

**Wednesday, October 23, 2019  
2:00 M – 3:15 PM**

**Peer to Peer Session 1**

**All Pumped Up: From Coffee to Crunches & Bikes to Beds,  
Strategies and Challenges in Mixed Use Projects**

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## Mixed-Use Project Planning Checklist

The world of mixed use development is no longer confined to cities, they are increasingly also a suburban phenomenon. To meet today's lifestyles, developers increasingly are creating "villages" with multiple uses to attract and captivate their target markets – projects that require thoughtful business and legal planning to successfully mix disparate users and their competing interests.

This is a comprehensive, but by no means all-inclusive, list of issues that must be understood before drafting a set of documents that will effectively facilitate the development and operation of a successful mixed use project.

- 1) What uses should the project make room for?
  - a) More than other types of projects, mixed use projects have a tendency to evolve over the life of the project. Whether uses not initially anticipated present themselves before project completion or after, during the operation phase of the project, agreements that allow flexibility for the owner to take advantage of new opportunities position the project to be more likely to be successful in the long run.
  - b) Typical mixed use components of primarily retail projects:
    - i) Residential
      - (1) Short term stays
        - (a) Traditional hotels
        - (b) Extended stay hotels
      - (2) Long term stays
        - (a) Apartments
        - (b) Condominiums
    - ii) Experiential Activities
      - (1) Restaurants
      - (2) Health and fitness
      - (3) Entertainment
      - (4) Restaurants
    - iii) Office
      - (1) Shared office space environments
      - (2) Traditional office space
        - (a) Creative workspaces
        - (b) Medical office
        - (c) Service/governmental office
        - (d) Corporate office
  - c) Zoning issues
    - i) Entitlements – Existing or underlying zoning classifications will often not anticipate the complexities of a mixed use project, requiring a thorough exploration of what tools exist in the applicable municipality to achieve the goals for the development that is being planned. Early, thoughtfully planned, interactions with governmental authorities, organized community groups and neighbors will inform the development team of potential winning strategies.
      - (1) Zoning classifications – Understanding the underlying zoning classifications of the site, the history of the governing authorities' recent previous reactions to proposals for other projects within the same and similar zoning classifications, and the wishes and expectations of the governing authorities with jurisdiction over the zoning process for the site are critical.

- (a) Existing zoning
  - (b) Planned Unit Developments – are they available, how have they been used in the past, is the staff for the governing authority favorably disposed to taking a creative approach to their use, or do they look at them as a means of locking in controls that would not otherwise be available to them, without much gain in development flexibility?
  - (c) Specialized, contract or custom zoning. Is this option available in the jurisdiction? What are its pros and cons for your project?
    - (i) Are incentives available for providing amenities, community resources?
    - (ii) Are you able to accomplish otherwise hard to achieve results, such as pay a fee for public greenspace protection to achieve a lower greenspace requirement on a project parcel that either is too tight to provide the regularly required greenspace or where such a space would be hard to adequately maintain?
- (2) Parking requirements
- (a) Parking sharing efficiencies – Reduced parking diminishes cost for both initial construction and operating costs.
    - (i) Uses that are complementary parking users will use the same spaces used at differing times (more on this later).
    - (ii) Mass transit and alternative transit - Where will the people come from that will use the project? In urban areas the traffic is increasingly not only from individual automobiles, but also from mass transit, ride sharing, bicycles and scooters. Anticipate dealing with each of these modes of transportation.
  - (b) Constituencies – Who will be affected by how the project deals with parking and transportation, and what are their concerns?
    - (i) Governmental – More and more regulatory authorities are coming to understand the changing role of the automobile in civic life. They are looking for robust, creative means to serve the transportation needs that a new exciting project will bring to their community, but are often looking to outdated zoning regulations to guide their decisions. Being prepared with a well-researched and thoroughly documented needs analysis from a professional they trust is key to gaining understanding and trust.
    - (ii) End user
      1. Retail – Like regulatory authorities, retailers are gaining a new understanding on how their customer gets to their door. However, they still are greatly concerned about the availability of convenient adequate parking, in addition to ensuring that their clients arriving by other means are not inconvenienced.
      2. Office – Office users parking needs vary depending on their employee workforce, but have not generally changed their views on parking needs much. Even if an occupant with a definite understanding that it will need less than typical parking facilities is identified, having reserves that will ensure that a replacement user does not feel constricted is advisable.
      3. Entertainment – With a wide range of potential users falling into this category, it will be important to understand the needs of the occupant.
      4. Health – Parking needs for this use category are evolving slower, with many patients and users still arriving by auto.
- (3) Uses
- (a) Allowed – Matching as many potential uses of the project to the allowed uses for the zoning (including PUD or contract zone) will provide greater flexibility, but (especially with PUD's and contract zoning) municipalities will want to instill as much control as they are able.
  - (b) Prohibited – Anticipate if any of the planned uses are carried on any list of prohibited uses, either governmental or private restrictions and form a plan to obtain any necessary waivers or zone changes.

