

**WHERE DO WE GO FROM HERE?
SUGGESTIONS ON STRUCTURING MIXED-USE PROJECTS**

By:

LORIN WILLIAMS COMBS

JEFF MATTHEWS

Winstead PC

Dallas, Texas

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LORIN WILLIAMS COMBS

Winstead PC
5400 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270

phone: 214.745.5753
lcombs@winstead.com

BACKGROUND, EDUCATION AND PRACTICE

Lorin Combs is an associate in the Dallas office of Winstead PC. Lorin's practice focuses primarily on condominium and mixed use development.

Before practicing law, Lorin earned a B.A. in Classics with honors from The University of Texas at Austin and a J.D. from The University of Texas School of Law where she was an editor of The Review of Litigation.

Lorin has since co-authored and presented "A Due Diligence Checklist for Condominium Developers" at the 17th Annual Advanced Real Estate Drafting Course (March 2006), "Representing the Borrower in a Securitized Loan Transaction – What You Can Negotiate and When" at the 38th Annual University of Texas Mortgage Lending Institute (September 2004) and "Texas Annotated Assignment of Rents" at the Advanced Real Estate Drafting Course (March 2003), and co-authored "Waiver and the Quest for Lender Protection", which was presented at the 37th Annual University of Texas Mortgage Lending Institute (September 2003).

In addition, Lorin is the author of "The Sky's the Limit: High-Rise, Mixed-Use and Other Condominium Development Mean Big Opportunities for Texas Lenders", which was published in the April 2007 edition of the Texas Bar Journal and is the federal courts editor for the Real Estate, Probate and Trust Law Section Reporter of the Texas State Bar.

Lorin is also a member of the State Bar of Texas, the Dallas Bar Association, the Women's Finance Exchange, the Dallas Association of Young Lawyers and the Longhorn Foundation, and was also a member of the 2002-2003 Dallas Association of Young Lawyers Leadership Class.

JEFFREY W. MATTHEWS

Winstead PC
5400 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270

phone: 214.745.5634

fax: 214.745.5390

jmatthews@winstead.com

BACKGROUND, EDUCATION AND PRACTICE

Jeff Matthews is an associate in the Dallas office of Winstead PC. Jeff's practice focuses primarily on mixed-use and condominium development, and real estate lending. Prior to joining the Real Estate Section, Jeff spent time in the firm's Litigation Section. As a trial attorney, he represented real estate developers and banks on a wide array of issues, including real and intellectual property disputes, as well as enforcement of financial obligations.

Before practicing law, Jeff earned a B.B.A. in Marketing from The University of Texas at Austin McCombs School of Business. During Jeff's senior year, he was a candidate for the University's "Outstanding Male Student" award. Following his undergraduate work, Jeff matriculated to the University of Texas School of Law where he received his Doctor of Jurisprudence.

Jeff is also a member of the State Bar of Texas, the Dallas Bar Association, the Dallas Association of Young Lawyers and Leadership Winstead, and was also a member of the 2004 Dallas Association of Young Lawyers Leadership Class.

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WHERE DO WE GO FROM HERE? SUGGESTIONS ON STRUCTURING MIXED-USE PROJECTS

By: Lorin Williams Combs and Jeff Matthews

I. THE RISE OF MIXED-USE PROJECTS: HISTORICAL APPROACHES TO MIXED- USE PROJECTS

In recent years, "New Urbanism" has been the latest trend in real estate development in Texas. In contrast to urban sprawl, New Urbanism advocates sustainable smart growth through high-density housing and mixed-use development in a pedestrian-friendly environment. New Urbanism projects hold vast appeal for cities looking to rejuvenate its urban core, for developers who receive incentives to build high-density or mixed-use projects in these areas and for consumers who seek to live and work within a common area.

Prior to the New Urbanism movement, developments containing different uses, whether aligned horizontally or vertically, were typically created through replatting or leasing the property. The most familiar example of horizontal mixed uses would be a shopping center with several anchor tenants and numerous smaller tenants in between, with pad sites sold to restaurants or banks. Typically, the relationship between tenants and owners of a horizontal project is governed by a set of covenants, conditions and restrictions or "CCR's," or a reciprocal easement agreement, or an "REA." The CCR's or REA set forth the various owners' obligations and rights as they relate to maintenance, access, permitted uses, cost sharing, and other matters related to the shopping center. Similarly, the approach to vertical development with different stacked uses, such as a retail operation on the bottom floor and either residential or office space above, has also historically relied on a single owner leasing space to tenants with varying uses with the relationships of the parties largely governed by leases, CCR's and REA's.

