions prevented business or commercial purposes); Southampton Civic Club v. Couch, 159 Tex. 464, 465-66, 468, 322 S.W.2d 516, 517-18 (1958) (restrictions in furtherance of "high class and exclusive" residential subdivision construed in favor of policy against restrictions); Baker v. Henderson, 137 Tex. 266, 276-77, 153 S.W.2d 465, 470 (1941) (restrictions construed strictly to further business policy of free use). *See generally* Consigny & Zile, *Use of Restrictive Covenants in a Rapidly Urbanizing Area*, 1958 WISC. L. REV. 612, 612-13; Note, *Equitable Servitudes As a Land Use Planning Tool*, 6 MEM. ST. U.L. REV. 101, 111-13 (1975); Note, *Running of Restrictive Covenants in Kentucky*, 45 KY. L.J. 637, 646-47 (1957); Comment, *Equitable Servitudes: A Rule of Property in Need of a Rule of Reason*, 10 PAC. L.J. 905, 919 (1979).

89. *See* 5 R. POWELL, POWELL ON REAL PROPERTY § 670[2] (1981) (confusion due to distinction between real covenants and equitable servitudes); R. RABIN, FUNDAMENTALS OF REAL PROPERTY 489 (1974) (calling law of covenants an "unspeakable quagmire"); Berger, *A Policy Analysis of Promises Respecting the Use of Land*, 55 MINN. L. REV. 167, 169 (1970) (referring to distinctions between real covenants and equitable servitudes "as unnecessarily complicated, cumbersome and unpredictable"). The necessary elements for covenants to run with the land at law and at equity have developed differently in various jurisdictions. *See* 5 R. POWELL, POWELL ON REAL PROPERTY § 670[2] (1981) (requirements judicially created at different times in different jurisdictions resulted in discrepancies); Browder, *Running Covenants and Public Policy*, 77 MICH. L. REV. 12, 19-44 (1978) (tracing American transformation of English common law); Newman & Losey, *Covenants Running With the Land, and Equitable Servitudes; Two Concepts, or One?*, 21 HASTINGS L.J. 1319, 1326 (1970) (analysis of division of covenants into law and equity).

90. The appropriate remedies available depended upon the legal or equitable characterization of the right sought to be enforced. *See* 5 R. POWELL, POWELL ON REAL PROPERTY § 676 (1981).

91. *See id.* § 670[2] (law of covenants confused because of real and equitable distinctions); Newman & Losey, *Covenants Running With the Land, and Equitable Servitudes; Two Concepts, or One?*, 21 HASTINGS L.J. 1319, 1335-39 (1970) (noting great disparity in relief available in various jurisdictions); Stoebuck, *Running Covenants: An Analytical Pri-*

tions between the remedies available for breaches of equitable servitudes or real covenants running with the land[92] and no longer prohibit enforcement against subsequent purchasers of parcels burdened with affirmative covenants which satisfy only the tests for equitable servitudes.[93] Sound policy formulation requires that if distinctions are to be made in requirements for creation of distinct legal rights, different benefits and obligations should arise from those different sets of rules; otherwise, there is no reason to draw the distinction. If the rules of law and the remedies are to be the same concerning covenants and equitable servitudes, then no matter what the name of the right, no reason exists to perpetuate

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mer, 52 WASH. L. REV. 861, 887, 906-07, 920 (1977) (legal and equitable remedies available for breach of real or equitable restriction); Note, *Covenants Running With the Land: Viable Doctrine or Common Law Relic?*, 7 HOFSTRA L. REV. 139, 175-83 (1978) (advocating complete replacement of real covenants by equitable servitudes).

92. *See, e.g.*, Nonnenmann v. Lucky Stores, Inc., 368 N.E.2d 200, 204 (Ill. App. Ct. 1977), Suess v. Vogelgesang, 281 N.E.2d 536, 544 (Ind. Ct. App. 1972); Peters v. Davis, 231 A.2d 748, 751-53 (Pa. 1967). *See generally* Note, *The Running of Restrictive Covenants in Kentucky*, 45 KY. L. REV. 637, 649 (1956-1957) (concluding no difference whatsoever persists between two theories); Comment, *Restrictive Covenants in Missouri: Creation, Enforceability in Equity, and Termination*, 23 Mo. L. REV. 214, 221 (1958) (damages available for breach of real covenant even if not enforceable in equity). Some courts faced with real covenants defective for one reason or another (but satisfying the requirements for equitable servitudes) have enforced equitable liens in lieu of applying legal remedies. The end result is essentially the same. The defendant must either comply with the covenant or lose his right to occupy the burdened land. *See* Bessemer v. Gerston, 381 So. 2d 1344, 1347-48 (Fla. 1980) (lien for affirmative duty to pay for recreation provided in subdivision enforceable by lien); Everett Factories & Terminal Corp. v. Oldetyme Distillers Corp., 15 N.E.2d 829, 834 (Mass. 1938) (covenant to pay money may not be enforced as covenant with land but will be enforced as equitable servitude); William W. Bond, Jr. & Assoc. v. Lake O' The Hills Maintenance Ass'n, 381 So. 2d 1043, 1044, 1046 (Miss. 1980) (lien is proper remedy to enforce a covenant of assessment by homeowner's association); Orchard Homes Ditch Co. v. Snavely, 159 P.2d 521, 523-25 (Mont. 1945) (although covenant to pay for water did not run with land, it is enforceable by equitable lien); Child v. C.H. Winans Co., 183 A. 300, 302-03 (N.J. 1936) (no remedy at law for covenant to pay taxes on neighboring land; but enforceable as equitable lien). *See generally* Berger, *A Policy Analysis of Promises Respecting the Use of Land*, 55 MINN. L. REV. 167, 186-87 (1970) (if legal remedies fail, court may impose equitable lien); Note, *Affirmative Duties Running With the Land*, 35 N.Y.U. L. REV. 1344, 1355 (1960).

93. *See, e.g.*, Anthony v. Brea Glenbrook Club., 130 Cal. Rptr. 32, 34-35 (Ct. App. 1976) (covenant upheld as running with land as equitable servitude); Peterson v. Beekmere, Inc., 283 A.2d 911, 918 (N.J. Super. Ct. Ch. Div. 1971) (notice of affirmative covenant binds subsequent grantees); Nicholson v. 300 Broadway Realty Corp., 164 N.E.2d 832, 834-36, 196 N.Y.S.2d 945, 949-50 (1959) (affirmative covenant can run with land if parties intend such, continuous conveyances connect original covenantor and present party, and covenant touches land).

meaningless distinctions.

It is uniformly acknowledged that the intentions of the parties to property covenants will be effectuated if not violative of public policy;[94] thus, if the parties clearly express their desire that a breach of a restriction or covenant will subject the breaching party to legal and equitable remedies, such desire should be enforced. It is of little moment to a plaintiff seeking to enforce an affirmative covenant requiring the payment of money whether he obtains a judgment for damages, a mandatory injunction, or judgment for specific performance of a covenant to pay money; he simply wants to recover the dollars necessary to satisfy the covenant. Although no Texas court has explicitly discussed these various considerations, the author believes that if the terms of an equitable servitude expressly manifest the desire of the original covenantor and convenantee that legal and equitable remedies be available for a breach of the promise, Texas courts will follow the majority trend and enforce such desires.[95] An early Texas case dealing with a party wall agreement considered the troubling distinctions between real covenants and equitable servitudes and concluded that both the benefits and burdens of an affirmative covenant to contribute to the maintenance of a party wall should run with the land without regard for the theories propounded to sustain such result if the subsequent owner of the burdened parcel had notice of the agreement.[96] Yet, this case has been virtually ignored by subsequent de-

94. Racial covenants and anti-competitive covenants are generally considered violative of public policy. *See* Shelley v. Kraemer, 334 U.S. 1, 8-23 (1948) (racial covenants violate equal protection clause of fourteenth amendment); Dalmo Sales Co. v. Tysons Corner Regional Shopping Center, 429 F.2d 206, 208-09 (D.C. Cir. 1970) (use of veto power in lease to monopolize violates anti-trust laws).

95. This conclusion is consistent with modern jurisprudential trends in other areas. *See* TEX. BUS. & COM. CODE ANN. § 1.106 (Vernon 1968) (Uniform Commercial Code remedies to be liberally administered). Restrictive covenants in employment agreements have been enforced by both legal and equitable relief. *See* Leck v. Employers Casualty Co., 635 S.W.2d 450, 453 (Tex. Civ. App.—Fort Worth 1982, no writ) (injunction); Hogg v. Professional Pathology Assoc., 598 S.W.2d 328, 330-31 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ dism'd) (damages). Easements, of course, are enforceable through legal or equitable remedies, as appropriate, and equitable servitudes which are restrictive in nature have often been analogized to easements. Miller v. Babb, 263 S.W. 253, 254 (Tex. Comm'n App. 1924, judgmt adopted); Ortiz v. Jeter, 479 S.W.2d 752, 759 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e); *see also* C. CLARK, COVENANTS AND INTERESTS RUNNING WITH THE LAND, 174-76 (1929); Comment, *Equitable Servitudes: A Rule of Property in Need of a Rule of Reason*, 10 PAC. L.J. 905, 907 (1979).

96. McCormick v. Stoneheart, 195 S.W. 883, 885-87 (Tex. Civ. App.—Amarillo 1917, no

cisions and limited in subsequent citation to the area of party wall agreements.[97] Nevertheless, the distinctions between real covenants and equitable servitudes should be ignored as an unfortunate hangover resulting from the affection for formalism in property law historically displayed by courts.[98] Since the requirements for creation of an equitable servitude are far simpler, the balance of the section will focus upon equitable servitudes.

C. *Respecting the Use of Land*

To determine whether an equitable servitude has been properly created so as to run with the land, one must determine whether the covenant respects the use of the land.[99] The requirement that an equitable servitude must "respect the use of the land" appears to be a restatement of the requirement at common law that a covenant running with the land at law touch and concern the land.[100] This somewhat anachronistic rule has been sharply criticized;[101] nevertheless, the rule remains a requirement in Texas.[102] To re-

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writ); *cf.* Whittenburg v. J.C. Penney Co., 139 Tex. 15, 20, 161 S.W.2d 447, 449 (1942) (successor in title not bound by restrictive covenant of which he had no notice).

97. *See* Montgomery v. Creager, 22 S.W.2d 463, 466 (Tex. Civ. App.—1929, no writ) (covenant to purchase gasoline not enforceable as covenant running with land); Lakewood Heights Co. v. McCuistion, 226 S.W. 1109, 1110 (Tex. Civ. App.—1920, writ ref'd) (covenant not running with land not enforceable).

98. As Mr. Justice Holmes observed:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 459 (1897).

99. *See, e.g.*, Clear Lake City Water Auth. v. Clear Lake Utils. Co., 549 S.W.2d 385, 388 (Tex. 1977) (grant of exclusive service franchise did not "respect the use of the land," therefore, did not run with land); Blasser v. Cass, 158 Tex. 560, 562, 314 S.W.2d 807, 809 (1958) (duty to pay brokerage fees did not respect use of land); International Ass'n of Machinists Lodge No. 6 v. Falstaff Brewing Corp., 328 S.W.2d 778, 782 (Tex. Civ. App.—Houston 1959, no writ) (contract concerning wages and working conditions did not relate to use of land).

100. *See* 5 R. POWELL, POWELL ON REAL PROPERTY § 673[2] (1981); Williams, *Restrictions on the Use of Land: Equitable Servitudes*, 28 TEX. L. REV. 194, 197-99 (1950).

