

Master Communications Easements in the Fiber Age

This approach maximizes developer rights while providing incentives to build fiber

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Access to the latest broadband services is quickly becoming a necessity for new homebuyers. As a direct result, many new homebuyers now consider availability of these services when making home buying decisions.

In the past, when telephone and video services were fairly standard, developers gave little thought to what communications services might be available in their new housing developments. Today, meeting the expectations of increasingly tech-savvy homebuyers requires that developers ensure that advanced broadband services are available in their new developments. It is for this reason that more and more new residential communities in the United States include fiber-to-the-home (FTTH) communications solutions as an amenity.

The successful implementation of a FTTH (or “wired community”) arrangement almost inevitably requires that the developer retain control over access to the community by communications service providers. Controlling access allows the developer to offer exclusive arrangements to service providers. That’s an incentive for them to construct state-of-the-art fiber facilities and to deliver the latest fiber-enabled voice, video, Internet, and home monitoring services.

A Master Communications Easement (or “MCE”) arrangement also allows the developer to obtain these services in bulk for the community as a whole on terms that are more favorable to the residents than the residents individually could achieve. This is because the selected services provider is assured

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of a higher customer take rate that will generate a revenue stream sufficient to justify lower prices to residents while also covering the significant up-front costs inherent in deploying fiber facilities.

Developers and property owners can retain control over access to their communities through the use of a MCE. This article will explain the usual elements of a MCE, describe how one typically creates a MCE, and provide a brief outline of some of the recurring strategic and legal issues associated with using a MCE in a wired community arrangement.

The Basics of the Master Communications Easement

The MCE is a private easement (actually a bundle of several easements) that authorizes both the installation of communications infrastructure within a new housing or multi-family development and the provision of communications services to homeowners. The MCE typically is exclusive, where permitted under state law. This means that communications facilities and services can only be provided on the property with the express consent of the holder (or grantee) of the MCE.

Because a MCE limits service provider access to the community, the penetration or market share of the preferred service provider is likely to be quite high if not 100 percent.

This prospect of high penetration is often the only economically feasible way to support the capital investment necessary to construct and operate a state-of-the-art FTTH communications infrastructure. Absent the availability of preferential or exclusive access by a service provider to the development, such infrastructure might not be deployed in many instances. A MCE also better positions the developer to receive compensation from the selected service provider for providing the preferential or exclusive right to serve the community.

When drafting a MCE, it is important to preserve the distinction between the communications infrastructure (*i.e.*, the plant in the ground) and the services provided *over* that infrastructure. This preserves the greatest amount of flexibility in structuring wired community transactions.

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Distinguishing between communications infrastructure and the services provided over that infrastructure also permits possibly billing for the use and enjoyment of the infrastructure separately from charges for the communications services.

In any event, these distinct rights should, at a minimum, be taken into account when developing a wired community strategy that involves a MCE.

It also is advisable to define “communications infrastructure” and “communications services” broadly enough to future-proof the MCE. While somewhat circular, “communications infrastructure” should be defined to include the tangible personal property related to the provision of “communications services.” For its part, “communications services” should be defined to include (in addition to voice, video, Internet and security services) other communications, data and information services that can be provided over the communications infrastructure.

The stated purposes of the MCE should include, in addition to the obvious purposes of installing and maintaining communications infrastructure, the marketing and provision of communications services within the community and the use of the communications infrastructure to serve end users located *outside* of the community.

Multiple Easements within the MCE

The MCE typically grants several easements over the property. While at times this may seem redundant, these easements serve separate legal purposes. An all-encompassing “blanket” easement covering the entire property gives the developer and the selected services provider maximum flexibility for locating the communications infrastructure, while also precluding unauthorized provision of communications services anywhere in the com-

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munity. A “perimeter” or “moat” easement around the inside boundary of the property typically also is included in the MCE. The perimeter easement effectively seals off the community from unauthorized access by other service providers.

It also is advisable for the MCE to grant a “common area” easement with respect to any existing or future common area or common property that has been or may be conveyed to the homeowners association for the community. Depending on when the MCE is granted, the HOA for the community sometimes must join in the grant of the MCE to cover common property previously conveyed to the HOA. If the MCE is granted before the HOA is formed or before it assumes control over any common property, then the HOA’s title to the common property will be encumbered by the previously granted MCE. In addition to these three easements, a specific “access” easement for ingress and egress at the property also is included in the typical MCE.

A sometimes-contentious easement often included in the MCE relates to the granting of a private easement within any road, street or highway within the community and the continuation of such private easement following the public dedication of such roadway or any public right-of-way. The dedication process itself should not negate any pre-existing private easement in the roadway or right-of-way to be dedicated.

Under this approach, the public au-

thority receives the dedicated roadway or right-of-way subject to the pre-existing private easement. This also preserves the ability of the holder of the private roadway easement to take the position that its communications infrastructure located under the public roadway or within the area subject to the public right-of-way is actually within its private easement. This can be useful when trying to avoid obtaining a video franchise to provide services in the development.

Before deciding to create a private communications easement in roads or rights-of-way that are to be dedicated to the public use, there are a number of considerations that should be taken into account. For example, local franchising authorities sometimes require a wired community provider that is offering video services to obtain a franchise, even if it holds a pre-existing private easement within the public right-of-way. (Under federal law, local franchising authorities are permitted to require that video service providers obtain a franchise to locate communications infrastructure in the public right-of-way.)