II. ADVANTAGES OF A COMMON OWNERSHIP APPROACH

Today, structuring mixed-use projects has become more complex as developers seek to maximize the use and value of a property by stacking several uses that may be divided and owned in fee by different owners.¹ There are a number of reasons why developers are now seeking to subdivide and sell stacked mixed-use projects:

A. Maximizing Value.

Rising land prices and construction costs have been one of the driving forces to not only stack uses, but also allow the uses to be sold separately. In real estate, the parts are often worth more than the whole. Indeed, developers often live by the credo "Buy by the acre, sell by the foot." If the developer finds itself in a soft market for one type of use, dividing the building into separate uses can substantially increase the value of the project. For example, should the developer find that it can profitably operate the retail portion of the property, but not the office space, the developer can sell the underperforming portion to an entity better suited for the job. Finally, mixed-use projects may be eligible for tax breaks or other incentives offered by municipalities that are looking to revitalize their central business districts.

B. Financing.

Lenders prefer to finance a property that is used for a distinct purpose because the cash flow is easier to underwrite. There are few permanent lenders who have the ability to finance an entire mixed-use project. However, if a property has been subdivided by use, a developer has access to a large number of permanent lenders who would have otherwise not been available. A mixed-use project that is properly structured and clearly presented in the legal documents should allow permanent lenders to become comfortable with the project as whole.

C. Zoning and Land Use.

Full use of a building site is often imperative in an urban project to allow the developer to achieve its desired rate of return. Therefore, if zoning permits multiple uses on certain property, it is often in the developer's best interest to fully utilize the property by engaging in various permitted uses. If separate uses will be operated and owned by different owners, then a developer should strongly consider using a condominium structure because replatting is generally not required and allows for a more flexible development plan. The developer should be aware, however, that subjecting the property to a condominium does not exempt the property from zoning requirements; condominiums are subject to applicable zoning, so the developer should ensure that the condominium is located in an area that permits multiple uses.²

¹ Peterson, Edward A. *High Rise Multi-Use Development: The Rise of Vertical Mixed Use Condominiums* A.B.A. PROBATE & PROPERTY (Sept./Oct. 2005).

² TEX. PROP. CODE § 82.006 (West 2006).

III. DETERMINING THE STRUCTURE

With respect to structuring the ownership and governance of mixed-use developments that are to be subdivided and sold, developers generally rely on either a "master condominium" approach or a division of air-rights. In a master condominium, the property is subdivided into several "master units" in accordance with the Texas Uniform Condominium Act ("Act").³ Each master unit is typically designated by type of use, such as hotel, retail, residential or office uses and the owners of the master units own the common elements, usually the real property and certain improvements, in common. The master condominium declaration ("Master Declaration") then gives those master units the right to further subdivide. The Master Declaration also sets forth the necessary easements and other rights and obligations of the master unit owners similar to what would be in CCR's or an REA. In an air-rights project, the airspace within the project is divided three dimensionally, the different owners have no common ownership of any portion of the real property or improvements and the relationship between the parties and the use of the air space lots are governed by a set of CCR's.

Although there are advantages to both approaches, the extent to which state and local law permits the use of air-rights or a master condominium will have the most influence on the structure of the project. Therefore, before a developer can decide whether to form a master condominium or structure the project as an air-rights development, the developer must be familiar with not only the condominium law of the state where the development will be located but the subdivision and platting regulations of the county or municipality.