101. *See* C. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" 101-11, 139-43 (2d ed. 1947); Note, *Covenants Running With the Land: Viable Doctrine or Common Law Relic?*, 7 HOFSTRA L. REV. 139, 142-44 (1978).

102. *See, e.g.*, Clear Lake City Water Auth. v. Clear Lake Utils. Co., 549 S.W.2d 385, 388 (Tex. 1977); Blasser v. Cass, 158 Tex. 560, 562-63, 314 S.W.2d 807, 809 (1958); International Ass'n of Machinists Lodge No. 6 v. Falstaff Brewing Corp., 328 S.W.2d 778, 782 (Tex. Civ. App.—Houston 1959, no writ).

spect the use of the land, the covenant must be so related to the land as to enhance its value and confer a benefit upon it.[103]

Promises to make payments for general maintenance for a unified development,[104] for general ad valorem taxes and special assessments,[105] and for special repairs or improvement projects[106] have been held to touch and concern the land, whereas other types of payments deemed to be more personal in nature have been held not to touch and concern the land.[107] Similarly, the benefit of a covenant that no charge would be made for sewer services has been held to run with the land.[108] Promises to build or maintain structures generally have been held to touch and concern the land,[109] as

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103. *See* Prochemco, Inc. v. Clajon Gas Co., 555 S.W.2d 189, 191 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.). Although stated with reference to the benefitted land, the burden of a covenant must respect the use of the land as well. *See* International Ass'n of Machinists Lodge No. 6 v. Falstaff Brewing Corp., 328 S.W.2d 778, 782 (Tex. Civ. App.—Houston 1959, no writ).

104. Kell v. Bella Vista Village Property Owners Ass'n, 528 S.W.2d 651, 653 (Ark. 1975) (recurring charges for maintenance); Anthony v. Brea Glenbrook Club, 130 Cal. Rptr. 32, 34 (Ct. App. 1976) (country club dues for maintenance and other uses); Bessemer v. Gersten, 381 So. 2d 1344, 1347 n.3 (Fla. 1980) (payments for maintenance of recreational facilities); Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793, 795 (N.Y. 1938) (maintenance of subdivision facilities).

105. Greenspan v. Rehberg, 224 N.W.2d 67, 73 (Mich. Ct. App. 1974) (maintenance of culvert and right-of-way); Harbor Hills Landowners v. Manelski, 339 N.Y.S.2d 793, 796 (Dist. Ct. 1970) (pro rata share of road maintenance expenses); Leh v. Burke, 331 A.2d 755, 760-61 (Pa. Super. Ct. 1974) (road improvements, water line installation).

106. Child v. C.H. Winan Co., 183 A. 300, 302-03 (N.J. 1936) (covenant to pay taxes and assessments); Hughes v. City of Cincinnati, 195 N.E.2d 552, 554 (Ohio 1964) (assessments for road improvements).

107. Pelser v. Gingold, 8 N.W.2d 36, 40 (Minn. 1943) (mortgage and debt for past improvements); Beaver v. Ledbetter, 152 S.E.2d 165, 170 (N.C. 1967) (assumption of mortgage); Blasser v. Cass, 158 Tex. 560, 562, 314 S.W.2d 807, 809 (1958) (leasing brokerage fees); Talley v. Howsley, 170 S.W.2d 240, 243 (Tex. Civ. App.—Eastland) (personal debt of grantor), *aff'd*, 142 Tex. 81, 176 S.W.2d 158 (1943); Lundeberg v. Dastrup, 497 P.2d 648, 650 (Utah 1972) (attorney's fees).

108. Water Works & Sanitary Sewer Bd. v. Campbell, 103 So. 2d 165, 167 (Ala. 1958).

109. *See, e.g.*, Mobil Oil Corp. v. Brennan, 385 F.2d 951, 952 (5th Cir. 1967) (construing Texas law with respect to covenant to install pipeline); Parks v. Hines, 68 S.W.2d 364, 367 (Tex. Civ. App.—El Paso 1934) (covenant to construct improvements), *aff'd*, 128 Tex. 289, 96 S.W.2d 970 (1936); Beckham v. Ward County Irrigation Dist. No. 1, 278 S.W. 316, 317-18 (Tex. Civ. App.—El Paso 1925, writ ref'd) (covenant to construct and maintain irrigation flume); *see also* Choisser v. Eyman, 529 P.2d 741, 743 (Ariz. Ct. App. 1974) (agreement to extend water services); Atlantic Coast Line R. v. Georgia A. S. & C. Ry., 87 S.E.2d 92, 97 (Ga. Ct. App. 1953) (install signal lights); Mississippi Highway Comm'n v. Cohn, 217 So. 2d 528, 532 (Miss. 1969) (build cattle underpass); Chesapeake & O. Ry. v. Willis, 105 S.E.2d 833, 837 (Va. 1958) (build fence).

have agreements concerning repurchase rights or dedication of land[110] and promises not to sue for damages.[111] Promises by a grantor to hold harmless his grantee from various debts against the land conveyed and to allow a grantee to remove improvements from the property conveyed have also been held to touch and concern the land.[112] On the other hand, promises concerning the exclusive use of products or services have been held not to touch and concern the land.[113]

Under these general principles, most of the affirmative covenants typically found in Reciprocal Agreements[114] will be deemed to respect the use of land. The covenants to build a store and operate a retail business, or to maintain the improvements and to restore them in the event of a casualty should respect the use of land.[115] On the other hand, there seems to be no authority giving guidance as to whether a covenant to insure will be deemed to respect the use of land.[116] The courts are split with respect to collateral payments for such purposes as ad valorem taxes, special assessments, and satisfaction of obligations to contractors so as to avoid

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110. *See, e.g.*, Frumkes v. Boyer, 101 So. 2d 387, 389-90 (Fla. 1958) (dedication); Huff v. Duncan, 502 P.2d 584, 585-86 (Or. 1972) (land restricted to residential use); Prochemco, Inc. v. Clajon Gas Co., 555 S.W.2d 189, 191 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.) (purchase of gas under contract).

111. *See* Phillips v. Altman, 412 P.2d 199, 201 (Okla. 1966) (covenant not to sue ran with land).

112. *See* Guardian Loan & Trustee Co. v. Schunke, 36 S.W.2d 585, 587 (Tex. Civ. App.—San Antonio 1931, writ ref'd); Cunningham v. Buel, 287 S.W. 683, 687 (Tex. Civ. App.—San Antonio 1926, no writ). *But cf.* Pelser v. Gingold, 8 N.W.2d 36, 40 (Minn. 1943) (assumption of mortgage does not respect use of land); Beaver v. Ledbetter, 152 S.E.2d 165, 170 (N.C. 1967) (mortgage assumption does not respect use of land); Talley v. Howsley, 170 S.W.2d 240, 243 (Tex. Civ. App.—Eastland 1943) (mortgage assumption does not respect use of land), *aff'd*, 142 Tex. 81, 176 S.W.2d 158 (1944).

113. *See* Clear Lake City Water Auth. v. Clear Lake Utils. Co., 549 S.W.2d 385, 388 (Tex. 1977) (grant of exclusive service franchise did not respect use of land); Martindale v. Gulf Oil Corp., 345 S.W.2d 810, 813 (Tex. Civ. App.—Beaumont 1961, writ ref'd n.r.e.) (contract to purchase petroleum products was only personal contract). *But see* Prochemco, Inc. v. Clajon Gas Co., 555 S.W.2d 189, 191 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.) (contract to furnish gas ran with land).

114. Affirmative covenants are discussed in detail in Section V *infra*.

115. *See, e.g.*, Mobil Oil Corp. v. Brennan, 385 F.2d 951, 952 (5th Cir. 1967) (covenant to install pipeline); Parks v. Hines, 68 S.W.2d 364, 367 (Tex. Civ. App.—El Paso 1934) (covenant to construct improvements), *aff'd*, 128 Tex. 289, 96 S.W.2d 970 (1936); Beckham v. Wade County Irrigation Dist. No. 1, 278 S.W. 316, 317-18 (Tex. Civ. App.—El Paso 1925, no writ) (covenant to construct and maintain irrigation flume).

116. Since the benefitted land is more valuable with an undamaged building on the adjoining parcel, it would seem that covenants to insure would respect the use of land.

mechanics' and materialmens' liens;[117] however, the better reasoned point of view is that such covenants enhance the value of the benefitted property by giving assurance of stability of the ownership structure of the shopping center.

Whether or not an equitable servitude runs with the land may be a less important consideration in the context of shopping center Reciprocal Agreements because the transferor of a parcel burdened by restrictions and covenants typically will obtain from his transferee an express assumption of all such matters. Often, the Reciprocal Agreement will provide that the transferor will be released as to obligations arising after the transfer if he obtains the assumption described above. In effect, this procedure is a novation,[118] and the covenants may be enforced by the other party to the Reciprocal Agreement under contract theories, without regard to whether the covenants run with the land.[119] An incentive for the transferor to obtain such an assumption is created by providing that the transferor will not be released from liability under the Reciprocal Agreement for matters arising after his transfer unless he obtains an express assumption from his transferee of the obligations contained therein which relate to the transferred parcel. Human nature being what it is, however, assumptions are not always obtained and it would be unwise to place reliance on this procedure.

D. *Enforcement*

A purchaser of land benefitted by a covenant may enforce that covenant, even though at the time he purchased the land he was ignorant of its existence, if an intention that he have such right is

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117. *See* Greenspan v. Rehberg, 224 N.W.2d 67, 72 (Mich. 1974) (maintenance of culvert and right-of-way respect use of land); Child v. C.H. Winans Co., 183 A. 300, 302 (N.J. 1936) (covenant to pay taxes and assessments did not respect use of land); Harbor Hills Landowners v. Manelski, 318 N.Y.S.2d 793, 795-96 (1970) (pro rata share of road maintenance expenses did respect use of land); Leh v. Burke, 331 A.2d 755, 760 (Pa. Super. Ct. 1974) (covenant for road improvements and water line installation did run with land).

118. A novation is the substitution and creation of new relationships and obligations between the parties in place of the prior contract. *See* Siegler v. Telco Leasing, Inc., 593 S.W.2d 850, 851 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ).

119. *See id.* (novation creates new contract between parties); Crossland v. Nelson Auction Serv., Inc., 424 S.W.2d 318, 320 (Tex. Civ. App.—Amarillo 1967, writ ref'd n.r.e.) (one element of novation is new agreement between parties); McKinney v. Flato Bros., Inc., 397 S.W.2d 525, 529 (Tex. Civ. App.—Corpus Christi 1965, no writ) (novation is new enforceable contract).

clearly set forth in the covenant.[120] An action for injunctive relief may be pursued without a showing of damages or of irreparable injury if the plaintiff can establish that there has been a substantial breach of the covenant;[121] however, injunctions are not automatic. If the plaintiff has an adequate remedy in damages, or if enforcement by injunction would be oppressive, harsh, and unreasonable, the plaintiff will be denied an injunction, notwithstanding a clear breach of the covenant.[122] In addition, mandatory injunctions which require affirmative action,[123] such as removing an offending structure, are not generally favored by courts.[124]

By statute, an incorporated city which does not have a zoning ordinance may sue to enjoin or abate a violation of a restriction contained or incorporated by reference in a duly recorded plan or plat or other instrument affecting a subdivision within its boundaries, provided that the city has passed an ordinance requiring the uniform application and enforcement of the statute to all property

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120. *See* Ortiz v. Jeter, 479 S.W.2d 752, 759 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.); Scaling v. Sutton, 167 S.W.2d 275, 279 (Tex. Civ. App.—Fort Worth 1942, writ ref'd). *See generally* Annot., 51 A.L.R.3d 556, 600-02 (1973). One remedy for breach of a covenant is an injunction. *See* Davis v. Hinton, 374 S.W.2d 723, 727-28 (Tex. Civ. App.—Tyler 1964, writ ref'd n.r.e.); Briggs v. Hendricks, 197 S.W.2d 511, 512 (Tex. Civ. App.—Galveston 1946, no writ).

