MIXED-USE PROJECTS:

STRUCTURE, OPERATIONS & GOVERNANCE

MICHAEL K. KUHN
JACKSON WALKER L.L.P.
1401 McKinney, Suite 1900
Houston, Texas
(713) 752-4200 (Telephone)
(713) 752-4221 (Facsimile)
mkuhn@jw.com
www.jw.com

SOUTH TEXAS COLLEGE OF LAW
REAL ESTATE LAW CONFERENCE
JUNE 8-9, 2006
Michael K. Kuhn is a partner in the Business Transactions section of Jackson Walker. He has over 26 years of expertise in the area of commercial real estate. Mr. Kuhn is Board Certified in Commercial Real Estate Law by the Texas Board of Legal Specialization.

As a member of the firm’s Real Estate Group, Mr. Kuhn works in the areas of real estate acquisition, disposition, development, and leasing matters. His practice encompasses traditional purchases and sales, leases and financings involving office buildings, shopping centers, commercial and residential condominiums, and mixed-use projects, including large portfolio and multi-state transactions. He has had significant experience in most every area of real estate law, enabling him to responsively address the clients’ needs and to create innovative solutions. Mr. Kuhn’s real estate clients range from individual investors to small- to mid-size real estate operating companies, up to large publicly-traded REITs, and other public companies.

Mr. Kuhn serves as the Secretary/Treasurer of the Houston Bar Association’s Real Estate Law Section. Mr. Kuhn is also a member of the International Council of Shopping Centers (ICSC), College of the State Bar of Texas, and the American Bar Association.

Mr. Kuhn has been recognized as one of America’s leading lawyers for business by Chambers USA. Mr. Kuhn was named one of “Houston’s Top Lawyers” by H Texas Magazine and a “Texas Super Lawyer” by Texas Monthly magazine.

Mr. Kuhn has authored various articles and made presentations on real estate topics at the State Bar of Texas Advanced Real Estate Law Seminar and the Mortgage Lending Institute.

Mr. Kuhn received his B.A. degree, magna cum laude, from Duke University, and his J.D. degree from the University of Virginia School of Law.
TABLE OF CONTENTS

I. INTRODUCTION .......................... 1

II. STRUCTURING ALTERNATIVES 2
   A. VARIOUS STRUCTURING DEVICES ......................... 2
   B. STATUTES GOVERNING TEXAS MIXED-USE PROJECTS .......... 3
   C. HORIZONTAL MIXED-USE PROJECTS – USING COVENANTS
      CONDITIONS & RESTRICTIONS ............................. 4
   D. VERTICAL MIXED-USE PROJECT – STRUCTURING
      AS A CONDOMINIUM ...................................... 8

III. OPERATIONAL AND DESIGN
     ISSUES WITHIN THE MIXED-USE
     PROJECT .................................................. 10
   A. PARKING .................................................. 10
   B. ACCESS TO THE PROJECT ................................. 11
   C. VISIBILITY ................................................. 11
   D. CONVENIENCE ............................................. 12
   E. CONSTRUCTION AND RENOVATION ......................... 12
   F. LIGHTING CONTROLS ................................... 12
   G. NOISE 12
   H. COMMON AREA MAINTENANCE COST
      ISSUES .................................................... 12
   I. PHASING .................................................. 13
   J. IMPACT ON DOCUMENTATION ............................. 14

IV. GOVERNANCE .............................. 15
   A. LAYERED OR TIERED ASSOCIATIONS ....................... 15
   B. CONTROL STRUCTURES AND MECHANISMS ............... 15
   C. THIRD-PARTY MANAGEMENT .............................. 16
   D. TURNOVER ............................................... 16
   E. DISPUTE RESOLUTION ................................... 17

V. CONCLUSION ............................... 17

Exhibit A ............................................. N-(i)
Exhibit B ............................................. N-(ii)

BIBLIOGRAPHY ...................................... N-(iii)
I. INTRODUCTION

In response to continued urban sprawl, many cities are now encouraging more intensive development as certain portions of the urban population desire live/work/play arrangements where compactness is an attractive feature and close-hand availability of shops, stores, entertainment and restaurants provide a compelling mix. As a result, many different types of mixed-use projects have been created – vertical mixed-use towers, integrated multi-owner structures, suburban lifestyle centers, business parks, shopping centers with additional uses, master-planned communities and resorts.