A. Vertical Platting.

If the state in which the developer plans to build permits vertical platting, the developer will have a number of structuring options available. Vertical platting is the subdivision of airspace through platting without the necessity of forming a condominium. California is one of several states that permit vertical platting. The Subdivision Map Act generally regulates the development of certain subdivisions but largely authorizes local government agencies to develop regulations relating to development and control of subdivisions.⁴ Vertical platting is then addressed on a local level. For example, the planning and zoning portion of the Santa Monica Municipal Code permits vertical platting by recognizing an "air space lot", which is a division of air space above or below a lot,

having finite dimensions and is identified by reference to a specific number or letter on a final recorded subdivision or parcel map.⁵ A hypothetical mixed-use development that is structured through the use of vertical platting could consist of a hotel operation consisting of the airspace from the ground level through the eighth story of a building, with two more airspace lots used for office space located on the ninth floor and tenth floors of the building and a fourth airspace lot consisting of an additional five-story residential development, which has been formed as a condominium and subsequently divided into 40 residential condominium units. Each use could be owned by a different owner and operated independently from the other uses since the owners would not own any portion of the development in common with each other, as in a condominium.

Herein lies the principal difficulty with structuring air-rights developments. Since each air space lot is not subject to a regime or structure in common with the other air space lots, extensive agreements regarding access and use of the various air space lots must be negotiated. For example, the owner of residential air space would need to procure easements for access on the property, through the hotel and through the office air space to reach the residential air space on floors 11-16 for the benefit of the residential condominium unit owners. The office air space owner would need an easement of support over the hotel air space and would need an easement, lease or license for parking on the property. The hotel air space owner would need an easement on the roof of the residential air space for installing satellite dishes and the residential air space owner and office air space owner would need various electrical and plumbing easements through the rest of the building to service their own air space.

B. Airspace Development in Texas.

Without a vertical plat, an airspace structure in Texas is arguably an illegal subdivision of property in violation of the Texas Local Government Code. Any subdivision of a parcel, whether horizontal or vertical, is technically a "subdivision" as contemplated by Chapter 212 of the Texas Local Government Code (the "Platting Statute"), which provides that an owner of property within the limits or in the extraterritorial jurisdiction of a municipality who divides a tract into two or more parts to lay out a subdivision of the tract . . . must have a plat of the subdivision prepared.⁶ The Platting Statute grants municipalities the authority to determine whether certain divisions of land require

³ TEX. PROP. CODE § 82.001 *et seq.* (West 2006).

⁴ California Subdivision Map Act, Government Code, Section 66410, *et seq.*

⁵ Santa Monica, CA, Municipal Code art. 9, §9.20 (1984).

⁶ TEX. LOCAL GOV'T CODE §212.004(a) (West 2006).

platting and the ability to regulate the divisions.⁷ Municipalities are not required to require platting for every parcel of land subject to the Platting Statute. The authors are unaware of any municipality in Texas that has set forth specific requirements relating to vertical platting, although it is likely that the larger municipalities would welcome the tax base that would be created by a mixed-use air-rights development and would cooperate with a developer and its counsel in approving such a project. At this time, only a handful of mixed-use developments in Texas are structured as air-rights transactions and this will likely continue until municipalities recognize vertical platting.

The issue remains, however, whether a condominium would be subject to the platting requirements of a municipality pursuant to the Platting Statute. In 2004, the Texas Attorney General issued an opinion that has led some experts to believe that it would. The particular opinion was limited to the applicability of Section 232 of the Local Government Code to a condominium created under the Act and provided that (1) a condominium created in the extraterritorial jurisdiction is subject to the control of a county; and (2) Section 232 permits certain counties to enforce its subdivision or infrastructure requirements on a condominium created in the extraterritorial jurisdiction of a county.⁸ Critical to the Attorney General's argument, and most telling with respect to the possible broader applicability of the opinion, is the Attorney General's analysis of Section 82.006 of the Act. Section 82.006 of the Act provides that a zoning, subdivision or other real property use law cannot prohibit the condominium form of ownership or impose any requirement on a condominium *that it would not impose on a physically identical development under a different form of ownership*. Section 82.006 goes on to provide that the Act does not otherwise invalidate or modify any provision of zoning, subdivision or other real property use law or ordinance. The Attorney General correctly pointed out that while Section 82.006 prevents a county or municipality from discriminating against the condominium structure, the county or municipality nonetheless has the right to regulate condominiums in a manner consistent with other forms of ownership structures. Despite the limited scope of the opinion, an extension of this analysis would likely give any municipality or county a strong argument that a condominium is subject to the same platting requirements as any other development within the vicinity. Therefore, even though Section 82.059 of the Act sets forth the requirements for preparing a valid set

of condominium plat and plans, a developer should always be familiar with the platting requirements typical in the municipality and should approach the municipality to discuss its plans prior to moving forward.