121. *See, e.g.*, Stewart v. Welsh, 142 Tex. 314, 316-18, 178 S.W.2d 506, 507-09 (1944) (building of fence constituted breach of covenant not to build "structure" on land); Davis v. Huey, 608 S.W.2d 944, 956 (Tex. Civ. App.—Austin 1980) (where substantial violation of restrictive covenant has occurred, no need to show monetary damages to seek injunctive relief), *rev'd on other grounds*, 620 S.W.2d 561 (Tex. 1981); Calvary Baptist Church v. Adams, 570 S.W.2d 469, 474 (Tex. Civ. App.—Tyler 1978, no writ) (irreparable injury need not be shown to seek injunction for substantial breach of covenant). *See generally* Hecke, *Injunctions to Remove or Remodel Structures Erected in Violation of Building Restrictions*, 32 TEX. L. REV. 521, 524-37 (1954) (factors in grant or denial of injunctions for breaches of building restrictions).

122. *See* Davis v. Carothers, 335 S.W.2d 631, 640 (Tex. Civ. App.—Waco 1960, no writ); Blythe v. City of Graham, 327 S.W.2d 800, 800 (Tex. Civ. App.—Fort Worth 1959, writ ref'd n.r.e.); Massengill v. Jones, 308 S.W.2d 535, 542 (Tex. Civ. App.—Texarkana 1957, writ ref'd n.r.e.); *cf.* Arrington v. Cleveland, 242 S.W.2d 400, 402 (Tex. Civ. App.—Fort Worth 1951, no writ) (holding defendant's evidence failed to show value of restricted property would be destroyed by enforcement of covenant).

123. The converse of mandatory injunctions requiring affirmative action are injunctions which merely prohibit offensive behavior.

124. *See* Cabla v. Shockley, 402 S.W.2d 289, 291 (Tex. Civ. App.—Amarillo 1966, writ ref'd n.r.e.) (mandatory injunction to remove dike denied). *But see* Zelios v. City of Dallas, 568 S.W.2d 173, 175 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.) (mandatory injunction proper remedy when defendant knowingly commits wrongful act).

and citizens.[125] Also, by statute, a city having a population of more than 900,000 may join with an interested property owner in a suit to enjoin construction activity by one who does not have a commercial building permit issued in compliance with the statute, if the structure is in violation of a restriction contained in a deed or other instrument.[126]

IV. Purposes For Which Restrictions Are Used

Restrictions (negative covenants which run with the land or equitable servitudes) declared against one parcel of land for the benefit of another parcel of land play an important role in creating the appearance of a functionally integrated shopping center. Generally, the restrictions are mutual[127] and may be designed to accomplish numerous goals.

To assure that sight lines to the streets surrounding the shopping center are preserved, a permitted building area for each parcel may be identified on a site plan attached to the Reciprocal Agreement[128] outside of which no buildings will be permitted. Limiting the building area also assures that no unreasonable burdens

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125. Tex. Rev. Civ. Stat. Ann. art. 974a-1 (Vernon Supp. 1982-1983). *See generally* Comment, *The Municipal Enforcement of Deed Restrictions: An Alternative to Zoning*, 9 Hous. L. Rev. 816, 818-24 (1972) (discussion of article 974a-1); Comment, *Municipal Enforcement of Private Restrictive Covenants: An Innovation in Land-Use Control*, 44 Tex. L. Rev. 741, 744-67 (1966) (discussion of municipal enforcement of private covenants).

126. Tex. Rev. Civ. Stat. Ann. art. 974a-2 (Vernon Supp. 1982-1983). *See generally* City of Houston v. Walker, 615 S.W.2d 831, 834-35 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ) (holding article 974a-2 constitutional).

127. When representing a developer, counsel should recall that a retailer will probably know what it plans to build on its parcel, its use, its sign requirements, and so on. On the other hand, the developer's plans for his speculative space within the shopping center (that portion of the shopping center which is not necessarily leased prior to development) are necessarily much more uncertain, inasmuch as the developer at that juncture generally has not leased that space yet. Although the developer may have determined the size of his building area, he probably does not yet know his tenant-mix and the needs of those tenants, his architectural plans, his specific sign needs, and other design aspects of his project. It is, therefore, difficult for the developer to know with certainty at this point in the development process which, if any, restrictions are acceptable. Each restriction to which the developer agrees will limit to some degree possible alternatives he might otherwise have enjoyed. With this in mind, the developer should not readily accept restrictions or approval provisions merely because they are reciprocal.

128. Care should be exercised in recording site plans in Harris County; as of the date of this article, that recorder's office will not accept plats for recordation without written approval from the Harris County Commissioners' Court.

will be placed on the parking area of one owner by customers visiting businesses located on the parcel of another owner.[129] To further assure that the sight lines from each of the buildings to the streets surrounding the shopping center will be preserved, height restrictions will often be imposed upon the buildings. The height restriction should not be stated in terms of the number of stories permitted, but rather in terms of a total number of feet from the base of the building in order to assure that the restriction is specific enough to be enforceable.[130] These restrictions are essential with respect to the out parcels, which are typically situated between the primary buildings of the shopping center and the roads. By virtue of their location, buildings situated upon out parcels which are too high may block the oncoming motorists' view of the buildings in the rear of the shopping center.

Another common limitation, designed to provide adequate parking areas in the shopping center, is a minimum parking space to square footage of building area ratio.[131] Retailers are vitally concerned about the adequacy of parking necessary to assure their customers will be able to park within a convenient distance from

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129. This problem of over-building can be addressed more directly by placing a maximum floor area restriction against each parcel; however, care should be taken by the developer to preserve maximum flexibility with respect to the out parcels on his tract, keeping in mind that the development of those out parcels will depend to a great extent upon the needs and desires of the ultimate users. *See generally* Annot., 80 A.L.R.2d 1258, 1259-63 (1961) (discussion of restrictive covenants in relation to parking uses). Thus, the developer is faced with a dilemma: he desires maximum flexibility as to future development opportunities within the shopping center, but to preserve the value of the balance of his investment, he, too, desires to restrict the out parcels.

130. *See* Leighton v. Leonard, 589 P.2d 279, 280-81 (Wash. Ct. App. 1979) (height restriction measured in feet held valid covenant running with land); *cf.*, Johnson v. Linton, 492 S.W.2d 189, (Tex. Civ. App.—Dallas 1973, no writ) (height restrictions stated in terms of "stories" too vague to be enforceable). *See generally* Annot. 1 A.L.R.4th 1021, 1029-32 (1980) (discussion of vagueness in height restrictions); Annot. 92 A.L.R.2d 878, 880-82 (1963) (discussion of general considerations in height restrictions).

131. In more complicated agreements, it is not unusual to use a sliding scale keyed to different uses in a manner similar to that used by zoning codes. *See* DALLAS, TEX., CODE §§ 51-4.201 to -4.220 (1981) (different parking restrictions depending on type of use). The rationale of this approach is that certain types of users such as fast-food users or movie theaters are more parking intensive than normal retail users. For a discussion of parking uses, see generally URBAN LAND INST., PARKING RESTRICTIONS FOR SHOPPING CENTERS: SUMMARY RECOMMENDATIONS AND RESEARCH STUDY REPORT 16-17 (1982). Other considerations in determining an appropriate parking ratio include the size and location of the shopping center, the size of the city in which the shopping center is located, and the method of customer travel to the shopping center. *See id.* at 2-22.

their respective stores.[132] Here, the developer's interest is directly adverse—the more parking at the shopping center, the less income-producing building area. How a parking space is defined is not without potential for dispute; as automobiles become smaller in size,[133] some persons advocate the use of some percentage of the parking area for compact cars to conserve the area used for parking spaces.[134]

In order to assure architectural harmony within the shopping center, one or more parties to the Reciprocal Agreement may want the right to review plans and specifications for the exterior appearance of the other buildings to be located in the shopping center.[135] Although a very logical concern in the abstract, the subjective nature of this approval right should be of concern to each party since the privilege of review could be abused.[136] The goal of a provision requiring architectural review in a Reciprocal Agreement should be to force the parties to cooperate with one another in good faith to produce an architecturally harmonious shopping center;[137] there-

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132. The retailers' concerns center on the amount and location of customer parking in relation to their respective stores.

133. It is estimated that by 1990, between 70 and 80% of all automobiles in the United States will likely be compact cars. *See* URBAN LAND INST., PARKING RESTRICTIONS FOR SHOPPING CENTERS: SUMMARY RECOMMENDATIONS AND RESEARCH STUDY REPORT 20-21 (1982); *see also* OFFICE OF THE ASSISTANT SECRETARY OF TRANSPORTATION FOR POLICY AND INTERNATIONAL AFFAIRS, REPORT TO THE PRESIDENT FROM THE SECRETARY OF TRANSPORTATION, THE U.S. AUTOMOBILE INDUSTRY 1980 (January 1981).

134. Presently, most zoning ordinances generally do not provide for use of compact car spaces. *See* DALLAS, TEX., CODE § 51-4.301(d)(1)(A), (B) (1981).

135. *Cf.* Davis v. Huey, 620 S.W.2d 561, 566 (Tex. 1981) (submission of plans and prior consent covenants can be valid); Annot., 40 A.L.R.3d 864, 874-902 (1971) (discussion of covenants requiring prior consent to build).

136. *See* Davis v. Huey, 620 S.W.2d 561, 566 (Tex. 1981) (upholding enforceability of subjective rights of review of architectural plans if adequate notice given); Black Lake Pipe Line Co. v. Union Constr. Co., 538 S.W.2d 80, 88 (Tex. 1976) (judgment of party regarding adequacy of performance will be sustained if made in good faith); *see also* Schriewer v. Liedtke, 561 S.W.2d 584, 587 (Tex. Civ. App.—Beaumont 1978, no writ) (right to terminate contract to purchase land, must be applied in good faith); Hugley v. Caldwell, 559 S.W.2d 877, 879 (Tex. Civ. App.—Houston [14th Dist.] 1977, no writ) (in contract to buy land, provision allowing description of land with "more or less" variance factor upheld). *See generally* Annot., 78 A.L.R.3d 880, 886-901 (1977) (analogous situation of sufficiency of attempts to secure financing discussed). Although not specifically applicable to these circumstances, the Uniform Commercial Code imposes upon parties to commercial contracts which are subject to the terms of Uniform Commercial Code, the obligation to act in good faith. *See* TEX. BUS. & COM. CODE ANN. § 1.203 (Vernon 1968) (every contract imposes obligation of good faith).