Mixed-use projects have several perceived advantages over comparable single-use developments. Among these are: the opportunity to create a “sense of place” (an increasingly common “buzz-phrase” among mixed-use developers and the design professional community), ability to deliver a critical mass of bundled product, enhanced cross-marketing opportunities, economies of scale in operation and management (such as optimizing the use of parking structures), and creation of a high-profile project. However, with the complexity and interdependence of the various components of mixed-use development, the challenges to success and the potential risks are increased over those associated with the typical single-use project.

Mixed-use projects are characterized by three or more different types of uses – typically retail, office, and residential, and sometimes including hotel or entertainment – all integrated by means of a master plan. Because of the scale and complexity of the typical mixed-use project, significant feasibility planning, market analysis, governmental approvals and permits, and capital investment are required in order to achieve success. The uses contemplated in the project must complement each other and in turn must be separately marketable. The integration among the different elements and uses must function both in the real world and in the legal documentation. Timing is important in bringing the desired uses on-line consistent with market demand. As a result, many mixed-use projects are developed in phases. Phasing helps the developer better gauge the market demand for different product types; yet phasing adds a significant layer of complexity to an already complex project structure.

Cities and towns have increasingly become interested in mixed-use projects to address municipal objectives. In some cases, the municipal attraction or impetus for a mixed-use project is the parking garage component – the municipality seeks to have the developer furnish a parking facility that is shared between the tenants, occupants and customers of the developer’s project as well as visitors to nearby municipal offices, parks or other attractions. In such instances, the parking structure, although constructed by the mixed-use project developer, is purchased by a redevelopment agency with municipal bond proceeds, giving rise to special tax considerations in the operational aspects of the garage. Oftentimes, balancing the tension between the municipality’s parking needs and the demands of the project components (particularly retail and multi-family) is tricky.

We will focus on the structure, organization and governance of mixed-use projects, both horizontal projects (where the various uses are side-by-side on adjoining tracts) and vertical developments (where one use sits atop another within the same building structure). In particular, we will look at the structuring possibilities available under Texas law. Since every mixed-use project tends to take on specific characteristics of its locale, there is no “one size fits all” structural or organizational method. However, general principles are applicable to most every mixed-use development.

A mixed-use project requires imaginative revisions to traditional document forms. Counsel should consider carefully which parties should enter into each document to account for issues of confidentiality and flexibility in obtaining later approvals. Since the different uses within a mixed-use project often have competing interests, it is incumbent on the project developer to reconcile those interests,
and it is left to developer’s counsel to document carefully and thoroughly those reconciliations.

This article is to serve as a guide to counsel in thinking through the issues involved in creating the documentation for a mixed-use project. Critical thinking, careful examination of ramifications, and recognition of the balancing task involved in drafting fair and even-handed provisions assure the success of the project documents.

Since mixed-use projects themselves vary widely, template document forms generally available are either over-generalized or restrictively narrow. There are, however, several good examples of mixed-use project documentation contained with the articles listed in the bibliography appearing at the end of this article.

II. STRUCTURING ALTERNATIVES

A. VARIOUS STRUCTURING DEVICES

In the various states, there are several different structuring devices to choose from for mixed-use development:

1. Condominium – most advantageous for vertical mixed-use projects.

2. Covenants, Conditions & Restrictions (CC&Rs) and Reciprocal Easement Agreements (REAs) – for horizontal mixed-use development.

3. Air Rights Deed – Airspace Subdivision (or Three Dimensional Plat where local laws allow).

4. Partnership interests through a master limited partnership.

5. Ground Lease(s).

6. “Vertical PUD” (Planned Unit Development) under the Uniform Common Interest Ownership Act in the states (not including Texas at present) where available.

