Legal Issues In Mixed Use Real Estate Developments

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What is a Mixed Use Development?

A real estate development that integrates different compatible land uses within the same area, structure, building or group of buildings, including retail, commercial, residential, office, and/or other uses.

A. A Brief History of Mixed Use Developments
   a. Mixed use developments were the most common forms of cities and towns before cars and other transportation. Everything needed to be within walking distance.
   b. During the Industrial Age, issues such as (i) pollution, (ii) health and safety factors, (iii) property values and (iv) other factors caused manufacturing to be separated from residential and other land uses.
   c. Mixed use developments have come back into favor as municipalities, engineers, planners and developers have re-discovered the benefits of this type of land planning.

B. The Need for Mixed Use Developments
   a. Benefits include:
      i. Efficient increase in density
      ii. Transform declining neighborhoods into lively ones
      iii. Reduce traffic congestion
      iv. Preserve space for parks and outdoor recreation

C. Legal Issues – Land Acquisition
   a. Mixed use developments often require large tracts of land from different sources.
   b. Assembling patchwork land from multiple owners
      i. Watch for “holdouts”
      ii. If a “holdout” will not sell, look at other possessory interests
      iii. Be prepared to design the project around the “holdout”
   c. Title Encumbrances
      i. Many easements and other encumbrances many need to be abandoned or moved
ii. Title company may insure over certain encumbrances
iii. Good title review will be essential to lenders
d. Survey issues and other physical conditions
   i. Current improvements
   ii. Encroachments
   iii. Other survey items
e. Prescriptive rights
   i. Look for evidence of use
   ii. Need to understand history of property
   iii. Be flexible in finding solutions

D. Legal Issues – Planning and Design
   a. Designing the project
      i. Attorneys should be involved in this phase of project
      ii. Understand land uses and locations within the project including parcel and lot lines
   b. Lot and parcel separations
   c. Designing parking
      i. Parking for a project should be carefully considered and addressed
         i. Who owns the parking?
         ii. How is parking allocated?
         iii. How are parking rights given to users/tenants?
         iv. Who gets preferred parking stalls?
         v. Impact of mass transit
         vi. Keep parking for different users as separate as possible

E. Legal Issues – Zoning and Entitlements
   a. Involving the municipality
      i. Get the municipality involved early
      ii. Municipality may not have suitable zoning districts or regimes
      iii. May take years and can be political
   b. Finding the right zoning regime or district
      i. Use a mixed use zoning district
      ii. Condominium regime
      iii. Variances may be necessary
      iv. Draft your own zoning district
c. DRAPER CITY MUNICIPAL CODE
d. ARTICLE 4 - SPECIAL PURPOSE AND OVERLAY ZONES
e. Chapter 9-18 COMMERCIAL SPECIAL DISTRICTS (CSD)
f. Section:
F. Legal Issues – Legal Subdivisions
   a. Subdividing property within mixed use developments
      i. Many times the assembled properties need to be subdivided differently
      ii. Understand the subdivision laws of the jurisdiction
      iii. In Utah, boundary line agreements are usually simpler and just as effective as legal subdivisions (Utah Code §57-1-45)
      iv. Watch out for unintended consequences of subdivisions
      v. 3-D subdivisions are difficult and complicated – work with an experienced surveyor/engineer
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G. Legal Issues – Legal Documentation
   a. Declarations of covenants, conditions, and restrictions
      i. Master CC&Rs
      ii. Use/building specific CC&Rs
         i. Residential
         ii. Office
         iii. Retail
   b. Issues related to CC&Rs
      i. Understand the restricted and permitted uses
      ii. Residential should be separated from other uses
      iii. Allocation of costs common areas
      iv. Casualty and condemnation rights
      v. Lender protections
      vi. Architectural review committee
      vii. Developer control period
      viii. General control
   c. Development agreements (multiple owners)
      i. Who constructs the improvements?
      ii. How are development costs allocated?
      iii. Who will maintain the improvements?
      iv. How will maintenance costs be allocated?
   d. Reciprocal easement agreements
i. Cross access easements  
ii. Pedestrian/Vehicular/Vertical transportation  
iii. Parking easements  
iv. Structural and lateral support easements  
v. Utility easements  
vi. Encroachments  
vii. Noise, vibrations, etc.

e. Construction contracts  
i. AIA forms are most often used  
ii. Make sure you properly address change orders  
iii. Resolve conflicts between multiple contractors  

f. Formation documentation for owners associations  
i. Usually multiple associations are involved  
ii. Residential vs. commercial uses  
iii. Non-profit vs. for profit entities  
iv. For condominium developments, corporate bylaws must be attached to declaration

g. Other documentation:  
i. Condominium/residential unit sales contracts  
ii. Form leases for retail/commercial/office spaces  
iii. Disclosure documentation  
iv. Property management contracts

H. Legal Issues – Construction  
   a. Construction related issues:  
i. Permits and approvals  
ii. Demolition  
iii. Construction  
   b. Most important aspect of construction:  
i. Remain flexible and ready to help – construction issues and problems arise all the time and often they are emergencies

I. Legal Issues – Operations, Management and Maintenance  
   a. Issues to consider:  
i. Who will run the project?  
ii. Will there be multiple property managers for the different uses?  
iii. How will disputes between users/tenants be resolved?

J. Legal Issues – Financing  
   a. Lending is difficult  
   b. Involve the lender early
c. Lender will usually want to approve the
d. legal documentation
e. Be willing to be flexible
f. May need to have multiple phases in
g. the development

K. Review
a. Remember:
   i. Land Acquisition
      i. May require multiple purchases
      ii. Need time to work through title, survey, and prescriptive rights issues
b. Design/Planning
   i. Lawyers need to be involved
c. Zoning and Entitlements
   i. Involve the municipality early
   ii. May need to draft your own code
d. Legal Documentation
   i. Layers of CC&Rs
   ii. Development agreements
   iii. Reciprocal easement agreements
   iv. Construction contracts
   v. Owners association formation documents
   vi. Sales contracts
   vii. Form leases
   viii. Disclosures
   ix. Property management contracts
e. Construction
   i. Be ready to help at any time
f. Operations, Management and Maintenance
   i. Pick the right property manager
   ii. Be ready to resolve disputes between users/tenants
g. Financing
   i. Be flexible and involve the lender early