137. *See* Johnson v. Dick, 281 S.W.2d 171, 173 (Tex. Civ. App.—San Antonio 1955, no

fore, the more objective the standards for such review, the less likely it becomes that the reviewing party may act out of ulterior motivations. The restricted party may wish to identify another shopping center development or retail building and provide that an exterior appearance which is substantially similar to that development or building will be acceptable; moreover, the reviewing party should agree not to unreasonably withhold or delay its consent[138] and to couple any denials of approval with requests for specific changes. Another difficult issue is compliance verification and proof of such compliance to interested third parties, such as lenders and prospective purchasers. To provide a method for determining whether compliance was accomplished, the parties may agree that if no objections to the design of a building are manifested in a definite and certain manner (such as being recorded in the real property records of the county in which the shopping center is located within a prescribed period following completion of the building), then the building will be deemed approved and any right to object waived. Although none of the parties will want an objection filed of record against their property, this approach has the benefit of assuring future lenders and purchasers that if no such objection appears in the chain of title, all rights to object have conclusively been waived. The reviewing party should disclaim any assumption of a duty to review the plans and specifications for safety and structural purposes;[139] this may be of special concern to large re-

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writ) (covenant requiring approval of plans by architectural committee designed to approve quality of work and materials and insure harmony of exterior); Johnson v. Wellborn, 181 S.W.2d 839, 840-41 (Tex. Civ. App.—San Antonio 1944, writ ref'd w.o.m.) (committee approval covenant designed to cause structures to be harmonious).

138. *Query:* Whether an agreement not to unreasonably withhold consent provides much protection in light of Crestview, Ltd. v. Foremost Ins. Co., 621 S.W.2d 816 (Tex. Civ. App.—Austin 1981, writ ref'd n.r.e.), which held that an agreement by a lender not to unreasonably withhold consent to the sale of mortgaged property by the borrower did not prevent the lender from insisting on an increase in the interest rate of the loan as a condition to the lender's consent. *See id.* at 818, 829. As a safeguard against unreasonably slow responses, the party whose plans are being reviewed may wish to provide in the Reciprocal Agreement that if no response is delivered within a specified period of time following receipt of the plans by the reviewing party, such failure to respond will be deemed to be approval.

139. One who assumes an undertaking is obligated to use reasonable care in the performance of those duties. *See* Damron v. C.R. Anthony Co., 586 S.W.2d 907, 913 (Tex. Civ. App.—Amarillo 1979, no writ); Dalkowitz Bros. v. Scheiner, 110 S.W. 564, 565 (Tex. Civ. App. 1908, no writ). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 56, at 344-48 (4th ed. 1971); Boynton & Evans, *What Price Liability for Insurance Carriers Who Undertake Voluntary Safety Inspections?*, 43 NOTRE DAME LAW. 193, 194-201 (1967); Greg-

tailers and developers who might be deemed to have special expertise in the area.[140] The developer may wish to obtain some concessions from the other parties to the Reciprocal Agreement for the benefit of the probable out parcel occupants—national chain establishments—who invariably have prototype buildings from which they are generally reluctant to deviate.

Signage in a shopping center generally takes one of two forms: detached, free-standing signs such as pylon or monument signs or signs which are attached to the face of a building, often referred to as facia signs. Sign restrictions limiting the size and height, location and number of signs, and providing for approval of plans and specifications for the aesthetics of the signs are often included in Reciprocal Agreements.[141]

Use restrictions are used in Reciprocal Agreements to accomplish diverse goals.[142] By restricting parking-intensive users, a retailer may provide greater opportunities for its customers to find parking spaces.[143] In order to preserve the integrity of a retail-oriented shopping center, parties customarily limit the use of the shopping center to retail uses and limited office uses or office uses which are incidental to the retail uses in the shopping center. The developer should be careful in drafting this restriction because insurance agencies, travel agencies, savings and loan institutions, and other similar nonretail users may be attractive tenants who desire to locate in the shopping center.[144] Use restrictions can also be im-

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ory, *Gratuitous Undertakings and the Duty of Care*, 1 DE PAUL L. REV. 30, 67-68 (1951).

140. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32, at 161 (4th ed. 1971).

141. The developer may be very concerned about this point, inasmuch as it is likely that many of his tenants will insist upon adequate identification of their location by signage. Retailers, on the other hand, are often more concerned about preserving the visibility of their store from the streets by limiting the number of freestanding signs and their size. *Cf.* Cornett v. City of Houston, 404 S.W.2d 602, 604 (Tex. Civ. App.—Houston 1966, no writ) (conflict between retailer and city over covenant that no sign be erected without consent).

142. Use restrictions may be literally applied. *See* Calvary Baptist Church v. Adams, 570 S.W.2d 469, 474 (Tex. Civ. App.—Tyler 1978, no writ) (church driveway located on land restricted to residential purposes violated restriction as if church had been located on restricted land); H.E. Butt Grocery Co. v. Justice, 484 S.W.2d 628, 631 (Tex. Civ. App.—Waco 1972, writ ref'd n.r.e.) (land restriction against food store use violated when used for parking by supporting grocery store).

143. Retailers may be willing, as an alternative to an absolute prohibition against such uses, to restrict such uses from being located within a specified distance from the boundary line of their property to lessen the likelihood of overburdening the parking available for their use.

144. One compromise is to limit nonretail uses to a certain percentage of the building

plemented to obtain economic advantage for certain retailers by excluding any competition from the shopping center. These types of restrictions are fraught with public policy problems because they act as restraints of trade.[145] Parties also customarily include a "noxious-use" clause prohibiting a number of uses which would, for one reason or another, be injurious to the operation of any successful shopping center.[146]

V. Purposes for Which Affirmative Covenants Are Used

Each party to the Reciprocal Agreement will want assurance concerning the manner in which the shopping center will be operated and maintained. To provide this assurance, the Reciprocal Agreement will typically include various covenants which are affirmative in nature and concern a variety of operational issues; additionally, the agreement will often include quality standards, both subjective and objective,[147] by which performance of the covenants may be evaluated. All of these covenants generally have one goal in mind—to keep all portions of the shopping center constantly operating in a manner of even quality.

The developer invariably will request that the large retailers build their stores, open by a defined time, and operate. Without

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area on each parcel.

145. A thorough discussion of these issues is, itself, an appropriate topic for a law review article. *See* Halper, *The Antitrust Laws Visit Shopping Center "Use Restrictions,"* 4 Real Est. L.J. 3, 7-34 (1975); Lentzner, *The Antitrust Implications of Radius Clauses in Shopping Center Leases*, 55 U. Det. J. Urb. L. 1, 5-61 (1977); Schear & Sheehan, *Restrictive Lease Clauses and the Exclusion of Discounters from Regional Shopping Centers*, 25 Emory L.J. 609, 610-29 (1976); Comment, *The Impact of Federal and Texas Antitrust Laws on Restrictive Covenants in Shopping Center Leases*, 30 Baylor L. Rev. 305, 305-15 (1978); Note, *The Antitrust Implications of Restrictive Covenants in Shopping Center Leases*, 86 Harv. L. Rev. 1201, 1204-48 (1973); Comment, *The Shopping Center Radius Clause: Candidate for Antitrust?*, 32 Sw. L.J. 825, 826-56 (1978); *see also* Dow, *Some Selected Problems in Shopping Center Leases*, in State Bar of Tex. 3d Ann. Adv. Real Est. Law Course L at L-27 to L-48 (1981); Annot., 97 A.L.R.2d 4, 14-19 (1964).

146. Special attention should be given to out parcels in this regard. Since these users will set the tone for a shopping center because they are generally in front of the shopping center, the developer may wish to provide for repurchase rights in the event of a breach. As might be expected, these are vigorously resisted, even when an attempt is made to provide for a fair market value purchase price.

147. Such a standard would require the performance of the covenant to the satisfaction of the other parties or, less subjectively, in accordance with a specified level of quality. More objective standards would include specific criteria designed to evaluate each component of the performance.

these covenants, the developer's ability to lease the shop space on his parcel is diminished and, as a corollary, his ability to finance the project may also be impaired;[148] however, retailers are loathe to make such promises for too many variables influence their expansion plans. Although covenants to build and operate a specified store may not be enforceable by a judgment for specific performance,[149] an alternative remedy is a purchase option whereby, unless the retailer commences construction of a store of a specified size within a stated period of time and pursues such construction with diligence, the developer may repurchase the retailer's parcel at a bargain price.[150] A bargain-price purchase option held by the developer prevents the retailer from speculating on the land and may make it more likely that the retailer will build a store on that site. Even if that goal is not realized, the developer is at least assured of an opportunity to locate another retailer to purchase the land—one more enthusiastic about operating from that location. The developer should be just as concerned about a cessation of operation by a major retailer as by a failure to build in the first instance. To be sure, the dimunition in value to the developer's portion of the shopping center, caused by a major retailer ceasing to operate and a subsequent failure to locate a replacement, might be even more damaging since the developer in most instances would have increased his investment at that point by developing his portion of the shopping center and expending large sums of money in the process. To afford protection against the retailer's parcel lying vacant, the developer may request that the retailer grant the developer another purchase option, becoming applicable if, after a period of operation, the retailer wishes to cease operation.

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148. Since the likelihood of success of leasing the smaller tenant spaces on the developer's parcel is greatly enhanced if a major retailer is obligated to open a store within the shopping center, lenders will be more willing to lend money to a project in which the risks are lessened in this manner.

149. Specific performance will generally be ordered only when the decree can be presently enforced without the need for continuing supervision by a court. *See* Chain v. Pye, 429 S.W.2d 630, 635 (Tex. Civ. App.—Beaumont 1968, writ ref'd n.r.e.). *See generally* Annot., 164 A.L.R. 802, 815-38 (1946) (discussion of specific performance and court supervision).

150. The terms of the option must be definite, certain, and complete to be enforceable. *See* Williams v. Ellison, 493 S.W.2d 734, 736 (Tex. 1973); Colligan v. Smith, 366 S.W.2d 816, 819 (Tex. Civ. App.—Fort Worth 1963, writ ref'd n.r.e.). Issues to be considered in preparing such a clause are the same as with any other option: price and terms—if any—of payment, time of exercise, time for consummation of the purchase, method of conveyance, and mechanics of closing.

To assure that the shopping center maintains an attractive appearance and safe condition, the parties to the Reciprocal Agreement should designate who will maintain the driveways, sidewalks, parking areas, landscaping, utilities, lighting facilities, buildings, and signs. One alternative is for each party to maintain its parcel; with respect to areas encumbered by easements, however, such maintenance covenants are contrary to the common law rule that the person benefitting from the easement maintain it.[151] Retailers may suggest that the developer maintain all of the common areas and agree to reimburse him for their proportionate share of the expenses. This reduces some of the manpower requirements for the retailers and assures consistency, for better or for worse, in the maintenance of the shopping center. In this regard, the parties also may wish to agree upon a standard against which the maintenance activities will be measured.

Each party will want assurance that the other parties are adequately insured with comprehensive public liability insurance because if a neighboring landowner is insolvent and underinsured, it becomes more likely that its neighbors will become embroiled in personal injury lawsuits involving accidents on that neighbor's land thereby raising issues of fact where the accident actually occurred.[152] Each party will also want to know that the other parties are maintaining adequate fire and extended coverage insurance to assure an available source of funds necessary to restore damaged improvements and keep the shopping center operating. With respect to the common areas, parties often agree to contribute on a proportionate basis to the cost of one insurance policy covering all of the common areas.[153] Major retailers and substantial developers may want the right to self-insure; a minimum net worth should be required as a condition to this right to assure an adequate asset base necessary to absorb claims which may be made. Each party should indemnify the others from and against the use of its parcel and its liability insurance should cover this contractual indem-

151. *See* Cozby v. Armstrong, 205 S.W.2d 403, 408 (Tex. Civ. App.—Fort Worth 1947, writ ref'd n.r.e.); Pokorny v. Yudin, 188 S.W.2d 185, 194 (Tex. Civ. App.—El Paso 1945, no writ).

152. For a general discussion of the law of invitees, see W. PROSSER, HANDBOOK ON THE LAW OF TORTS §§ 61-62, at 385-99 (4th ed. 1971).