In a project that contains a number of different uses, a master condominium approach is preferable in Texas. Not only is the use of a master condominium structure more widely recognized and accepted in the real estate community, but compared to an air-rights approach, a master condominium allows for more streamlined and efficient documentation of the rights of the respective parties. Because a master condominium contains a number of "common elements" or areas for the use of all unit owners, each unit is not required to have the same number of easements that would otherwise be required in a air-rights project. The Act provides that units are given the right to use the common areas since each unit owner has an individual ownership interest in the common elements. For example, master condominiums normally classify the parking garage, lobby, foyers, and other areas used by all owners as common elements. Thus, a unit owner (or its tenants, invitees, or sub-unit owners) may park and walk to their respective units without crossing property that they do not own.

IV. STACKING USES

Nearly every mixed-use project will have some aspect of vertical stacking, otherwise the project should most likely be structured using a traditional REA/CCR's approach. Vertical stacking allows a residential or office project to be part of a larger, integrated development. The following are several approaches to structuring a mixed-use project in a vertically aligned project.

A. Vertical Stacking with Multiple Master Units.

The most common method for stacking multiple uses in the same building is to separate the airspace into master units based upon use. For example, this method will allow a project to have a retail unit on the ground floor and then separate master units stacked on top for office or residential uses. The common areas, such as the parking garage, lobby and access routes to the property, will be general common elements. Normally, parking spaces are designated as limited common elements so that any future purchaser of the residential or office portion knows that they have parking spaces specifically assigned to their master unit.

In this approach, a master unit owner will have the right to subdivide its unit and create a sub-condominium that will have all the rights and assumes the obligations of the master unit in the master condominium. Often, a developer will place

⁷ TEX. LOCAL GOV'T CODE §212.0045(a) (West 2006).

⁸ Opinion of the Attorney General of Texas, No. GA-0223, July 30, 2004.

restrictions and limitations on the uses of master units. This allows the developer to ensure that a master unit is not subdivided and then used for purposes outside of what was originally intended for that master unit, such as having all residential sub-unit condominiums contained within a residential master unit.

B. Vertical Stacking In a Residential Declaration.

Another approach for structuring a vertical mixed-use project is to have every use contained within one declaration. This structure can be used for a residential condominium with only limited retail space on the ground floor, which configuration is becoming increasingly popular for projects located in downtown areas. Another application of this method would be projects with "Live/Work" units that are condominium units that can be used as either a residence or an office, or both.

In this structure, a parcel is vertically subdivided into units and should specifically state which units are for what type of use, but none will have the right to further subdivide. Similar to a master condominium approach, the declaration will have specific restrictions on how each unit can be used. Furthermore, all units will be governed by the same set of rules and regulations, thus it is important to make sure that the commercial unit is given the rights it needs to operate effectively. The developer may structure the voting so that the condominium association cannot approve a "major decision" without the joinder of the affected unit. This gives the commercial unit a limited right to veto certain actions that if taken, would have an adverse impact on its operation.

V. HORIZONTAL DEVELOPMENT WITH VERTICAL STACKING

The popularity of mixed-used developments has also led to an increase in multi-acre developments that contain a number of separate buildings, many of which, if not all, contain multiple uses. These types of projects often combine several types of residential products, including apartments and "brownstones," retail concepts that often include both national and local tenants and possibly municipal components, such as a city hall. Indeed, larger applications of this concept have often been referred to as "New Town Centers" or "Faux Downtowns" because people have the ability to live, work, shop and play all in the same development.

A. Utilizing CCR's and Condominium Declarations.

Structuring a horizontal development with vertical stacking requires an examination of how the different owners and major tenants will interact. Often, such a project combines both the use of CCR's and

condominium declarations in order to achieve the goals of the developer, yet provide the necessary protections for the various uses. This approach is best when the developer does not want to include every parcel owner within the development in a master condominium, yet desires to control the use of the land. As in a traditional horizontal development, the owners of each parcel have certain rights and obligations vis-à-vis the other parcel owners through the CCR's. Each parcel may then either be submitted to its own Master Declaration, which governs the use of the master units located in that parcel's airspace, or owned without any further restrictions.