- (c) Required - Understand if there are uses that will need to be included in the project, and that may need to be completed in order to get occupancy or operating approvals.
- (4) Neighborhood planning
  - (a) Identifying allies – Motivate those with something to gain from the development to be champions with various constituencies.
  - (b) Neutralizing opponents – Provide education that addresses any unfounded concerns in various forums and formats to reach as many opponents and on-the-fence constituents as possible. Recruit members of the community to speak up on behalf of the project to counter NIMBYism.
- 2) What features or facilities will be common to all or some of the uses and phases?
  - a) Are there transportation facilities that need to be considered?
    - i) Private facilities like paid parking decks, valet parking, bicycle or scooter sharing
    - ii) Public facilities
      - (1) Paid for with public funding?
        - (a) Commuter rail or buses
        - (b) Commuter
      - (2) Paid for with private funds – an amenity for the project?
  - b) Will there be park or recreational facilities?
- 3) Who will be involved in the project?
  - a) Will there be one developer over the entire project, or will various portions be done by developers with differing expertise?
  - b) Will the project have one lender, or different lenders for different phases or portions of the project?
  - c) Will there be primary tenants whose approval will be required regarding the big picture decisions about the project (e.g., access, governance, potential uses).
- 4) What is the best ownership structure for the project?
  - a) Single fee simple will typically only work when a single developer with a single source of funds (as opposed to different lenders for different components) is developing the project and will own it after completion
  - b) Long term leases offer structuring flexibility, but present challenges for lenders and will limit the number of available lending sources
    - i) Ground leases are typically good choices for hotels and restaurants, which have established sophisticated funding sources that are well versed in financing leasehold interests, but archetypally are less flexible than other structures.
    - ii) Master leases can be very flexible in how they are initially set up, but can complicate the ownership and financing options by being less flexible once in place.
    - iii) Long lease terms will be required to enable the lessees to conduct their activities, finance their investments and keep the value of their interests intact over the typical life of an investment. Terms of 99 years or more are not uncommon.
  - c) Condominium
    - i) Master Association – A master association can be used to govern the overall development, with sub-associations to govern the different components of the project. The control of these associations can be molded to suit the development, but statutory requirements must be considered.
    - ii) Sub-Associations can be arranged to separate uses, operating expense pools or governance issues
    - iii) Operational requirements
      - (1) Annual meeting
      - (2) Voting structure must be established in an equitable manner, which is sometimes dictated by statute.
      - (3) Assessment regimes are often controlled by statute as well.

- (4) Compliance with local condominium laws – These laws may change over time. Does the certainty of present statutory guidance outweigh the possibility that unfavorable legislative changes may be made?

d) Vertical subdivision

- i) Must understand the pros and cons of the local subdivision regulations related to divisions of property without setbacks and on vertical planes.
- ii) Operational and access easements will need to be carefully crafted to allow operation of integrated buildings over long periods of time.
- iii) Standards for future cooperation must be established by the governing documents:
  - (1) Related to adaptive changes over time to avoid building obsolescence
  - (2) Related to casualty, condemnation, rebuilding and support