153. This often results in lower premium costs and alleviates the need to determine upon whose property the accident occurred.

nity.[154] In addition, to the extent they are not cooperating in one insurance policy, the parties should consider waiving the right of subrogation held by their respective insurance carriers.[155]

Provision should be made in the Reciprocal Agreement for casualties which damage or destroy any of the buildings situated on the shopping center. It is desirable that damaged buildings should be restored promptly thereby assuring consistent operation of the shopping center. At the very least, each party should agree that it will either rebuild or repair its damaged building or remove the debris and clean the area so as to present a neat appearance and to prevent unsightly debris from presenting safety hazards. In the alternative, the parties may agree that, to the extent insurance proceeds are available for restoration, they will rebuild. Here again, some thought should be given to practical remedies should a party who is obligated to rebuild refuse to do so; judgments for specific performance may be unavailable due to the vagueness of the obligation.[156]

Foreclosure of any portion of the shopping center should be prevented due to the resulting disruption and negative publicity which would likely follow; thus, covenants requiring each party to pay ad valorem taxes when due are appropriate.[157] The right to pay such taxes on an installment basis, if such is available, and to contest the amount of an assessment should be preserved for each party.[158] For similar reasons, each party should indemnify the other against the filing of any mechanic's liens for work done on

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154. For a discussion of indemnity contracts, see generally Reynolds, *Contracts of Indemnity in Texas*, 43 TEX. B.J. 297, 298-305 (1980).

155. *See* Williams v. Advanced Technology Center, Inc., 537 S.W.2d 531, 533 (Tex. Civ. App.—Eastland 1976, writ ref'd n.r.e.) (no right of subrogation where insuror settles or releases); International Ins. Co. v. Medical-Professional Bldg., 405 S.W.2d 867, 869 (Tex. Civ. App.—Corpus Christi 1966, writ ref'd n.r.e.) (where insuror pays, entitled to subrogation); Wichita City Lines, Inc. v. Puckett, 288 S.W.2d 122, 124 (Tex. Civ. App.—Fort Worth) (insured has right to subrogation), *aff'd*, 156 Tex. 456, 295 S.W.2d 894 (1956).

156. Specific performance will generally be ordered only when the decree can be presently enforced without the need for continuing supervision by a court. *See* Chain v. Pye, 429 S.W.2d 630, 635 (Tex. Civ. App.—Beaumont 1968, writ ref'd n.r.e.). *See generally* Annot., 164 A.L.R. 802, 815-38 (1946) (discussion of specific performance and court supervision).

157. Note that a lien attaches to each piece of property in Texas to secure payment of ad valorem taxes. *See* TEX. TAX CODE ANN. § 32.01 (Vernon 1982); *see also id.* §§ 34.01- .08 (statutes on foreclosures of tax liens); *id.* §§ 34.21- .23 (statutes concerning redemption rights).

158. *See generally id.* §§ 41.41- .47 (discussion of methods of payment of taxes).

the property of the other.[159] Although not common, covenants requiring payment of loans secured by liens on portions of the shopping center would be logically consistent.

VI. Miscellaneous Provisions

The parties should provide for options available in the event of a condemnation of a portion of the shopping center.[160] If a significant condemnation occurs, which may be defined in terms of a percentage of land area or building area or both, the parties may want the right to terminate the Reciprocal Agreement. The parties should also resolve the extent, if any, each will be permitted to participate in one another's condemnation proceedings.[161]

Each party will want to identify its remedies in the event of a default by the other parties. Such remedies may include suit for damages or injunctive relief,[162] the right to perform or take the action with regard to which the other party has defaulted and to be reimbursed therefore with a significant interest factor (*i.e.*, self-help), and the grant of a lien on the ownership of the parcel of the defaulting party to secure these obligations.[163] Different covenants

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159. See Tex. Rev. Civ. Stat. Ann. arts. 5452-5472e (Vernon Supp. 1982-1983) for requirements and rules regarding mechanics' and materialmen's liens. This is especially important since materialmen and laborers may have no means of determining the ownership structure of the shopping center; therefore, other owners having nothing to do with the construction contract may be drawn into their neighbor's disputes.

160. For examples of condemnation actions involving shopping centers or land planned to be shopping center developments, see Uselton v. State, 499 S.W.2d 92, 94-99 (Tex. 1973); City of Texarkana v. Kitty Wells, Inc., 539 S.W.2d 205, 206-08 (Tex. Civ. App.—Texarkana 1976, no writ).

161. The benefits of easements, covenants, and restrictions which have properly been created are generally property interests and, therefore, the owner of such benefits should be entitled to some compensation upon deprivation of such benefits.

162. *See* Nonnenmann v. Lucky Stores, Inc., 368 N.E.2d 200, 203-04 (Ill. App. Ct. 1977) (subdivision landowner suit to enjoin violation of restrictive covenant); Suess v. Vogelgesang, 281 N.E.2d 536, 544 (Ind. Ct. App. 1977) (one appropriate remedy for violation of restrictive covenant is action in damages); Peters v. Davis, 231 A.2d 748, 752 (Pa. 1967) (breach of restriction subject to suit in equity to enforce restriction); Ortiz v. Jeter, 479 S.W.2d 752, 756-59 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.) (restrictions enforceable by injunction); Scaling v. Sutton, 167 S.W.2d 275, 276 (Tex. Civ. App.—Fort Worth 1942, writ ref'd n.r.e.) (restriction can be enforced by injunction).

163. In the absence of an existing debt, the lien is not effective. *See* Hagan v. Anderson, 506 S.W.2d 298, 302 (Tex. Civ. App.—San Antonio 1973), *aff'd*, 513 S.W.2d 818 (Tex. 1974); Tyler Bank & Trust Co. v. Shaw, 293 S.W.2d 797, 800-01 (Tex. Civ. App.—Texarkana 1956, writ ref'd n.r.e.); Griswold v. Citizens Nat'l Bank, 285 S.W.2d 791, 799 (Tex. Civ. App.—Waco 1955, writ ref'd n.r.e.). In essence, the Reciprocal Agreement creates an equita-

and portions of the Reciprocal Agreement may warrant different remedies; it is not necessarily wise to employ universal remedies to deal with all defaults under the Reciprocal Agreements. Notice and a reasonable period for cure should be provided as a condition to exercising any remedies. With respect to the lien granted, a procedure for filing[164] and foreclosing[165] such lien should be established, and the lien should be made subordinate to any liens presently existing or to be obtained in the future securing financial institutions to avoid impairment of financing opportunities.

Although the parties are clearly working closely together, neither will wish to be responsible for the debts or obligations of the other, nor will they wish to have created a partnership or joint venture with one another.[166] If the parties disclaim the creation of a part-

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ble lien. *See* Bradley v. Straus-Frank Co., 414 S.W.2d 504, 508 (Tex. Civ. App.—Dallas 1967, no writ) (equitable lien created by express written agreement showing intention to make certain property collateral for obligation). This lien becomes effective upon the failure of one party to perform an affirmative duty required by the Reciprocal Agreement. The lien is granted to secure repayment of funds expended in curing the default; thus, an obligation to repay such funds should clearly be set forth in the Reciprocal Agreement. *Query:* whether restrictive covenants may be enforced by the use of a lien, since necessarily no debt exists. One argument arises in *Shaw:* "[T]here can be no valid lien without a valid debt or *obligation.*" Tyler Bank & Trust Co. v. Shaw, 293 S.W.2d 797, 800 (Tex. Civ. App.—Texarkana 1956, writ ref'd n.r.e.) (emphasis added). Use of the words "or obligation" suggests that agreements not to use land in proscribed ways (which are, no doubt, obligations) may be secured by a lien.

164. The priority of the lien *vis a vis* other lien claimants and bona fide purchasers presumably will be determined by the date of recordation of the claim of lien, since at the date of execution of the Reciprocal Agreement, no debt exists. *See* Kennard v. Mabry, 78 Tex. 151, 156-57, 14 S.W. 272, 274 (1890) (all instruments intending to create lien shall be recorded and recordation takes effect when instrument filed with clerk). The Reciprocal Agreement parties may find some protection, however, in the following argument:

> The law appears to be settled in Texas that parties may make a note and deed of trust for a definite amount, upon the agreement that some *or all* of the money will be advanced at a later date; and that in such event the holder of the note and mortgage will have a valid lien to secure the amount of the money actually advanced . . . .

Foxworth-Galbraith Lumber Co. v. Southwestern Contracting Corp., 165 S.W.2d 221, 224 (Tex. Civ. App.—Fort Worth 1942, writ ref'd) (citations omitted and emphasis added).

165. Unless the Reciprocal Agreement provides for a power of sale, the beneficiary of the lien will be forced to obtain a judicial decree ordering the foreclosure of the lien. *See* Southwestern Peanut Growers Ass'n v. Womack, 179 S.W.2d 371, 373 (Tex. Civ. App.—Eastland 1944, no writ).

166. *See* TEX. REV. CIV. STAT. ANN. art. 6132b, §§ 6(1), 7(2) (Vernon 1970) (requirements for creation of partnerships). A partnership has been defined as a contract between two or more competent persons to place their money, effort, labor, and skill or some or all of them in lawful commerce or business and to divide profits and bear losses in specified proportions. *See* First Nat'l Bank v. Chambers, 398 S.W.2d 313, 316-17 (Tex. Civ.

nership or joint venture relationship, they greatly diminish the likelihood of such a relationship being imposed upon them.[167]

Each party, from time to time, may need to obtain an estoppel certificate[168] from the other party to satisfy key tenants, lenders, or purchasers. Thus, the Reciprocal Agreement should provide that each party will upon request furnish such a certificate, and that failure to respond within a specified period of time will be deemed a favorable response.[169] If either party should sell a parcel or any portion thereof to another person or entity, the selling party, in addition to needing an estoppel certificate for his purchaser, will want to be released from any obligations and liabilities arising under the Reciprocal Agreement after the transfer.[170] Provision

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App.—Eastland 1965, no writ); Burr v. Greenland, 356 S.W.2d 370, 376 (Tex. Civ. App.—El Paso 1962, writ ref'd n.r.e.). Stated another way, a partnership is a relationship between or among two or more persons with a community of interest, a prosecution of a common enterprise for the joint benefit of the parties, the right of each to participate in profits, and the obligation of each to bear some portion of the losses. *See* Jenkins v. Brodnax White Truck Co., 437 S.W.2d 922, 925-26 (Tex. Civ. App.—Tyler 1969, no writ). The issue of the existence of a partnership is one of fact. Cherokee Village v. Henderson, 538 S.W.2d 169, 174 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ dism'd). No single fact is determinative. State v. Houston Lighting & Power Co., 609 S.W.2d 263, 267 (Tex. Civ. App.—Corpus Christi 1980, no writ).

167. The intention of the parties to an alleged partnership to form or not to form the partnership is a critical issue. *See, e.g.*, Coastal Plains Dev. Corp. v. Micrea, Inc., 572 S.W.2d 285, 287 (Tex. 1978); Voudouris v. Walter E. Heller & Co., 560 S.W.2d 202, 206 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ); Holman v. Dow, 467 S.W.2d 547, 550 (Tex. Civ. App.—Beaumont 1971, writ ref'd n.r.e.); *cf.* Taylor v. Lewis, 553 S.W.2d 153, 158 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.) (persons intending to perform acts that law considers partnership acts have intent to create partnership); Howard Gault & Son, Inc. v. First Nat'l Bank, 541 S.W.2d 235, 237 (Tex. Civ. App.—Amarillo 1976, no writ) (intent to do things in which law will regard as partnership is intent to create partnership); Cherokee Village v. Henderson, 538 S.W.2d 169, 174 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ dism'd) (written statement that parties intended trust was not conclusive of intent that it not be partnership).