Since mixed-use projects are, by definition, a combination of concepts, it is not uncommon to see one or more of these structuring devices combined in interesting and challenging arrangements in mixed-use project development. An air rights deed can be combined with a condominium to allow the creation of a residential condominium within a fee simple airspace. As a further example, a combination of ground lease and condominium was used in the formation of Albuquerque Plaza, a full-city-block mixed-use project in downtown Albuquerque, New Mexico, containing the Hyatt Regency Albuquerque Hotel and Albuquerque’s tallest office building. The project consists of a six-unit commercial condominium – one unit for each type of use: office, hotel, parking garage, and three subdivided retail units – all atop a group of 99-year ground leases. Typically, the most advantageous structuring choice is a function of state law considerations.

In some states such as California, it is possible to create a vertical subdivision – sometimes called a “flying freehold” – as a means of creating separate ownership space above the ground. Only a handful of states have subdivision statutes that allow the creation of a vertical subdivision without the use of a condominium. Texas subdivision law is considered by most not to permit the flexibility of subdividing air space into a separate legal lot. Although changes to Texas law allowing vertical subdivisions may be in the offing, today the structure of choice for mixed-use development in Texas is either a condominium (or a two-tiered condominium structure) under the Texas Uniform Condominium Act for vertical mixed-use development or the classic Covenants, Conditions & Restrictions (CC&Rs) or an interlocking series of CC&Rs and reciprocal easement agreements (REAs) for horizontal projects. The more complex mixed-use projects may employ a combination of condominiums over-laid with CC&Rs. Although other ownership methods for a Texas project are theoretically possible (such as the use of tenants in common, air rights conveyance, and partnership interests through a master limited partnership), the two structuring devices described above are generally preferable for the organization and governance of Texas mixed-use projects.
B. STATUTES GOVERNING TEXAS MIXED-USE PROJECTS

Counsel for the mixed-use developer must consider and address a number of statutes in the creation, design and operation of a mixed-use development: Some that may be applicable include:

1. Texas Uniform Condominium Act, Chapter 81, Texas Property Code ("TUCA");


3. Federal Fair Housing Act, 24 CFR §100.205;

4. Texas Fair Housing Act, §301.025 Texas Property Code;

5. Residential Construction Liability Act, Texas Property Code §27.001 et seq., and Texas Residential Construction Commission Act, Texas Property Code §401.001 et seq.;

6. Americans with Disabilities Act (ADA), 42 U.S.C. §12181 et seq. & regulations under 28 CFR §36.001 et seq.;


8. Local housing ordinances;

9. Local municipal development codes;


Of the statutes that may come into play in the development of a mixed-use project involving a residential component (as most do), the more notable ones are summarized below:

1. Interstate Land Sales Full Disclosure Act. The Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701 et seq. ("ILSFDA") may be applicable to the residential component of a mixed-use project. Though many developers are familiar with ILSFDA in connection with the sale of undeveloped lots, this federal registration statute is often applicable to the development of large scale residential condominiums, or apartment condominium conversions. If the project will have less than one hundred units, registration is not mandated under ILSFDA. If the project will contain one hundred units or more, either the project must be registered under ILSFDA or qualify under one of the several exemptions from registration.

The most common exemption relied upon by the development community from ILSFDA registration is the “builders exemption” provided in 15 U.S.C. §1702(a)(2). To satisfy this exemption, the developer must unconditionally agree, in the sales contract for each unit, to deliver the unit to the purchaser within two years from the date the unit purchaser signs the sale contract. HUD has stated its position that each unit of a condominium project is viewed separately for determination as to whether the exemption is satisfied. In other words, to qualify for the exemption, the developer must be subject to a legally binding obligation to deliver the unit completed within two years of contract signing, and the unit purchaser must have a remedy other than mere return of the earnest money deposit. The exemption does allow the developer to include a market feasibility period of up to 180 days that would allow the developer to terminate the purchase contract if the developer has not satisfied its pre-sale requirement or otherwise concludes not to proceed with the project. But this market feasibility period does not extend the two year period for delivery of the completed unit. However, the ILSFDA exemption does recognize extension for customary “force majeure” events to the extent they would excuse the developer’s performance under applicable state law.