Examples using this approach include New Town Centers, which often have city owned portions, or hotels (who often demand control of any association of which they are a member). These situations are examples where the projects might be better suited to being governed at the highest level by a set of CCR's instead of a Master Declaration so that neither the city and/or hotel's influence is limited only to the matters contained in the CCR's.

B. Submitting the Entire Tract to One Master Condominium Declaration.

Another option is to submit the entire property to a master condominium. The master units may be separated according to use, or each building may be its own unit. The structure selected by the developer is dependant upon how the ownership interests will be aligned. One of the more attractive aspects of this approach is that the property can be horizontally subdivided without necessarily having to replat the property, subject only to any zoning requirements.

Also, certain tracts may be labeled as "future development units," which gives the developer the right, but not the obligation, to develop a portion of the development at a later time. Depending on which types of uses are reserved for the future development units, the developer will have increased flexibility to tailor the development to the demands of the market. Also, future development units may be sold to another developer without having to replat the property.

VI. CRITICAL CONSIDERATIONS

During the initial discussions with a developer about the project, counsel should spend considerable time focusing on the critical considerations that will affect how the project is structured. No two projects are the same, thus counsel will need to be mindful of any unique issues presented in a given project. The following list of issues will provide a checklist of preliminary issues likely to be present in every project.

A. Understanding the Project.

As with any development project, counsel must first fully understand the developer's goals and the

physical configuration of the property in order to properly structure the mixed-use project. The initial discussion should cover the types of uses, number of units and their proposed boundaries, and the initial owners of each unit. The developer's attorney must help establish unit boundaries and fully comprehend and explain to the developer how the unit boundaries will effect each unit's responsibility for maintenance, repair or replacements of the unit and the common elements. Moreover, it is important to identify the owners of each unit so that they can be part of the process from the beginning. Undertaking of the project by counsel is necessary to help advise the developer of the many use rights that will be needed to deal with the various requirements of the owners of the master units.

Within the condominium structure, the creation of separate categories of common elements such as general common elements, unit-specific limited common elements and special limited common elements will help in avoiding the typical disputes between co-owners as to financial responsibility for maintenance, repair and replacements of portions of the property, particularly disputes that arise with respect to sharing responsibility with respect to common elements. It is possible to structure a mixed-use condominium with many of the usual common elements included in the units thereby isolating many of the costs and expenses to individual master unit owners.

B. Who is in Control?

A critical issue will be to determine who will control the association, especially when there is a mix of residential and commercial uses. Control involves several aspects, including (a) appointment and removal of members of the board of directors and officers of the owners' association of the master condominium ("Master Association"); (b) amendments to the bylaws, rules and regulations and other governing documents; (c) maintenance and repair of the common areas; (d) preparation of an annual budget; and (e) resolution of disputes with unit owners regarding the condominium or the governing documents. The interests of the commercial owner and the residential owners will usually be at odds, and commercial owners clearly want to avoid involvement with the multiple owners of the residential condominiums. Likewise, the owners of the individual residential condominiums will likely have little or no desire to be involved in any of the commercial aspects of the condominium, except to the extent the commercial uses interfere with their use and enjoyment of the property.

Assuming that the developer has arranged ownership of the various units, there will be complex negotiations between the various parties prior to the commencement of construction. Counsel must guide the parties so that the uses can co-exist in the same

structure and have a minimum of overlap in administration and a workable process to deal with dispute resolution. Through the negotiations it will become apparent which unit will have the leverage necessary to control the administration of the condominium. In a project where there is a hotel unit, special consideration should be given as to who will control the Master Association. Usually, hotel operators demand that the owner of the hotel unit control the Master Association because they wish to protect the integrity of their brand.

There are a variety of control mechanisms that can be utilized in regard to actual control of the Master Association. Class voting can be utilized if the class has a legitimate interest to protect.⁹ For example, if the hotel unit has a legitimate interest to maintain the quality of the overall project, giving the hotel unit control through a class of membership should be allowed under the Act. It is important to segregate the residential units from the commercial to the greatest extent possible through one of the structures discussed in Sections IV and V. If the residential unit will be subdivided into multiple residential units, then the sub-unit condominium will have a residential association (the "Residential Association") that will handle the administration of the individual residential units. The Residential Association will have a representative on the board of directors of the Master Association but the commercial unit owners will generally control the Master Association. If, however, the residential units are not subdivided and the residential unit is apartments, then the owner of the residential unit may insist on a greater role in the Master Association in order to protect its investment.