5) Parking Management and Control

a) Quantity

- i) Will there be complementary uses that will use the same spaces at differing times?
  - (1) Office and entertainment? Sharing parking between an office user with daytime only needs and an entertainment use that predominately needs nighttime and weekend parking is feasible.
  - (2) Commuting and residential? A residential parking facility can typically house a number of commuter parkers while the residents are at work themselves.

b) Will you need to control parking uses in differing areas?

i) Physical controls

- (1) Gates and barriers – must be allowed by operating documents
- (2) Reserved parking areas for occupants of residential or hotel components offer available spaces and some measure of security, but often sacrifice efficiency with other users' parking.

ii) Soft controls

- (1) Valet Parking – where will it be available, times for service and who pays for service?
- (2) Ride Share/Taxi pickup areas
- (3) Ride Share/Taxi waiting areas
- (4) Parking fee validation
  - (a) Provided by individual businesses, arranged with parking contractor individually or in a group
  - (b) Provided by retail component, arranged with parking contractor or, if retail component also owns the parking, simply as a way to control outsiders from parking
- (5) Differing parking fee charge rates depending on user
  - (a) Occupant free parking
  - (b) Peak time parking rates
  - (c) Extended parking penalties (e.g., first two hours free, then \$ per hour, until over six hours, then \$\$\$ per hour) This can also be fashioned to address peak parking needs for when a nearby event is driving parking, with an event charge that can be waived or reduced if a receipt with a minimum purchase is shown for the time period parking occurred.

iii) Legal controls

- (1) Restricted and exclusive rights
- (2) Zoning compliance requirements

c) Parking ownership

- i) Separate parking. Will each user have its own parking fields, owned by them and accessible only to their occupants and visitors?
  - (1) If separate ownership, will shared management contract be required so that one manager controls all parking, albeit on behalf of separate owners
- ii) Shared parking.
  - (1) Construction guarantees – so that parking is available when each party needs it

(2) Who owns?

(a) Shared ownership among more than one of the components

(b) Separate ownership – fee paid for parking

(i) Gross fee paid by each component based on use

(ii) Group contracts available to various users

1. Are long-term (monthly or more) parking contracts available to general public, or only to occupants of the project?

d) Parking Revenues

i) Shared or not?

ii) How allocated among components and owners?

iii) Are parking charges to be controlled by contract or by the market?

iv) Is a cap on maximum profit level to be imposed to protect users?

6) When will the various components of the project be constructed and completed?

a) Are there long-lead portions of the project?

b) All at once or in phases?

7) Where will the various components of the project be located and how will they interact?

8) How will access needs be addressed?

a) Common entrance facilities or separated?

i) Hotel and residential may be complementary

ii) Residential and retail are most often not

iii) Office typically will require separate access, but convenience to amenities, retail and restaurant

iv) Limit access to various uses based on time of day

b) Peak demand time site access

i) Separate entrances/exits that do not interfere with other users for peak demand users

(1) Movie/entertainment

(2) Office

(3) Commuting/mass transit

ii) Traffic control – who pays for it?

c) Potential easements needed:

i) Vertical transportation

(1) Stairwells, elevators and escalators

(2) With or without access controls

(a) Timed controls or 24/7 controls

ii) Building lobbies and other entrance areas

iii) Pedestrian and vehicular traffic

iv) Utilities

(1) Horizontal and vertical easements

(2) Shared facilities easements

(3) Cost-sharing allocations

(a) Installation

(b) Maintenance, repair and replacement

(4) Metering and demand measurement

(5) Processes for increasing capacity and relocation of facilities

9) Development Coordination – if one developer is constructing the entire project, this is an often overlooked aspect of setting the project up to succeed. Over time, various components of the project may be either

financed by differing sources, or sold piecemeal to others. Any party that does not control the entire project will be concerned with how they will be able to make decisions regarding changes in the project, and how they will be able to implement those changes.

