

MIXED USE DEVELOPMENT OPERATING AGREEMENTS
A Governmental Perspective

Mixed-use developments can create unique planning, building code, and regulatory issues. Cities and counties in Arizona are only beginning to understand the best ways in which to address these issues. Each mixed-use development must incorporate a jurisdiction's requirement or desires for certain elements and styles. A city or county may have different building codes (or interpretations of those codes) and acceptable construction techniques. Taxation and the willingness to provide incentives for these types of developments may also vary by jurisdiction. Interlaced throughout all of these issues is the political environment of the community in which the project is to be located. As a result, planning a mixed-use development takes a certain amount of vision, perseverance, and financial wherewithal.

Some jurisdictions have experience with mixed-use development. As more mixed-use developments are planned and built, solutions to the issues these types of development raise will become more apparent. Some jurisdictions have adopted mixed-use development zoning ordinances for different reasons. For example, Attachment 1 provides the ordinance of Gwinnett County, Georgia, located just southeast of Atlanta, which seeks to encourage redevelopment of older shopping spaces in order to benefit from denser planning. Also provided, as Attachment 2, is an ordinance of The Township of Lower Marion, Pennsylvania, which was adopted in April 2006 as an Overlay District due to mixed-use transit-oriented development occurring within its borders.

The Oregon Transportation and Growth Management (TGM) Program has also prepared a booklet that suggests various land use policy decisions and a model ordinance.¹ Efforts such as these at the policy level are very helpful as governmental thinking evolves to accommodate changing marketing conditions. In the meantime, developers may become frustrated with a planning process that is not well suited for mixed-use development.

After development, the local governmental entity, which for ease of reference will be referred to merely as a "city", would theoretically have much less involvement as the various owners, lessors, visitors, users, etc., determine the best way to operate the project cooperatively. However, natural law dictates that the greater a development's density, the greater the need for some form of governance. It is, therefore, virtually a given that a city will be much more involved than perhaps the developer, landowners, users desire; and even more the city desires to be involved.

A city's involvement may take many forms. This short paper will mention a few areas in which a city might affect the operations of a mixed-use development. Although

¹ See <<http://www.oregon.gov/LCD/docs/publications/commixedusecode.pdf>>.

usually arising at the time of construction, some cities, including the City of Glendale, will request a reciprocal agreement that assures continued compliance with building codes. Also, the parking needs of a mixed-use development will affect not just the development but also the surrounding community. A city will, consequently, continue to be heavily involved in parking issues associated with the project even after development. Additionally, mixed-use developments may incorporate a publicly-owned facility or feature. This type of arrangement can significantly enhance the project; however, when the city becomes a landowner, special arrangements and accommodations must be made. Lastly, because of the density and structure of a mixed-use development, a city will, either by choice or by necessity, impose enforcement of its ordinances in a more concentrated matter. These issues are explored in more detail below.

Building Code Compliance Covenant and Easement Agreement

Approximately five years ago, the City of Glendale's Building Safety Department and Fire Marshall's Office became concerned about the growing number of multiple use retail developments, e.g., strip centers, shopping centers, mixed-use developments, in which the property that was originally under one owner was being subdivided and sold to various owners. Several factors feed this concern.

First, building codes require a specific distance between a building and an adjoining property line. One purpose of this requirement is to assure that the building can be property serviced by public safety personnel and equipment when required. There was an additional desire to limit the risk of disharmonious insurance coverages on the buildings in the event of a casualty. And, from a planning perspective, single ownership of two or more adjoining or adjacent buildings allows the owner and the City to address traffic and pedestrian requirements, wherein multiple owners' interests may be divergent.

Secondly, it is not uncommon for multiple-use structures to be designed and built (originally or ostensibly for one owner) with shared life safety infrastructure and utility metering systems. City officials found that no provision was made to assure access by the various owners to this critical infrastructure. Changes to the building or changes in use of the various portions of the building were not being accommodated after a portion of the building was sold. The new owners then had no legal recourse to assure that the changes would not affect their needs. Additionally, utility-billing disputes started to become an issue. A palatable common area maintenance (CAM) that was originally shared by all owners increases over time. At some point, the charges become large enough for the various owners to become concerned about a fair allocation among the owners. The affect of such disagreements ultimately ends up at the City when utility bills became overdue and action became imminent. While cities have the authority to discontinue utility service, they seek to avoid that remedy whenever

possible; particularly when it would be levied against a residential unit or a retail establishment that is providing tax dollars and a community benefit.