C. Regulation of Uses.

The uses for each master unit must be carefully analyzed so that permitted or prohibited uses for each unit are specially covered in the Master Declaration. There will be a natural tension between the residential and commercial uses in a project. Counsel must make sure that all zoning ordinances, covenants, conditions, and restrictions are carefully reviewed and considered when preparing the Master Declaration so that there are no conflicts and that the Master Declaration is properly integrated with the provisions in these use regulations.

Owners of commercial units must determine whether the Master Declaration permits the kinds of uses that will attract potential tenants. Commercial unit owners and their mortgagees must make sure that the Master Declaration cannot be amended without their respective consent. Owners of individual residential units will want to provide reasonable

⁹ TEX. PROP. CODE § 82.057(c)(2) (West 2006).

limitations on the commercial uses in the condominium so that there is no unreasonable interference with their life style.

Developers generally impose restrictions that are usual in the market and do not effect the marketability of the individual residential units. In addition to any restrictions in the condominium declaration, the master rules and regulations can be effectively used to govern the various units. Another way to control the uses of each master unit is to have a special provision of the rules or regulations of the Master Association that specifically addresses concerns relating to each use. For retail units, especially those with restaurants, the rules can specifically address what type of establishments are permitted and hours of operation, and any other issues that might create tension.

D. Easements and Licenses.

Counsel must carefully analyze and determine what easements must be granted and retained in the Master Declaration. Whenever possible, the easements should be specific, rather than blanket, legal descriptions of the specific easement areas, and should reference the condominium map. Some easements are expressly provided by the Act, but it is good practice to carefully outline and set forth each necessary and required easement. A partial list of the possible easements that will be required is: access, support, encroachment, parking, loading dock, elevator, utilities, amenities, signage, stairs, roof (telecommunications and utilities) garbage chutes, construction, easements relating to the future development area, communications, and common element easements. A determination should be made as to the permanence of the easement and whether each should be assignable, exclusive or non-exclusive, temporary or perpetual. Each easement should specifically identify the party responsible for maintenance of the easement and the standard for such maintenance. In some instances, it might be more desirable to license certain use rights that can later be terminated by the Master Association. If there are payments associated with the use rights, consideration should be given to suspension of the rights if the payments are not made. Certain rights, however, should never be terminated, such as parking, because of the consequences, such the interruption to a certain use's cash flow or default under leases.

E. Allocation of Expenses.

A predetermined expense allocation should be determined between the owners or potential owners of the various units based on a formula or method. There are numerous ways that this can be accomplished. One of the more common approaches, especially in residential only condominiums, is to allocate expenses based upon an owner's interest in the common

elements. The Master Declaration may authorize the allocation of common expenses and votes in a different manner, so long as the declaration complies with the Act.

The Act provides that "[t]he declaration shall allocate a fraction or percentage of undivided interests in the common elements and in the common expenses of the association, and a portion of the votes in the association, to each unit and state the formulas used to establish those allocations. These allocations may not discriminate in favor of units owned by a declarant." Examples of alternatives in the allocation process include: (a) including a provision in the condominium documents that expenses relating to each particular portion of the property will be paid by those unit owners that use that portion of the property; (b) assignment of the responsibility to the Master Association to allocate expenses reasonably and fairly; (c) sub-metering or assigning the utilities and other services; (d) requiring the parties to split expenses based on third-party reports of actual usage after a reasonable period of usage; (e) utilizing the appraised value of each unit as the basis; or (f) developing a formula that includes subsidization of one or more uses based on benefit received or penalty based on burden inflicted. In addition, allocation of certain common expenses can be governed by a separate document, known as an "allocation document," in situations where it would be equitable to allocate certain common expenses between two or more owners based on use by each unit, rather than percentage ownership or size of each unit. An example would be the allocation of payment for maintenance of a parking garage between a retail unit that only has use of the parking garage during business hours and a hotel unit that has continuous use rights with respect to the parking garage. In this example, the allocation document would resemble a line item schedule with the different percentages shared on a percentage basis between the retail unit and the hotel unit. If an allocation document is used, it should be discussed in the Master Declaration and treated as a governing document. Furthermore, the Master Declaration should state that the allocation document is controlling as to any issues relating to expense sharing.