168. An estoppel certificate refers to a factual representation, requested from an interested party, concerning the status of performance under an agreement; the purpose of such certificate is to prevent the issuer of the certificate from later denying the truth of the statements made therein. *See* Fretz Constr. Co. v. Southern Nat'l Bank, 626 S.W.2d 478, 479-84 (Tex. 1981).

169. Even without such an agreement, a party presented with a statement of facts within his scope of knowledge, especially if such presentment is coupled with a request for a response, may be obligated to object if he knows of inaccuracies therein. *See* Champlin Oil & Ref. Co. v. Chastain, 403 S.W.2d 376, 387 (Tex. 1966).

170. Absent provisions to such effect in the Reciprocal Agreements, the original owner of the land would remain liable for performance under contract theories. *See* Russell v. Northeast Bank, 527 S.W.2d 783, 786 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd

should be made for such release; it is not unusual, however, to condition the release upon obtaining an express assumption of the obligations contained in the Reciprocal Agreement from the purchaser.[171] This has the benefit of lessening any dependence upon whether the covenants run with the land.

A Reciprocal Agreement typically will call for approvals to be given from time to time concerning certain matters. The parties should agree that such approvals will not be unreasonably withheld nor delayed;[172] in addition, there should be a provision specifying that if denial of approval and the reasons therefor have not been delivered within a specified time period, such failure to respond will be deemed an approval. In this regard, there should be a provision identifying the method and manner in which notices should be given. With respect to any obligations that contain inherent time limitations, the parties may wish to provide for an extension of the limitation based on causes beyond the control of the obligor.[173] In order to protect against abuses of this privilege, it is wise to condition the right to extend the time for performance upon de-

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n.r.e.); *cf.* Chastion v. Cooper & Reed, 152 Tex. 322, 325, 257 S.W.2d 422, 424 (1953) (intent to release original owner must be present); Redgleawood, Inc. v. White, 380 S.W.2d 766, 768 (Tex. Civ. App.—Waco 1964, no writ) (original owner remained liable because no intent to release).

171. This is, in essence, a prearranged novation. *See* Siegler v. Telco Leasing, Inc., 593 S.W.2d 850, 852 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ); Crossland v. Nelson Auction Serv., Inc., 424 S.W.2d 318, 319 (Tex. Civ. App.—Amarillo 1967, writ ref'd n.r.e.); McKinney v. Flato Bros. Inc., 397 S.W.2d 525, 529 (Tex. Civ. App.—Corpus Christi 1965, no writ).

172. The value of an agreement not to unreasonably withhold consent may be questionable. *See* Crestview, Ltd. v. Foremost Ins. Co., 621 S.W.2d 816, 818, 829 (Tex. Civ. App.—Austin 1981, writ ref'd n.r.e.) (agreement by lender to not unreasonably withhold consent to sale of mortgaged property not breached by lender's increase in interest rate as precondition to consent).

173. Texas courts have viewed dimly attempts to excuse nonperformance of a contract based on a defense of impossibility. *See* Toyo Cotton Co. v. Cotton Concentration Co., 461 S.W.2d 116, 118 (Tex. 1970) (one promising performance which has later become impossible bears risks of nonperformance); Texarkana Pipe Works v. Caddo Oil & Ref. Co., 252 S.W. 813, 816 (Tex. Civ. App.—Texarkana 1923, writ ref'd) (promisor of impossible performance remains liable unless prevented by God, fortuitous event, or irresistible force); *cf.* Foster v. Atlantic Ref. Co., 329 F.2d 485, 489 (5th Cir. 1964) (applying Texas law, one who unconditionally promises to perform will remain liable regardless of subsequent difficulty). *But cf.* Janek v. Federal Deposit Ins. Corp., 586 S.W.2d 902, 906 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ) (defense of original impossibility is different from supervening impossibility); Erickson v. Rocco, 433 S.W.2d 746, 751-52 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.) (favorable comments on defense of supervening impossibility).

livery of notice from the obligor that one of the specified events allowing time extension has occurred.

In addition, several miscellaneous subjects should be addressed. Particularly with respect to the inclusion of certain use restrictions designed to obtain for one of the parties lessened competition which are subject to being unenforceable based on illegality,[174] the parties should provide that the Reciprocal Agreement is intended to be severable,[175] that any illegal or invalid provisions will be severed from the agreement and will not act to terminate the entire agreement,[176] and that such provision will be replaced with as close a provision thereto as may be legal and valid. The mortgage lenders for each of the parties, to the extent they hold a prior lien on a portion of the shopping center, should join in the Reciprocal Agreement to evidence their subordination to its provisions, so that a foreclosure of such liens will not extinguish the Reciprocal

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174. Strong arguments exist contending that use restrictions lessening competition are violative of antitrust laws. *See, e.g.*, Halper, *The Antitrust Laws Visit Shopping Center "Use Restrictions,"* 4 REAL EST. L.J. 3, 7-34 (1975); Lentzner, *The Antitrust Implications of Radius Clauses in Shopping Center Leases*, 55 U. DET. J. URB. L. 1, 5-61 (1977); Comment, *The Impact of Federal and Texas Antitrust Laws on Restrictive Covenants in Shopping Centers*, 30 BAYLOR L. REV. 305, 305-15 (1978).

175. As with so many other aspects of Reciprocal Agreements, the intent of the parties is critical in connection with the severability of an illegal portion of the agreement. *See, e.g.*, McFarland v. Haby, 589 S.W.2d 521, 524 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.) (intent of parties controls severability); Blackstock v. Gribble, 312 S.W.2d 289, 292-93 (Tex. Civ. App.—Eastland 1958, writ ref'd n.r.e.) (parties' intention controls issue of severability); King v. Whatley, 236 S.W.2d 186, 191 (Tex. Civ. App.—Eastland 1951, writ ref'd n.r.e.) (intention of parties is controlling issue in severability of contract); *cf.* Patrizi v. McAninch, 153 Tex. 389, 395, 269 S.W.2d 343, 348 (1954) (notwithstanding declared intention that any illegal provision be severed, illegal portions of contract were so interdependent with other portions of contract such that illegal provisions could not be severed).

176. Generally illegal portions of an agreement may be severed. *See* Williams v. Williams, 569 S.W.2d 867, 871 (Tex. 1978); Spinks v. Riebold, 310 S.W.2d 668, 669 (Tex. Civ. App.—El Paso 1958, writ ref'd); Southern Properties, Inc. v. Carpenter, 21 S.W.2d 372, 376 (Tex. Civ. App.—Dallas 1929, writ dism'd). In Kroger Co. v. J. Weingarten, Inc., 380 S.W.2d 145 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.), the court held that an agreement entered into as a part of a lease agreement which violated state antitrust laws so tainted the entire transaction that neither the restriction agreement nor the lease were enforceable, notwithstanding strong assertions of severability by one of the parties. *See id.* at 154. Thus, regardless of the stated intention of the parties to a Reciprocal Agreement that any illegal use restrictions or other portions of the agreement be severed, violations of state antitrust laws may render the entire Reciprocal Agreement unenforceable. *See id.* at 154 (agreement so tainted by violations of state antitrust law so as to be unenforceable). The state antitrust laws are located at Tex. Bus. & Com. Code Ann. §§ 15.01- .34 (Vernon 1968 & Supp. 1982-1983).

Agreement.[177] Provision should be made for the manner in which amendments and termination of the Reciprocal Agreement will become effective.[178] A party's viewpoint concerning the appropriate duration for the Reciprocal Agreement will be determined in large measure by his perception of the value to him of the provisions of the Reciprocal Agreement. Invariably, parties owning the interior portions of the shopping center desire the longest durations for the Reciprocal Agreement, since they are dependent upon the Reciprocal Agreement for access, sight lines, and other protections. It is not unusual to provide that amendments and termination will be effective upon execution by the owners, from time to time, of a stated percentage of each parcel, thereby limiting the involvement of out parcel owners. Finally, in order to assure that tenants occupying portions of the shopping center and members of the public at large do not attempt to enforce the provisions of the Reciprocal Agreement or otherwise assert rights thereunder, it is prudent to disclaim the creation of any such rights.[179]

VII. Constructional Matters

Many words and phrases are commonly used in Reciprocal Agreements in their conversational sense without close attention to their strict legal definitions. Definitional problems can and should be avoided by careful use of defined terms in Reciprocal Agreements; inevitably, however, it is those words with which we are most comfortable that escape contractual definition by the parties. Courts have defined several of these words in various contexts and this section is devoted to a review of those judicial definitions. In any situation, the goal of a court in construing any portion of a contract or property instrument is to ascertain the intention of the parties.[180] The context in which the term, word, or phrase is used

177. *See* Cousins v. Sperry, 139 S.W.2d 665, 667 (Tex. Civ. App.—Beaumont 1940, no writ) (foreclosure of prior lien held to extinguish easement conveyed after lien granted).

178. The parties are free to stipulate the manner in which amendments may be made. Care should be exercised in drafting these provisions as they may often be misconstrued. *See generally* 5 R. Powell, Powell On Real Property § 677 (1981) (discussion of amendments).

179. For a discussion of public acquisition of private rights, see generally Comment, *The Acquisition of Easements by the Public Through Use*, 16 S.D.L. Rev. 150, 150-62 (1971).

180. *See* Settegast v. Foley Bros. Dry Goods Co., 114 Tex. 452, 454, 270 S.W. 1014, 1016

is always critical[181] and words and phrases used in a restrictive covenant will be accorded their ordinary and commonly accepted meaning if not otherwise defined.[182]

Bar. The term "bar" has been defined as a barrier or counter over which liquors and foods are passed to customers, also referring to the portion of the room behind the counter where liquors for sale are kept.[183] On the other hand, the term "saloon" has been accorded a meaning somewhat broader; it is defined as a place where intoxicating liquors are sold.[184]

Building. This word has not been given a uniform meaning and the circumstances of a particular case have been controlling.[185] Some courts have given the term its common sense meaning, holding that a building is a structure enclosing a space within its walls and covered by a roof, thereby excluding from its coverage walls and underground fall-out shelters.[186] At least one other court has endorsed a more expansive definition by including a mobile home with apparent permanent attachments to the ground within the definition of "building."[187]

Business Use. The term "business use" has most often been defined by the Texas courts in the context of the homestead exemption embodied in the Texas Constitution[188] and has been defined

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(1925); Curb v. Benson, 564 S.W.2d 432, 433 (Tex. Civ. App.—Austin 1978, writ ref'd n.r.e.).

181. *See* Mitchell v. Gaulding, 483 S.W.2d 41, 42 (Tex. Civ. App.—Waco 1972, writ ref'd n.r.e.); Fischer v. Reissig, 143 S.W.2d 130, 131 (Tex. Civ. App.—Austin 1940, writ ref'd).

182. *See, e.g.*, Settegast v. Foley Bros. Dry Goods Co., 114 Tex. 452, 455, 270 S.W. 1014, 1016 (1925) (construe according to plain meaning of language); Knopf v. Standard Fixtures Co., 581 S.W.2d 504, 506 (Tex. Civ. App.—Dallas 1979, no writ) (words given their common and ordinary meaning); Curb v. Benson, 564 S.W.2d 432, 433 (Tex. Civ. App.—Austin 1978, writ ref'd n.r.e.) (phrases accorded common, accepted meaning).