In addition, local authorities who are unfamiliar with having private easements embedded in a dedicated roadway or public right-of-way sometimes threaten to delay the dedication in order to review the legalities of the private roadway easement. Developers typically want to avoid any delay in dedication because it also delays their ability to sell lots in the development.

As a consequence, the roadway ease-

ment provisions sometimes are redrafted or even deleted in order to placate the local authorities and avoid these delays. Of course, elimination of the private roadway easement may result in the need for the selected video services provider to apply for a local franchise.

Creating A Master Communications Easement

It is imperative that the developer or property owner takes steps during the initial planning of the development to preserve its ability to grant a MCE. The plat for the property should expressly state, in clear and unequivocal language, that any public utility easements or public rights-of-way desig-

public utility easements are available for the transmission of communications services by public service companies or by third party communications service providers unless the easement expressly restricts such use. In addition to restricting the use of utility easements, the plat also should affirmatively state that the property owner reserves for itself the exclusive right to authorize both the installation of communications infrastructure and the provision of communications services within the property.

In addition to the plat, the Declaration of Covenants, Conditions and Restrictions (“CC&Rs”) for the development also should expressly permit

should confirm that the MCE and any sub-easements or licenses granted thereunder will not be subject to the lender’s mortgage on the property, or at least will not be disturbed by the lender if it forecloses or otherwise exercises its rights under the mortgage.

Granting a MCE

Once the proper groundwork has been laid, the next step is for the developer or property owner to grant a MCE. One approach often taken in wired community arrangements involves the developer granting the MCE to a wholly-owned special purpose entity (“SPE”), formed to act as the communications gatekeeper for the community. Having the developer’s SPE hold the MCE allows the developer to continue managing the relationships with the selected service providers, even after the developer turns over management of the community to a homeowners’ association or similar organization.

This step also moves the legal and contractual issues associated with a MCE away from the property owner, which often also is a special purpose entity of the developer formed for the purpose of acquiring and developing the property. Instead, the MCE is held by a separate entity whose existence and financial future is separate, to a certain extent, from that of the property owner and the developer.

A MCE granted by a developer to its SPE usually is exclusive and perpetual. It also expressly provides for the subsequent grant by the SPE of sub-easements and licenses (exclusive or non-exclusive; perpetual or limited in duration) to owners of the communications infrastructure and providers of the communications services at the property.

There are a few states that regulate the ability of landowners to enter into exclusive arrangements with communications providers for services to new housing developments. When the developer grants the MCE to its special

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nated on the plat are only for use by public service companies and that telecommunications services providers may access the property only pursuant to a private easement granted by the property owner.

The property owner also should limit the scope of any utility easement to the specific utility service being provided by the company obtaining the easement (such as power, gas or water) and expressly preclude use of such public utility easement for communications services.

Recent court decisions in several states, including Florida, Georgia and Washington, support the notion that

the creation of a MCE. It also should expressly authorize the developer to arrange for the installation of communications infrastructure and the provision of communications services to the community.

To this end, it is advisable to adopt language in the CC&Rs that is generic in nature. This allows the developer to maintain maximum flexibility regarding the structuring of wired community arrangements. It also allows for changes in law and other circumstances.

Finally, the developer usually needs to obtain its lender’s consent to the creation of the MCE. The lender also

purpose entity, there are ways for a MCE to be exclusive without running afoul of these state laws.

One way to achieve this is by structuring the wired community arrangements so that the SPE is not the owner of the communications infrastructure or the provider of the communications services. Instead, the SPE in turn grants *non-exclusive* sub-easements or licenses to the owners of the communications infrastructure and/or providers of services.

Notwithstanding the non-exclusivity of such sub-easements and licenses, even a properly structured non-exclusive wired community arrangement usually results in other service providers opting to forego spending capital dollars to wire a community that already is receiving fiber-enabled services at rates that are usually lower than otherwise available at retail.

Third-Party Access to Wired Communities

During the earliest stages of developing a wired community strategy, developers and service providers should consider making provisions for allowing other third party providers to obtain access to the community. There are a number of reasons for this. The developer (or later, the HOA) simply may want to give residents in the development a choice of different providers. Or the developer may want to preserve the option of bringing in a third party provider if the initial selected provider proves unable to deliver the services, affordability, or level of quality that the residents require.

In addition, creating contingencies for providing future third party access should preserve the wired community structure in the event that there is some shift in state or federal policy that affects the rights of developers and/or service providers to enter into exclusive or preferred provider arrangements.

In order to provide a means for

third party access within the wired community arrangement structure, it is advisable to require the holder of the MCE or a sub-easement granted under it to provide access, on just and reasonable rates, terms and conditions, to any qualified third party provider that requests access.

Such access can be granted by allowing the use of the existing communications infrastructure or by granting a license to use the easements. The rates and terms for third party access need not be spelled out in advance, but can be left for future good faith negotiations by the holder of the MCE or sub-easement and the third party service provider.

The likelihood of another communications service provider paying even minimal amounts for access to a community that already is receiving fiber-enabled services at bulk service rates is somewhat remote, given the current economics of the industry.

Conclusion

The MCE is one of several sophisticated legal arrangements that lead to a successful wired community arrangement for a master planned residential community. Proper planning for, and recordation of, a well crafted MCE preserves the developer's right to control access to the community by communications services providers. It also helps support the financial decision to commit capital dollars to the build out of a fiber communications infrastructure in the community. As such, MCEs are an invaluable tool for ensuring that the latest suite of broadband services is available to new homebuyers, especially in a more remotely located new housing development. **BBP**

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