F. Common Elements; Shared Facilities.

The designation of the common elements for a mixed-use condominium is especially important. All space that is used by one or more, but not all, of the unit owners will be limited common elements. All common elements that are not limited common elements are general common elements. Parking, elevators, patios, restrooms, stairs and many other jointly used areas can all be limited common elements at the master level, although parking can be contained within a separate unit within the condominium, which

is discussed in the following section. Any space that will only be used by a unit or units in the Master Condominium, such as amenities that would be used by the hotel unit and the residential unit, would generally be limited common elements. The designation of common elements will be different for each project and each developer.

Aspects of the project that must be examined in order to designate common elements include: (a) swimming pool and the pool area; (b) health and fitness club; (c) spa; (d) parks and other public spaces; (e) private club; (f) meeting or club rooms; (g) lobbies; (h) elevators; and (i) staircases. Each of these spaces can be common areas or can be included within one of the units depending upon the negotiations between the unit owners and their operators. In addition, the project could be structured so that all of what normally would be common elements are placed in a separate unit; provided, there is at least some common elements, such as the real property and the structure of the building. Having a separate "shared facilities unit" has some benefits as it provides a mechanism for one or more of the owners of a master unit in the Master Condominium to control the quality of the overall condominium project. The common elements can also be divided between the units by designating limited common elements appurtenant to a particular unit, such as "hotel limited common elements," or "retail limited common elements".

G. Parking.

Structuring the parking for a mixed-use project inevitably becomes one of the more difficult decisions for the developer. The plan must meet governmental codes in regard to the number of available spaces and must be practical and efficient in relation to the design of the building or buildings, as well as the types of uses in those buildings. Parking spaces may be wholly contained within their own master unit, be designated as a limited common element appurtenant to, or part of, a particular unit, or be wholly contained in a "parking unit." A parking unit may be owned by the declarant, the city or any other entity in the same manner as they would own another master unit. The parking unit owner often enters into a separate parking agreement with the other master unit owners that sets forth each master unit's parking rights and the costs associated with that use.

Parking for the residential component ideally should be separate from the parking for the other units. Parking for the retail unit should be located as close to the retail establishments as possible. The parking for the hotel unit must be reasonably convenient, but could be located offsite, especially if valet parking is utilized. Office unit parking must also be reasonably close, but given that the spaces likely will not be used on

weekends, the retail unit might be able to use the office unit's parking as overflow for busy weekends or nights.

Access to each of the parking areas must be carefully planned. Retail parking spaces must be easily accessible from the streets, otherwise access might become problematic in trying to sell the retail unit within the project. Also, it is often preferable to have the walkway to parking areas be within general common elements. Projects where someone must pass through another unit to reach the parking area can lead to a number of issues between unit owners.

H. Amenities.

Counsel should review a list of all amenities in the project and list which units will have the right or need to access each amenity. Depending upon how the project is structured, there may be a need for special easements or use rights so that the owners of the individual residential units will have the right to use each of the amenities intended for use by such unit owners. The right to use these facilities can be structured as revocable licenses that can more easily be terminated if the users fail to pay the required fees. For example, residential and hotel units often have the right to use some of the other unit's amenities. Also, this concept is needed where there are multiple residential units, but certain amenities are located in only one of those units. When and how each unit is able to access and use a certain amenity can be governed broadly in the Master Declaration or set forth specific regulations.

I. Future Development Rights.

Often the developer has additional land adjacent to the primary development or conceives a way to add additional density to the site under development. The developer of a condominium can reserve "development rights" as defined in the Act to achieve this end. The Act defines "development rights" as "a right or combination of rights reserved by a declarant in the declaration to: (a) add real property to a condominium; (b) create units, common elements, or limited common elements within a condominium; or (c) subdivide units or convert units into common elements..."¹⁰

Future development rights can be reserved either as a "future development area" or as "future development units" (collectively, "Future Development Tracts"). Under both approaches, the developer will have the right to develop this area (i) as a whole, whether all at once or as a serial development, (ii) in part, or (iii) not at all. Future Development Tracts can be located on adjacent or nearby land, or they may be in the airspace above an existing unit. If the Future Development Tract is the airspace above an existing

¹⁰ TEX. PROP. CODE § 82.003(a)(12)(A)-(C) (West 2006).

unit, counsel must carefully draft the easements necessary to accomplish the future construction. One advantage of using a future development unit approach is that it may be conveyed to another entity without having to first exercise the development right if converting a future development area to a master unit.