The ILSFDA imposes harsh penalties for non-compliance. A developer whose project would arguably fall within the registration requirements
of ILSFDA would do well to obtain an advisory opinion from the Office of Consumer Regulatory Affairs of HUD.

2. Fair Housing Act. The Fair Housing Act ("FHA") will apply to a mixed-use project containing a residential component. Generally, the Fair Housing Act prohibits discrimination in the sale or rental of a residential dwelling against any person because of race, color, religion, sex, familial status, or national origin. 42 U.S.C. § 3604. Case law has held that the FHA applies to residential condominium development. The FHA and regulations promulgated thereunder will impact the manner in which the developer designs the project (e.g., handicapped parking spaces) and markets the residential units.

3. Texas Residential Construction Liability Act; Residential Construction Commission Act. For Texas mixed-use projects involving a residential component, the Residential Construction Liability Act ("RCLA") will apply to any residential owner’s action to recover damages or other remedy arising from a construction defect. Texas Property Code, Section 27.001 et seq. As long as the developer and his contractor follow the provisions of the RCLA, compliance will effectively shield them from liability under the Texas Deceptive Trade Practices Act. A more recent law – the Texas Residential Construction Commission Act – creates a commission to adopt standards for warranties on residential construction and provides a mechanism for residential owners to present and prosecute claims against builders. Texas Property Code, Section 401.001, et seq.

C. HORIZONTAL MIXED-USE PROJECTS – USING COVENANTS CONDITIONS & RESTRICTIONS

A mixed-use project designed along horizontal lines customarily consists of separate specific-use parcels oriented around a centrally-themed common area or focal point, with each parcel being sold or ground leased to the selected specific-use user (either a sub-developer, retailer or builder). With each particular use type being situated on its own tract or parcel, the project documentation can be arranged through a set of “Covenants, Conditions & Restrictions” ("CC&Rs") or one similarly named, or for complex projects, a coordinated series of CC&Rs and restrictions which may involve a master CC&Rs document covering the entire project and separate subsidiary CC&Rs for each use component. For the sake of convenience, we will refer to either of these instruments or group of instruments as the “CC&Rs.”

The CC&Rs are designed to bring the diverse elements of the mixed uses together into one governing document. The instrument (or set of instruments) integrates and coordinates the various uses, establishes easements (including access, cross-parking, utilities), establishes general restrictions, and typically contains design and construction guidelines (including architectural elements, height and setback requirements, colors and materials, signage and landscaping). The CC&Rs are to be executed by each of the parcel owners, which often is the project developer at the inception of the project. The project developer designates the intended use of each tract or parcel of the project by means of a plat or the CC&Rs.

The CC&Rs are to run with the land and is used to bind all owners within a horizontal mixed-use development to the overall development scheme. As noted above, in complex projects, it may be useful to use multiple CC&Rs, including a master CC&Rs that addresses matters common to the entire project, coupled with supplemental CC&Rs that address matters unique to one or more uses or parcels within the project.

The CC&Rs provide the vision and general framework for the regulation of the horizontal mixed-use development, together with standards and procedures for the development, administration, operation and maintenance of the project. The following are the typical matters covered in the CC&Rs:

1. Permitted uses, including permissive, mandatory and prohibited uses;
2. Reciprocal and other easements;
3. Entitlements relating to use and enjoyment of common areas and shared facilities, particularly recreational elements;

4. Maintenance responsibilities, and enforcement mechanisms for failure to maintain;

5. Alterations and future additions;

6. Architectural control standards, design guidelines, approval procedures and dispute resolution procedures specific to design requirements;