183. Hinton v. State, 137 Tex. Crim. 352, 356, 129 S.W.2d 670, 673 (1939).

184. *See id.* at 356, 129 S.W.2d at 673; *see also* McDougall v. Giacomini, 14 N.W. 150, 151 (Neb. 1882); Kelly v. Theo. Hamm Brewing Co., 168 N.W. 131, 132 (Minn. 1918).

185. *See* Aluminum Co. of Am. v. Kohutek, 455 S.W.2d 789, 791 (Tex. Civ. App.—Corpus Christi 1970, no writ) (meaning of "building" depends on facts of each case).

186. *See* Hancox v. Peek, 355 S.W.2d 568, 568-69 (Tex. Civ. App.—Fort Worth 1962, writ ref'd n.r.e.); Johnson v. Dick, 281 S.W.2d 171, 175 (Tex. Civ. App.—San Antonio 1955, no writ). *See generally* Annot., 18 A.L.R.3d 850, 851-62 (1968) (discussion of what "building" means in restrictive covenants).

187. *See* Aluminum Co. of Am. v. Kohutek, 455 S.W.2d 789, 791 (Tex. Civ. App.—Corpus Christi 1970, no writ).

188. TEX. CONST. art. 16, § 51, exempts as urban homestead, subject to monetary limits, any place where the homestead claimant exercises his "calling" or "business."

as being that which occupies the time, attention, and labor of men as their chief concern, their livelihood, for profit or improvement.[189] In other contexts, the term has been defined slightly more restrictively to mean an occupation or employment habitually engaged in for purpose of profit or improvement.[190] The term has been deemed not to include promotion of religious, educational, and physical development of boys, young men, and families.[191]

Commencement of Construction. Defined most often in the context of determining when a mechanic's lien attaches to property, "commencement of construction" has been determined in Texas to occur when activities which constitute either (a) an improvement under the mechanic's lien statute[192] or (b) the excavation for or laying of a foundation of a building or structure, are conducted upon the land and visible thereupon.[193]

Curb. Although it appears that no Texas court has defined

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189. *See* Waggener v. Haskell, 89 Tex. 435, 437, 35 S.W. 1, 2 (1896); C.D. Shambruger Lumber Co. v. Delvan, 106 S.W.2d 351, 356-57 (Tex. Civ. App.—Amarillo 1937, writ ref'd).

190. *See* Thompson v. Calvert, 489 S.W.2d 95, 98 (Tex. 1972) (relating to statutes requiring licensing of coin operated music and entertainment machines); McCauley v. Hobbs Trailers, 357 S.W.2d 494, 496 (Tex. Civ. App.—Fort Worth 1962, no writ) (relating to statute's definition of pawnbrokers).

191. *See* Harrington v. Young Men's Christian Ass'n, 440 S.W.2d 354, 357 (Tex. Civ. App.—Houston [1st Dist.] 1969), *rev'd on other grounds*, 452 S.W.2d 423 (Tex. 1970).

192. TEX. REV. CIV. STAT. ANN. arts. 5452-5472c (Vernon Supp. 1982-1983) (Texas mechanics' lien statutes).

193. Diversified Mortgage Investors v. Lloyd G. Blaylock Gen. Contractor, Inc., 576 S.W.2d 794, 800-01 (Tex. 1978); *accord* George M. Newhall Eng'g Co. v. Egolf, 185 F. 481, 483-84 (3d Cir. 1911) (visible commencement of work on ground); Scott v. Goldinhorst, 24 N.E. 333, 334 (Ind. 1890) (foundation work is work on building); Kiene v. Hodge, 57 N.W. 717, 719 (Iowa 1894) (filling of land covered with water not commencement, but driving of piling is); Davis-Wellcome Mortgage Co. v. Long-Bell Lumber Co., 336 P.2d 463, 466 (Kan. 1959) (excavation for walls of foundation is commencement of construction); Dickason Goodman Lumber Co. v. Foresman, 251 P. 70, 72 (Okla. 1926) (must be visible work performed on foundation); Lansing v. Campbell, 101 A. 1, 1-2 (R.I. 1917) (excavation of cellar commenced construction); Williams Lumber & Supply Co. v. Poarch, 428 S.W.2d 308, 311 (Tenn. 1968) (laying of foundation commenced construction of house). The proposed uniform mechanics' lien law which is incorporated into the Uniform Simplification of Land Transfers Act as section 5-207, expands the definition of commencement of construction to include preparatory activities to actual construction work. *See* Youngblood, *Coping With Texas Mechanic's Liens: A Lender's Guide to Priorities*, 12 ST. MARY'S L.J. 889, 893 n.22 (1981). *See generally* Heath, *New Developments in Real Estate Financing*, 12 ST. MARY'S L.J. 811, 860-62 (1981) (discussion of mechanics' and materialmen's liens); Comment, *USLTA: Article 5 "Construction Liens" Analyzed in Light of Current Texas Law on Mechanics' and Materialmen's Liens*, 12 ST. MARY'S L.J. 113, 116-34 (1980) (discussion of USLTA and Texas mechanics' and materialmen's lien law).

"curb," other states have defined "curb" to mean a row of stones, or a similar construction of concrete, wood, or other material, along the margin of a roadway, serving as a limit to the roadway and as a restraint upon and protection for the adjoining sidewalk space.[194]

Improvement. The word "improvement" has been stated to be a relative term dependent for its meaning entirely upon the context in which it is used.[195] Generally, the term includes all activities which enhance the value of land permanently for general uses, including not only buildings and improvements, but many other things.[196] As used in the mechanics' lien statute, the word "improvement" includes abutting sidewalks and streets and utilities therein, clearing, grubbing, draining or fencing of land, wells, cisterns, tanks, reservoirs or artificial lakes or pools made for supplying or storing water, all pumps, siphons and windmills or other machinery or apparatus used for raising water for stock, domestic use or irrigation purposes, and the planting of orchard trees, grubbing out of orchards and replacing trees, and pruning said trees.[197]

Liquor Store. The term "liquor store" has been held to apply only to the sales of distilled spirits by the package for consumption off the premises.[198] Excluded from its purview is a store whose sales of beer and wine constitute forty-nine percent of the total sales from the store.[199]

Lot. When used in connection with a contemplated platting of acreage into a residential subdivision, the term "lot" means a fractional part of a block limited by fixed boundaries on an approved recorded plat.[200] In other contexts such as general restrictive covenants, however, the term "lot" has no fixed meaning and the meaning to be assigned to the word must be derived from the con-

194. *See* Clinkscale v. Germershausen, 302 P.2d 23, 32 (Cal. Ct. App. 1956): Lyman v. Town of Cicero, 78 N.E. 830, 830-31 (Ill. 1906).

195. *See* City of Beaumont v. Priddie, 65 S.W.2d 434, 443 (Tex. Civ. App.—Austin 1933), *rev'd on other grounds,* 127 Tex. 629, 95 S.W.2d 1290 (1936).

196. *See, e.g.,* Watson Bros. Realty Co. v. Douglas County, 32 N.W.2d 763, 764 (Neb. 1948) (everything that permanently enhances value of premises); Provident Mut. Life Ins. Co. v. Doughty, 6 A.2d 184, 187 (N.J. Ch. 1939) (valuable addition or betterment to building); W.T. Watts, Inc. v. Sherrer, 571 P.2d 203, 209 n.4 (Wash. 1977) (en banc) (enhancement of value of property).

197. TEX. REV. CIV. STAT. ANN. art. 5452(1) (Vernon Supp. 1982-1983).

198. Wilson v. Golman, 563 S.W.2d 655, 656 (Tex. Civ. App.—Eastland 1978, no writ).

199. *Id.* at 656.

200. Wall v. Ayrshire Corp., 352 S.W.2d 496, 501 (Tex. Civ. App.—Houston 1961, no writ).

text and circumstances.[201]

Maintenance. The term "maintenance" has been defined as the upkeep, repair, and preservation of the condition of the property and otherwise keeping the property in good condition.[202] It connotes a state of physical activity; it does not encompass expenditure of funds for administrative or managerial purposes of the entity performing the maintenance.[203]

Pave. One Texas case has held that to pave is to lay or cover with stone, brick, or other material to make a firm, level, or convenient surface for horses, carriages, or persons on foot to travel over.[204] More recent foreign authority defines paving as laying or covering with stone, brick, asphalt, concrete, or other material to prepare a firm, convenient, and suitable surface, including necessary preparation and curbs and gutters.[205]

Sidewalk. The term "sidewalk" usually refers to the portion of a highway or street or other area which has been set aside for use by pedestrians;[206] that portion is not necessarily required to be paved to be considered a sidewalk.[207]

Structure. As with the words "building" and "improvement," the word "structure" has been variously defined by Texas courts.[208] In a narrow sense, the word structure has been defined including a building of some kind.[209] On the other hand, courts have held

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201. Green Ave. Apartments, Inc. v. Chambers, 239 S.W.2d 675, 688 (Tex. Civ. App.—Beaumont 1951, no writ).

202. Saphir v. Neustadt, 413 A.2d 843, 851 (Conn. 1978).

203. Frye v. Angst, 137 N.W.2d 430, 433 (Wis. 1965).

204. Coleman-Fulton Pasture Co. v. Aransas County, 180 S.W. 312, 316 (Tex. Civ. App.—San Antonio 1915), *rev'd on other grounds,* 108 Tex. 223, 191 S.W. 556 (1917).

205. *See, e.g.,* Anderson v. City of North Miami, 99 So. 2d 861, 864 (Fla. 1957); Terrill v. City of Lawrence, 392 P.2d 909, 913 (Kan. 1964); Mendrop v. Harrell, 103 So. 2d 418, 424 (Miss. 1958).

206. *See* Pond v. City of Chicago, 183 N.E.2d 179, 180 (Ill. App. Ct. 1962); Blackburn v. Swift, 457 S.W.2d 805, 807 (Mo. 1970).

207. *See* Labruzza v. Boston Ins. Co., 198 So. 2d 436, 437 (La. Ct. App. 1967); Lipphard v. Hanes, 194 A.2d 93, 95 (Md. 1963); Moore v. City of Milwaukee, 65 N.W.2d 3, 5 (Wis. 1954).

208. *See, e.g.,* Mitchell v. Gaulding, 483 S.W.2d 41, 43 (Tex. Civ. App.—Waco 1972, writ ref'd n.r.e.) (radio tower is structure); Hussey v. Ray, 462 S.W.2d 45, 47-48 (Tex. Civ. App.—Tyler 1970, no writ) (trailer house affixed to land is not "structure of temporary character"); Abel v. Bryant, 353 S.W.2d 322, 323-24 (Tex. Civ. App.—Austin 1962, no writ) (steel air conditioning units are structures). *See generally,* Annot., 75 A.L.R.3d 1095, 1099-1118 (1977) (discussion of interpretation of "structure").

209. *See* Stewart v. Welsh, 142 Tex. 314, 317, 178 S.W.2d 506, 508 (1944) (fence is

fences, radio towers, and steel air conditioning condensing units to be structures.[210]

VIII. Development Agreements

In connection with Reciprocal Agreements, owners of various portions of a shopping center often will enter into development agreements whereby they prescribe the initial site work and preparation for the construction of buildings initially creating the shopping center and the manner in which they will share attendant financial and management responsibilities. The parties are able to achieve an economy of scale and reduce duplication by coordinating their efforts with respect to installation of utilities, soil preparation, building site preparation, paving, and other common area improvements. The parties may even enter into a joint contract to accomplish these tasks and, through the development agreement, provide escrow mechanisms for the payment of their joint obligations. The development agreement will typically contain provisions for mutual approval of plans and specifications for improvements to be located within the shopping center, coordination of timing and construction efforts, procedures for change orders in the work to be performed, obligations concerning insurance and bonding, lien waivers, and other construction-related agreements. These provisions may be included in the Reciprocal Agreement, but because they are temporary in nature, they typically are left out.

