

**Wednesday, October 23, 2019**

**2:00 PM – 3:15 PM**

**Peer to Peer 1**

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

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**DESCRIPTION OF SESSION**

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.

**FACT PATTERN 1**

Developer has taken over a building that was the site of a now closed downtown department store with over 240,000 square feet of space on three floors with a walk-out level basement, plus a sub-basement with receiving facilities and parking. Roughly half of the block is occupied by a multi-level parking deck. The building is located in Polar Vortex City (PVC), a northern city with extensive second floor skyway connection, of which this building is a hub between office, entertainment and retail uses. The building has been vacant for several years due to the evolution of retail in downtown locations, and Developer envisions dividing the space into several internally connected differing uses.

The basement level has storefront glass elevations along a light rail line, and will be the home of a brew pub and tasting room. The first floor (the ground level slopes up to the opposite side of the building) has retail storefronts that are across from a pedestrian only cross street where restaurants and bars, as well as a live music concert venue are located. The second level has most of the connections to the skyways that connect the building to the surrounding office towers, and will be home to a mix of convenience retail and restaurant uses, including a fitness facility. In addition, a daycare that is sorely needed in the downtown area will be housed on this level, with a play area for children located on an adjacent rooftop.

The third level will be the home of a state agency that has extensive contact with professionals in the community. The parking facility offers well in excess of 5 spaces per thousand square feet of finished area, with the top level located on the roof of the department store building.

Developer plans to add a soaring fourth floor on the roof of the building by adding a 20 to 30 foot high glass enclosed space to house a multi-tenant ice hockey rink with seating for 2500 spectators that will be the primary practice facility for the local National Hockey League team. The team's training facilities will be located in the sub-basement level of the building. A college hockey team will call the rink their home ice. Local men's and youth hockey leagues and tournaments, as well as local and national figure skating competitions will also be hosted at the rink. The rink is expected to generate activity that will dramatically increase the foot traffic in the remainder of the building. Unfortunately, the NHL team does not expect to pay any rent, but will share operating profits from running the rink.

The way that the NHL team "pays rent" is by allowing others to use its name and logo to advertise their affiliation with the team, so the team's practice facilities open multiple levels of sponsorship opportunities, including naming rights for the

building, the rink and the parking facility as well as revenues from advertising within the rink. The sponsorship prospects and the building's location adjacent to a major entertainment district make the exterior of the building very valuable for signage, including digital billboard monetization rights.

As with many urban areas, paid parking is the norm in PVC. However, it is quite common for major tenants in buildings to be given certain parking rights without charge or at reduced costs. Developer anticipates generating significant revenue from the parking facility, but has already had to grant free parking rights to the third floor governmental office user, and may need to offer other incentives to finish leasing the remaining space in the building.

As has been the case in many US cities, PVC has experienced very strong demand for downtown housing. Developer plans to provide air rights over the parking facility, which has been constructed with the possibility of extending an additional five stories over the top of the parking. Up to 150 units could be constructed here, and several apartment developers have expressed interest.

### **QUESTIONS FOR FACT PATTERN 1:**

1. Given the many different uses, and the differing expectations of the various tenants regarding security, how do you control access? Can combined access facilities be utilized? Discuss the expectations around access and security for each of the users: sports entertainment, professional office, daycare, convenience retail and food, full service restaurant and bar, brewpub; professional hockey team. When the residential units are added over the parking, what concerns will there be? To complicate matters, the skyway connections between and through buildings are established by easements to the City and are governed by regulations similar to those applicable to public sidewalks. What agreements will be needed to document everyone's expectations, and will they differ depending on how the ownership of the building is divided (see next question)?
2. The multitude of uses and the varying types of income streams will likely dictate a need to separate the ownership of varying uses to maximize value and to tailor risk profiles to varying investors and financing sources. Not everyone that understands rent coming from office, retail and restaurant tenants can efficiently underwrite less traditional income streams, such as parking and sponsorship revenues, ice rink profits or digital signage revenues. The building and parking may be divided by vertical subdivision, condominium declaration or long term master lease. Discuss the pros and cons of each as they relate to separating the steady income streams from the more variable ones. Will separating these streams require creating on-going obligations between the separated ownership structures, and how best is that accomplished? For instance, if you separate the parking, what assurances will the owner of the retail, restaurant and office need?
3. Once a direction is chosen regarding the separation of the project into differing ownership or master lease structures, a means of arriving at decisions between the various parties must be addressed. If changes in the building are needed, who gets a say? How are their viewpoints represented? How are conflicts resolved?

### **FACT PATTERN 2**

Owner owns an existing first-class shopping center which shares certain amenities, including a lake, with a neighboring condominium.

Owner is redeveloping the shopping center so that the stores will face outward toward the street, rather than facing towards an inner courtyard. As part of the redevelopment, Owner contemplates construction of a 285-unit low-rise apartment complex, and a 300-room hotel with associated amenities such as restaurants. Owner is also building a new health club and parking garage on an outparcel. Owner's expenditures for the redevelopment of the Shopping Center are premised upon the additional traffic to be generated from the apartment and hotel developments. Owner is planning to bring in developers for the residential and hotel components.

The hotel will be built above a portion of the retail, and guests will have access between the hotel and retail through a connecting hallway and elevator

The residential component will be behind the shopping center and Owner is still in the process of determining the best means of ingress and egress to the apartments. The most practical plan is to have the road leading to the hotel serve as a road into the apartments, which would make the apartments landlocked except through the one road.

## **QUESTIONS FOR FACT PATTERN 2:**

### **1. Guaranteed Completion:**

How does the Owner ensure completion of the apartments and hotel? Discuss various mechanisms that may be appropriate. Does one type of ownership structure better accomplish this goal? Should Owner have the right to buy back the land (or condominium) after some period if the building is not erected, should the property/condo only be conveyed after completion, or does a ground lease with a termination right better protect Owner? What are the mechanisms available to protect the Owner and what is the most effective?

### **2. Cost Allocations:**

There will be shared amenities, including access roads, parking lot lighting, and the connecting passage and elevator between the hotel and retail. On what basis can the allocation of expenses be determined? How are these issues different as they apply to the shopping center and residential uses, as compared to the shopping center and hotel?

The neighboring condominium owns a lake which is shared with Owner's customers and guests pursuant to an OEA. Each parcel pays 50% of the total costs. With the additional development, many costs will increase, including those for insurance and trash removal. How can these be fairly apportioned between the parcels?

### **3. REA/Condominium Documents:**

- a. What are the advantages/disadvantages of Owner having two separate sets of governing documents, one with the hotel and one with the residential, as opposed to one set of documents incorporating all 3 stakeholders?
- b. The Owner does not want the residential or hotel parcels to detract from the shopping center. What are the best ways to ensure aesthetic compatibility, both initially and over the longer term? How does the Owner ensure that the hotel remains of equivalent quality? What would be the enforcement mechanisms available to Owner, and how can Owner best build these rights into the initial documents?
- c. What use restrictions and protected areas might the parties want, and what conflicts might arise?
- d. The only ingress and egress to the apartment parcel may be owned by the hotel and used by the residents pursuant to an REA. How will these parties resolve issues of access and traffic?