In light of the above, the City of Glendale developed a BUILDING CODE COMPLIANCE COVENANT AND EASEMENT AGREEMENT, which is provided as Attachment 3. This reciprocal easement requires that property owners work with the city to address the issues outlined above and other issues created by multiple-owner developments. It is used for single or multiple structure development plans in which the property lines either intersect the building or the buildings do not meet the required distance requirements.

In the recitals, the basic concept of the development is identified as a planned, coordinated development. Over time, individual owners may vary the initial plan. Having the basic plan recorded against the property should serve as a basis, for not just the municipal authority but also the other landowners in the project, to argue in favor of consistent development, modification, and operation of the property. As one writer stated:

The Reciprocal Agreement is designed to protect the premises and assumptions of each participant concerning the manner in which the shopping center should be developed and operated. The general principles of shopping center development and operation to be applied are often not disputed by the various participants. Nevertheless, the application of those principles typically will be negotiated at length as each participant seeks to preserve the greatest flexibility possible in the use of its land while seeking to restrict and define, as much as possible, the manner in which the other portions of the shopping center will be used. . . . Whatever their scope, the goal remains the same: to allow several owners of land to use the aggregate land owned by them as a unified, functionally integrated shopping center, thereby enhancing the individual retailers' opportunities to generate business by collectively providing a more complete retailing menu for the consumer appetite.²

The agreement also amends the existing uniform building code to provide that distances can be measured from buildings and not from a property line. Obviously, there would be no distance between individually owned parcels for a property line that intersects a building, a situation that the building code does not even contemplate. However, in a dense, mixed-use development, building set-backs and buffer zones are impractical. Consequently, altering this requirement is a necessity.

² THOMAS J. TERKEL, Reciprocal Agreements in Shopping Center Developments, 15 ST. MARY'S L.J. 541, 544 (1983)(citing H. CARPENTER, JR., SHOPPING CENTER MANAGEMENT 6-7 (1978)).

Parking, Parking, and More Parking

Parking is a primary issue in any mixed-use development. It is a paramount issue because parking in any form is just extremely expensive. A parking structure adds an enormous amount to a developer's construction costs. Alternatively, surface parking takes valuable revenue producing land away from the project. Yet parking is an absolute necessity in all mixed-use development. Even where viable transit options are available—which eliminates the Arizona market, at least until the Valley's light rail system is complete—mixed-used development requires a substantial amount of dedicated parking.

A city will mandate parking requirements; however, the requirements in city zoning codes were generally not designed for mixed-use development. For example, the concept of shared parking, in which the parking needs of various types of uses within a development are recognized and accommodated, has not yet gained widespread acceptance. There are a few cities, nonetheless, that have adopted mixed-use development parking requirements. As an example, the City of Tempe's Standard Shared Parking Model is provided as Attachment 4.

A city can, of course, accommodate mixed-use parking, including shared parking, with planned area development zoning. Zoning for parking is secured at the beginning of the development. Experience has shown, however, that mixed-use developments evolve over time. Mixed-use developments take time to implement—providing sufficient time for market conditions to force changes in the initial design. Therefore, it is not unusual for the development to occur in stages and for subsequent stages to be altered during the development.

Moreover, mixed-use developments require modification as the development and surrounding area matures. The mix of uses that worked a decade ago, may present economic, social, and political problems today. Consequently, the city must amend its requirements, a process that can take some time and a coordinated effort. An aging mixed-used development, in which the owners of various uses may have differing interests, may be unable to speak in a coordinated voice. This guarantees to extend the redevelopment process and increase the effort to address this situation. Additionally, when the city revisits a mixed-use development's plan, the door swings wide opened for the surrounding community to voice their opinions about parking and other issues, whether related or not.

As a result, it is unlikely that a development will never entirely divorce itself from city involvement in parking issues. The process by which this issue is addressed, both during the initial development and during subsequent maturation of the project, will have a significant impact on the owners, users, and neighbors of the project.

Publicly Owned Property

Some large mixed-use development will incorporate, or even be centered around, a public building. This may be a public park, a waterfront, museum or, in the case of Glendale, a large professional sports facility.³ There is a mix of positive and negatives to a city being a significant landholder in a mixed-use development. The city's ownership interest will assure it stays focused on the development and the public amenity will assure a certain level of visitor traffic. On the downside, cities can be demanding, do not always understand or agree with the needs of a private developer, and most often require direct control over the land.