- a) Construction/Maintenance Easements
  - i) Construction Access
    - (1) Staging Areas
    - (2) Construction Vehicle Access
    - (3) Daily permissible construction work hours
    - (4) Overhead crane access
    - (5) Construction barriers, hoarding walls and traffic routing
    - (6) Site control
      - (a) Project site (not part of construction)
      - (b) Simultaneous construction projects cooperation and priorities
  - ii) Construction Encroachments/Shared Supports
    - (1) Shared foundations
    - (2) Party walls
    - (3) Support columns
- b) Processes to make changes to the project
  - i) What changes need consents?
    - (1) Site Plan changes
    - (2) Use changes
    - (3) Operational changes
  - ii) Who needs to give consents?
    - (1) Owners
      - (a) Owners Associations
        - (i) Homeowner's Association
        - (ii) Commercial Condominium Association
    - (2) Major Tenants
  - iii) Setting parameters for consents.
- c) Construction Guarantees – If there are more than one developer working on the project, with interdependent construction obligations, how does each party ensure that the other party's work is completed at the time that it will be needed?
  - i) Construction Completion Guarantees
    - (1) High net worth individuals
    - (2) Entities with substantial balance sheets and liquid assets
  - ii) Default mechanisms and self-help cure rights
  - iii) Construction bonds
  - iv) Escrowed funds
  - v) Three party agreements with lenders to allow access to funds if self-help is exercised.
- d) Obligations to cooperate
  - i) Governmental applications/approvals
  - ii) Construction inconveniences
  - iii) No build periods
  - iv) No build areas
    - (1) Height
    - (2) Light and air requirements

e) Contractor Approval Issues

i) Ability

- (1) Experience
- (2) Staffing
- (3) Financial Ability
- (4) Insurance – What are standard requirements to work on the project?

ii) Bonding – Does the contractor need to actually provide bonds or merely be able to show that they are capable of supplying the bond to show financial ability?

iii) Who must be apprised and who has approval rights over contractors on site?

iv) Labor issues

(1) Project Labor Agreement

(a) What components applies to?

- (i) Effect on PLA required components if not applicable to all components
- (ii) May need to stagger construction times so that union and non-union crews are not required to work together

(2) Living Wage Requirement

(3) Open Shop bidding

f) Cohesive Development Controls

i) Architectural and Engineering Approvals and Controls

- (1) Architectural Control Board – representation by various ownership groups
- (2) Plan approval by master developer

ii) Signage program

(1) Identification signage program

(2) Wayfinding signage program

(3) Digital display and advertising signage

(a) Who owns – where does revenue flow?

(b) Content

- (i) Access to content
- (ii) Approval of content
- (iii) Restrictions on competitors
- (iv) Process and criteria for appeals/protests regarding content or visual nuisance issues from occupants or owners

(4) Process for revising signage programs

10) Shared services - What services to the project are best shared, and how should the costs be allocated?

a) Trash pickup

i) Special trash needs

- (1) Dry / recyclable trash
- (2) Compactable retail or office waste
- (3) Compostables and wet trash
- (4) Grease and food prep disposal
- (5) Medical waste

ii) Sound isolation/pickup time limitations

b) Security

c) Central city utility services

i) Steam/hot air

- ii) Chilled water

- d) Dockmaster

- i) Delivery schedules for different users

- (1) Retail, hospitality and restaurant users need frequent and often unscheduled access

- (2) Office and residential users need long-term access for occupants to move in and move out.

- ii) Dedicated docks within shared dock area

- iii) Street delivery areas/times

- iv) Sound isolation/time limitations

- e) Day porters/on-site maintenance

## 11) Maintenance Issues

- a) Maintenance Access

- i) Routine maintenance access concerns

- ii) Construction access for replacement or renovation

- (1) Replacement or renovation that results from a planned redevelopment or remodeling of the project component versus one required after a casualty – depending on the characteristics of the project, these may have to be addressed differently.

- b) Maintenance sharing concerns

- i) Who benefits from various components and how do you share the cost of their maintenance?

- (1) Roofs

- (2) Sitework and stormwater

- (3) Parking facilities

- (4) Utilities

- (5) Exterior of the building

- ii) Who is responsible for regular maintenance?

- (1) Preparation and approval of annual budgets

- iii) How are decisions regarding unanticipated or periodic maintenance issues made? How about with regard to issues related to compliance with changing standards – either statutory or market driven. Who are the parties with a say?