Since Future Development Tracts are real property, the developer can add the Future Development Tracts to the condominium as part of an existing master unit or as an additional unit to the Master Condominium that can be further subdivided. These rights must be specifically set forth and special declarant rights reserved to exercise the development rights in the Master Declaration filed in connection with the Master Condominium. Easements relating to the construction of the improvements in the Future Development Tracts will need to be reserved in the Master Declaration and the configuration of the added area should be analyzed in order to attempt to contemplate the needed access, parking and use rights if the Future Development Tracts are added.

J. Dispute Resolution.

The more complex the structure of the condominium the more problematic the dispute resolution process becomes. The possibility that all of the disputes in a mixed-use structure would end up in the courthouse may not be the most efficient manner in which to deal with this issue. The alternatives are forced mediation, binding arbitration, a combination of these processes, or letting the parties litigate in the traditional manner. This combination of forced mediation and mandatory "final offer" or "baseball" arbitration is a fundamentally sound approach to encourage the parties to compromise their disputes. "Given the vastly disparate uses between the [residential and the commercial units in a mixed-use condominium], a balance must be established on the question of the governance and affairs of distinctly separate owners and uses, maintaining, on the one hand, flexibility for one owner's use while, on the other hand, respecting the rights of and ramifications upon neighboring owners. Thus, drawing upon a dirt lawyer's knee-jerk drafting technique of conditioning defaults based on "materiality" or (as here), "adverse effect," a balance of the potentially competing interests is reached which should accommodate the day-to-day operations of each of [the competing interests] in...[a] multi-use building. Providing a dispute resolution mechanism – such as one which would be triggered by a reasonable notice by an objecting party challenging a [board determination] – affords all users in a multi-use property an equitable avenue to communicate concerns over a Board's action which may affect an owner's use and operation. Arbitration is sometimes suggested as a mechanism for the board to resolve its differences. However, deferring to issues of corporate law, some

practitioners have questioned whether a board can be emasculated and delegate its right of decision to another body. If this is a concern under local law, creative lawyers might consider whether it would be possible to craft a system of guidance which would, in fact, rely upon what is essentially an arbitral device."¹¹

K. Sound and Odors.

Every mixed-use project must address how sound and odors will be handled. Projects with restaurants, kitchens or bars must consider how sound will be muted or restricted, and how odors will be vented so as to not unreasonably disturb those in other units. Counsel should review the conceptual drawings and discuss with the developer exactly how each proposed use will generate sound and odors. Many developers also engage "sound consultants" to help ensure that the project is appropriately soundproofed. Normally, odor issues can be prevented through the proper design and location of exhaust shafts and location of kitchens and trash collection areas.

Unfortunately, sometimes despite a developer's best efforts, a project nonetheless has sound and odor issues after completion. The condominium declaration and information statement should address this issue head on and contain disclaimers that sound transmission in a mixed-use project is difficult to control and that sounds from neighboring units or the surrounding development may be heard from a unit. Furthermore, the declaration and information statement should contain a waiver by the unit owner of any claims against the developer for sound issues. This disclaimer should be modified to include odors if the developer and counsel believe that one of the units will be producing strong aromas.

VII. CONCLUSION

"New Urbanism" will continue to be at the forefront of the development world for years to come as land and construction prices continue to rise. These high-density projects can become inefficient and ineffective if the legal documentation is sloppy and poorly conceived. Indeed, every mixed-use project is unique, thus the lawyer must fully understand the project before deciding on the project's legal structure. Careful consideration of the issues discussed here will enable counsel to deliver a product that will allow the various parties to live and operate in harmony, and if not, to find a quick resolution to their dispute.

¹¹ See Alan Goldberg and Matthew J. Leeds, "A Guide to Concerns in a Multiple-Use Condominium", American College of Real Estate Lawyers, Spring Meeting 2003.