City ownership of land within a mixed use development raises unique issues in itself that are beyond the scope of this paper. However, a developer seeking to partner with a city must understand three core principles if nothing else. The first is that public funds must be carefully accounted for, even when the amount hardly justifies the effort. Developers are willing to take risks, to expend funds upon the possibility of a future large return, and to forego a certain level of detail in order to move a project forward. Government, by way of understatement, does not work that way. A developer must be prepared to adhere to what will likely be foreign, and often arcane, characteristics of public project financing and accounting.

Secondly, the city will probably opt out of any CC&R that would apply to the remainder of the project. For example, it can be legally and politically difficult to justify expenditures of public funds for CAM charges that do not wholly and directly benefit the public land. Usually the city will be unwilling to subject itself to either the restrictions or governance structure that are commonly found in CC&R and mixed-use development associations. Attachment 5 is a copy of the Master CC&R for Westgate City Center. The City of Glendale owns the JOBING.COM ARENA parcel, which encompasses 13.5 acres within the Westgate City Center 240 acre mixed-use development. In order to provide adequate parking for this facility, the City also owns approximately 53.7 acres of land.⁴ One will note that, despite being a very major landowner in the development and providing the primary draw for visitors, the City is neither a party to nor subject to the Westgate CC&R's.

³ JOBING.COM ARENA (formerly GLENDALE ARENA) was the impetus for Westgate City Center, a 6,500,000 square foot mixed-use development that includes retail, entertainment, office, hotel, and residential uses located on 223 contiguous acres. See <<http://www.westgateaz.com>>.

⁴ Pursuant to a mixed-use development agreement, the parking land is subject to development rights. These rights allow the developer to take the parking land, build on it, and put it into a productive, revenue-generating use. However, the land cannot be removed from the parking inventory until structured parking (a parking garage, in other words) is available to replace the parking capacity of the land. Because of the costs of constructing structured parking, which can be approximately \$12,000 to \$16,000 per space, this arrangement has yet to benefit either the City or the developer.

On a positive note, a city's resistance to participation in the CC&R allows the developer and subsequent owners to avoid what could be very heated battles over decisions that affect the public portion of the project. Additionally, there will be strictly governmental functions that could never be restricted, inhibited, or delegated by a contractual agreement such as a CC&R. Parsing out the line between inherent government functions and propriety actions is not always easy. Consequently, the better structure is for the public portion to remain separate from the privately-owned portion to the greatest extent possible.

Lastly, the private development and later landowners must understand that government is constitutionally bound to protect free speech. Public property with public access is a public forum and provides a place to exercise one's right of protected free speech. Exercising that right within a mixed-use development may not be the most convenient for nearby private owners, whether retail, commercial, or residential. Some speech can certainly be disruptive of commercial and residential uses. There are measures that can be taken to limit the free speech aspects of public development; however, the more restrictions placed on the public property in order to limit the right of free speech on the property, the less benefit the public project will bring to the project.

Code Enforcement Issues

It is a fact that the denser the development, the more likely that local government will be deeply involved in that development. Two issues drive this fact with respect to mixed-use developments. First, residents are voters and businesses produce revenue for the city, particularly retail businesses. Voters and business have the ears of policy makers and can secure a great deal of attention, even to matters that may not otherwise warrant that attention.

In a mixed-use development, residents and businesses are clustered. While this is most often convenient, it can be an irritant at some point. Carefully crafted CC&R's and operating rules can ease or avoid some of the inevitable, irritating points. But some will remain and the enforcement of even the most carefully crafted CC&R's lead directly to the second issue that drives a city's involvement in the operation of the project—the cost of private litigation. Hiring a lawyer to threaten to enforce the CC&R's, much less paying the lawyer to actually institute a lawsuit, is an expensive proposition. As a result, many residents or businesses may seek to remedy an irritating situation by complaining to the city.

A city should not attempt to enforce private contract, such as a CC&R. It should only enforce its ordinances or code provisions. Most local governmental entities of any size will have a code enforcement unit charged with assuring that its laws are complied with. There are instances that can be addressed through code enforcement. Of course, the city will be quite involved, perhaps on a limited basis, with the operating issues of the mixed-use development. That may be helpful, but there are times when a city's

involvement in mixed-use development disputes is limited to merely informing the parties that their issues are a private matter. This, however, often serves to fuel the situation.

Conclusion

Governmental regulation of mixed-use developments will continue to evolve as economic forces make the cost and effort of such project increasingly worthwhile. Any intensive land use requires some form of governance. The structure, density, and impact on surrounding neighborhoods, of mixed-use developments must, therefore, involve the local jurisdiction. To some degree, the successful interaction of the project managers with the local government will affect the success of the project.