- (1) Must balance the requirements of the most sensitive user type with concerns of others regarding costs

- (2) What is process for making the decisions?

- (a) Who involved?

- (i) What level of consensus must be reached? – It will probably vary depending on the cost or impact of the necessary repair

- (b) How are they informed?

- (i) Management guided?

- (ii) Bids required?

- (c) What is timing on decision?

- (3) What time frames apply to various decisions?

- (a) Emergencies imperiling injury to life or property

- (b) Non-emergency but urgent matters (e.g., sinkhole in drive or parking)

- (c) Scheduled and non-urgent matters

- iv) What are the standards for repairs and maintenance?

- (1) Quality

- (2) Timeliness

- (3) Budgeted items vs. bid approvals

- v) Contractor Approval Issues – These may closely follow the standards established for the initial development of the project, especially for large projects like an expansion, remodel or replacement of a component, but may also have reduced standards for regular maintenance and routine repair jobs.
  - c) Cure rights are often the most-negotiated of provisions, and can be among the most complicated given the differing types of entities involved and their levels of sophistication.
    - i) Equitable relief, injunction
    - ii) Right to self-help if party obligated to conduct maintenance fails to do so
    - iii) Lien rights if CAM allocations unpaid and for costs if self help cure rights employed
- 12) Operating Costs – Various components of a project will inevitably benefit to differing degrees from the maintenance of the entire project, but will all be interested in a maintaining a first class appearance to preserve appeal and value. An equitable division of payment obligations must be made to preserve the economics of each of the components, often leading to multiple layers of CAM or operating cost pools. Additionally, not all components will have the same reserves to pay for unanticipated or unusual costs, so an ability to recover amounts paid for others should be included.
- a) CAM pools
    - i) Based on component (e.g., daily office janitorial should only apply to an office component of a project)
    - ii) Based on user's benefit
      - (1) All users benefit, such as storm water management
      - (2) Not all users benefit, but more than one does, such as valet parking provided to a hotel that is shared with a restaurant row adjacent to a shopping mall
      - (3) Parking may theoretically benefit all, but may be more important to a retail component than a residential component (especially if mass transit is convenient and readily available)
      - (4) Benefit based on frequency and nature of the use (e.g., a community room may be a benefit to both a residential community and a retail community, but not of particularly high value to the residential users if they only use it once or twice a month while the retail component provides it to various outside community groups as a service to the local community)
    - iii) Based on location of maintained amenity or feature
    - iv) Based on user's control over amenity or feature (e.g., ability to prioritize use of a feature for certain time periods or uses over other users, such as ability to have exclusive use of an elevator during an event for an event center)
  - b) CAM cost risk allocation
    - i) Fixed fee may be easier to administer, perhaps with a cost escalator, if party administering is willing to take on risk of cost fluctuations. This may be preferable when the party administering the CAM pool is also the major contributor to the pool
    - ii) Cost caps and escalation controls on pro-rata allocations may provide some protections for risk averse constituencies, especially if other users are better able to take on or control the risk
    - iii) Straight pro-rata, based on
      - (1) Density
      - (2) Land area
      - (3) Square footage of improvements
- 13) Insurance
- a) Master Policy with various insured parties?
    - i) How should payment obligations be shared?
    - ii) Who administers the insurance program?
    - iii) Who administers proceeds in the event of a claim?
      - (1) Which parties must approve dispositions of proceeds?
        - (a) Owners
        - (b) Tenants

(c) Lenders

- b) Each component/owner to provide coverage?
- c) Coverage issues
  - i) Casualties that affect multiple components
  - ii) Casualties within one component that collaterally affects another component (e.g., casualty in one affects access to another, or parking component is an amenity to another component)
    - (1) Does more than one party have insurable interests in various components?
  - iii) Differing requirements of lenders on different components
    - (1) Coverage requirements differences
    - (2) Competing proceeds disposition requirements

14) Casualty and Condemnation

- a) What are repair and rebuilding obligations?
  - i) Do differing users get disparate treatment?
- b) Who administers appeal of any governmental taking?
- c) Does local or state law influence or dictate obligations of the parties (e.g., do condominium laws and regulations assert certain requirements)?