IX. The Reciprocal Agreement as an Alternative to a Lease

Retailers who occupy portions of a shopping center may do so either as owners of fee simple to that portion of the shopping center or as tenants under leases demising that portion of the shopping center. In either case, the developer will essentially control the occupancy of the balance of the shopping center by either

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structure in broad sense, but, narrowly construed, only buildings are structures); Shaver v. Hunter, 626 S.W.2d 574, 578 (Tex. Civ. App.—Amarillo 1981, no writ) (concrete slab of tennis court not a structure).

210. *See* Stewart v. Welsh, 142 Tex. 314, 317, 178 S.W.2d 506, 508 (1944) (fences); Mitchell v. Gaulding, 483 S.W.2d 41, 43 (Tex. Civ. App.—Waco 1972, writ ref'd n.r.e.) (radio towers); Abel v. Bryant, 353 S.W.2d 322, 323-24 (Tex. Civ. App.—Austin 1962, no writ) (steel air conditioning condensing units); Alexander Schroeder Lumber Co. v. Corona, 288 S.W.2d 829, 834 (Tex. Civ. App.—Galveston 1956, writ ref'd n.r.e.) (fences).

leasing it to other retailers or through a combination of leasing and sales to other retailers. The various participants may be identified as the retailer who leases his site (the "tenant"), the retailer who owns his site (the "owner"), and the developer, representing current and future retailers. The relationship between the owner and the developer is in many ways similar to the relationship which exists between the tenant and the developer. Although the tenant owns the right to occupy its portion of the shopping center for only a limited period of time, in each relationship the parties must peacefully coexist as co-occupants of a unified development for some period of time. Obviously at the termination of his lease, the tenant no longer owns any rights in his portion of the shopping center and the relationship terminates; during the lease, however, the right of occupancy which exists on behalf of a tenant is virtually as extensive as the rights which inure to the owner, and the needs of the tenant during the lease are certainly very much like the needs of the owner. Because, on one hand, the tenant leases his space for a limited period of time and, on the other hand, the owner owns his portion of the shopping center does not of and by itself justify distinctions between their respective needs and obligations.

In some regards a lease serves the same functions as a Reciprocal Agreement.[211] Each portion of the Reciprocal Agreement regulates in some manner the rights of the parties to use each other's land and restricts the manner in which each party may use its portion of the shopping center. Logically, the legal relationships created by a Reciprocal Agreement and a lease should be relatively similar; in practice, they often are not. For whatever reason the rights of tenants to use the property of the developer is generally far more restricted and less explicit than those of owners. Correspondingly, the restrictions on how a tenant may use his portion of the shopping center are often more burdensome than those restrictions which are placed on an owner. These distinctions are not necessarily logical, but are no doubt based in part on subconscious value perceptions concerning fee simple ownership. To be sure, the owner pays an initially much greater price for his right to occupy that portion of the shopping center than does the tenant. This distinc-

211. For discussions of leases in the commercial retail context, see generally M. FRIEDMAN, FRIEDMAN ON LEASES (P.L.I. 1974); Kemph, *Drafting Commercial Leases*, 10 REAL EST. L.J. 99, (1981); Annot., 48 A.L.R.3d 287, 289-310 (1973).

tion is not conclusive, however, since rental rates contained in a lease are generally a factor of the assumed fair market value of that portion of the shopping center at the time the lease is made. The rental is structured to assure the landlord a fair market value return on the perceived amount of investment represented by that portion of the shopping center. Moreover, if the owner finances his investment, his out-of-pocket expenses may be similar to the rental paid by a tenant.

The fundamental premise which is overlooked by the various participants in these different relationships is that the most efficient and orderly manner to operate a shopping center to establish the most inviting retail environment does not change in relation to the ownership structure of the shopping center. Some distinctions are obviously required to equitably allocate economic burdens based upon the relative economic commitments of each of the participants to the long-term life of the shopping center; to the extent the owner accepts the financial risk of his property declining in value, he should be fully rewarded if his property appreciates in value. The noneconomic rights and obligations of the parties, however, should arguably remain the same. Again, in practice they do not. To illustrate some of these possibly illogical distinctions, the following portions of this section will analyze some provisions commonly found in major-tenant leases and Reciprocal Agreements. It must be kept in mind that the relative bargaining strength of the parties, as well as the characteristics of the shopping center site, often dictate the terms upon which agreements are reached. The following is, therefore, extremely general and simplified.

A. *Right to Use the Building Occupied*

In a typcial major-tenant lease, the uses to which the building may be put are limited in several different manners. As a threshold matter, the tenant generally covenants to use the building in a manner consistent with all laws, ordinances, rules, and regulations of governmental authorities. In a well drafted Reciprocal Agreement a similar covenant is generally found.

Another limitation which is often found in a lease prescribes permissible businesses which may be conducted from the demised premises. Thus, a tenant may agree to operate only a certain type of retail business from the demised premises without the landlord's consent, whereas it would be unusual for an owner to agree to a

similar limitation in a Reciprocal Agreement. More common, although vigorously negotiated, is a prohibition against businesses which may be conducted from the portion of the shopping center owned by the retailer; that is, the owner may, on occasion, agree in a Reciprocal Agreement that he may conduct any type of retail business other than the prohibited uses. In a Reciprocal Agreement, this type of provision often applies to the developer as well. In a lease, however, the developer may agree not to lease to competitors of the tenant retailer, but he will seldom agree to a broad category of users to whom he will not lease. The developer is concerned for the quality of the tenant mix of the shopping center. These concerns are no more and no less appropriate whether the developer is dealing with a tenant or an owner. The retailer, whether he be tenant or owner, has legitimate concerns for flexibility in his assortment of goods, which do not vary whether he owns or leases. Nevertheless, significant difference exists here with respect to how these issues are resolved in leases and Reciprocal Agreements.

B. *Right to Use Common Area Immediately Surrounding the Building Occupied*

Often, a lease will describe the demised premises as only that portion of the building which the retailer actually occupies and not including any portion of the common area. To the contrary, an owner invariably owns a portion of the common area of the shopping center in order to comply with applicable zoning codes relating to parking requirements. Thus, the owner, by virtue of his ownership of a portion of the common area, necessarily exercises greater dominion and control over such area than the retailer as a tenant. The tenant often is afforded no more protection with respect to the common area directly surrounding the portion of the building which he occupies than with any other portion of the common area. A retailer has bona fide reasons for being more concerned about the common area immediately surrounding his place of business than in portions of the common area far removed from his store; accordingly, it would seem appropriate to afford the retailer, whether he be a tenant or owner, with greater control over that area. In fact, some major-tenant leases do identify critical portions of the common area of the shopping center in relation to the retailer's business with respect to which no changes or alterations

may be made without the retailer's consent. This, in effect, places the tenant in essentially the same position as the owner.

C. *Rights of the Retailer to Use the Balance of the Shopping Center*

Obviously, each retailer operating in a shopping center requires access for himself and his various business invitees to and from all portions of the shopping center. The fundamental premise of a shopping center is to functionally integrate each of the businesses as an operating whole. The Reciprocal Agreement accomplishes this by virtue of a variety of easements reciprocally granted from each owner to the others. Rarely are easements for access to and from other portions of the shopping center identified in a lease, although there is no reason why an easement in favor of a leasehold estate may not be granted. In such case, the easement would exist during the term of the leasehold estate and would terminate upon the termination of the leasehold estate. Functionally, the tenant may be afforded similar protection, however, by virtue of covenants by the landlord not to make material modifications in the common area from that shown on a site plan attached to the lease and to maintain those accesses in good condition. To be sure, the tenant without easement rights may not fare as well in condemnation proceedings concerning portions of the common area since he may not own property interests deserving of compensation, nor may he have an insurable interest with respect to the common area; moreover, he will probably not have the right to pave or maintain the common area if the landlord should neglect a portion of it, as he would as the beneficiary of an easement. In spite of all this, he achieves his primary goal, which is to obtain access throughout the shopping center if he obtains protective covenants from the landlord. These provisions are not found in all leases, whereas easements are almost always granted in all Reciprocal Agreements. To the extent that the tenant fails to obtain adequate protection in the form of covenants from the landlord prohibiting changes to the common area and requiring maintenance, an illogical distinction exists between the rights of the tenant and the owner in this regard.

D. *Right of the Retailer to Substitute for Himself Another Retailer as an Assignee or as a Purchaser*

Generally leases contain strict prohibitions against the tenant assigning or subletting the demised premises to another user; there are often exceptions provided for corporate reorganizations and for assignments or subletting with the consent of the landlord. Developers often seek and obtain a covenant that any increased rent which may be obtained in connection with an assignment or subletting will inure to the benefit of the landlord and not the tenant. To the contrary, in many Reciprocal Agreements, no restriction exists against the owner in connection with the prospective sale of his portion of the shopping center. Economic considerations suggest that the owner should obtain for his own benefit any advantages to ownership of the land. At the same time, however, after removing economic considerations, the developer's concern for controlling the tenant mix of the shopping center and preserving the value of his investment by assuring that a responsible and attractive tenant anchor the shopping center is no more or less valid because he is dealing with a tenant or an owner. The developer may be protected by obtaining a right of first refusal or a purchase option structured to allocate to the retailer all of the economic gain to be obtained in connection with the sale of his portion of the shopping center.

E. *Obligation of the Retailer to Continuously Operate its Business*

Leases may contain provisions obligating the tenant to open and operate for some period of time, depending on the relative bargaining strength of the parties. In a lease which does contain such a covenant, generally the landlord's sole option when the tenant does not open and operate is to terminate the lease. In Reciprocal Agreements, distinctions are drawn often between the obligation to construct a building and open for business and an obligation to continuously occupy the building. Generally, owners are willing to agree to construct their building and open their business within a negotiated period of time; however, they are not often willing to agree to continuously occupy their building for any period after their initial opening. Given the developer's concern for tenant mix and for a fully operating shopping center to protect his investment, the developer may desire the option to terminate the right of the

owner to occupy his parcel by repurchasing that parcel, which effectively places the developer in the same position as in a lease. To protect the owner's legitimate economic concerns, the purchase price for the owner's portion of a shopping center should be based upon its fair market value at that time. By removing the economic considerations in this fashion, a provision of this nature in a Reciprocal Agreement will place the parties in as similar a position as possible to that which is often found in a lease.

X. CONCLUSION

Reciprocal Agreements, although potentially intimidating due to their breadth, are generally the written manifestation of common sense understandings of real estate developers and retailers as to how best to plan a shopping center. When broken into its components—easements, restrictions, affirmative covenants, and miscellaneous provisions—the Reciprocal Agreement becomes much more manageable. In virtually each area of a Reciprocal Agreement, the draftsman is free to prescribe those rules and provisions as the parties to the Reciprocal Agreement may deem appropriate without restraint from the common law; his failure to fully provide for every forseeable eventuality will not be catastrophic for the common law will fill many gaps. The common law may not do so, however, in the manner expected by modern real estate developers and retailers. The draftsman should use care in his choice and definition of words and phrases; again, the common law has defined many of these words and phrases, but not necessarily as the parties to a Reciprocal Agreement would expect. In counseling with a client, either developer or retailer, the attorney should challenge conventional methods of allocating rights and obligations if not well reasoned. Perhaps most of all, the attorney should urge the client to reach fair and equitable agreements. As the name of the agreement itself implies, one never knows on which side of an issue he will find himself when dealing with a Reciprocal Agreement.