7. Insurance requirements;

8. Casualty and condemnation provisions;

9. Access rights and controls;

10. The governance structure, typically including the designation of an owners association or maintenance manager;

11. Compliance and enforcement provisions;

12. Responsibility for assessments, including lien enforcements;

13. Operational obligations of various uses within the project (such as “continuous open” covenants of retailers);

14. Operational budgeting, record keeping and bookkeeping requirements;

15. Developer rights for future expansion, modification of uses, or redevelopment.

Several important concepts of the CC&Rs are discussed below:

1. Architectural Control and Construction Process. Since horizontal mixed-use projects are often developed by several property owners and developers on varying time lines, design guidelines and architectural control and construction procedures must be well conceived and unambiguous. The design approval provisions of the CC&Rs should address both initial construction activities and any future rights and obligations regarding modifications or alterations. Typically, the specific design and construction guidelines are incorporated into the CC&Rs or are contained in a separate design guideline document. The responsibility for architectural review and approval is typically delegated to an architectural review committee (initially controlled by the project developer and then subsequently by the major owners). In some instances, there are two committees – one reviewing new construction and a second overseeing modifications. Splitting these responsibilities allows the project developer a greater hand in executing the overall vision for the project in its construction phase, while allowing the end users greater say in the “look and feel” of the project in subsequent years as the project matures. Counsel in charge of drafting the CC&Rs should strive to balance the interests of the project developer and those of the subsequent owners in design control.

2. Construction Schedule. Due to the integrated nature of mixed-use developments, strict adherence to construction time lines for all parties is a critical element of the project’s success. The CC&Rs should contain or provide for the establishment of construction schedules for each parcel and construction milestones such as commencement or substantial completion dates, with penalties and perhaps self-help rights if the time line is not being achieved. Particular attention must be given for the construction of common elements or shared facilities that are essential to the opening of the project, such as driveways, walkways, pedestrian malls, and parking facilities. The CC&Rs should provide remedies to assure construction performance; for example, the CC&Rs may require performance bonds or construction guarantees to protect other property owners against construction delays or defaults or bankruptcy. Some exceptions may be necessary in limited circumstances, such as labor strikes, natural disasters, and unforeseeable adverse weather conditions. However, any delay, whether excusable or not, may have a serious impact on the other property owners and the success of the project.

3. Use Controls. The CC&Rs typically impose various permitted and prohibited uses, designed to protect each property owner in its
rightful enjoyment of its particular use. The most significant challenge in the interaction between different uses occurs between retail and residential uses. The residential owners typically want controls in place to ensure that the retailers will not disturb the residents with noisy operations, late-night clubs, congregating of crowds, adult entertainment, or overburdening of common areas or parking facilities. Retailers are typically less concerned about residential property owners but may worry about residents’ “poaching” on retail parking spaces or interfering with business operations. Regulations governing uses should extend not only to owners, but also to tenants, guests, licensees and invitees as well.

4. Common Area or Shared Facilities Cost Allocation. Mixed-use projects also present challenges in the delineation of maintenance obligations and the allocation of maintenance costs for common areas and shared facilities. Maintenance of improvements owned and used exclusively by one property owner should be the sole responsibility for that owner, even where the improvements are actually located on other property. For shared facilities, cost allocations based upon usage or benefits is the most common. Problems arise when either the project developer or a key tenant or user negotiates an exemption or discount from the normal cost allocation arrangement. This forces the remaining owners to bear an over-allocation of maintenance costs for those facilities. Proper cost allocation depends on many factors, including design, configuration, location, ownership, infrastructure, utilities, signage and monuments, and specific characteristics of the project such as the type of use, intensity of use and potential disproportionate impacts of one or more segment of users over another. Typically, the developer divides the expenses into separate cost centers, such as buildings, parking facilities, recreational amenities, elevators, HVAC systems, landscaping, security, etc. Although allocation based on square footages is convenient, oftentimes in mixed-use developments this type of cost allocation leads to unfair results since usage infrequently correlates well with floor areas. A more equitable allocation is based on the intensity of the anticipated use by the different use groups within the project. Since intensity of use cannot be known with certainty at the inception of the project, the CC&Rs may provide for cost allocation based on a reasonable estimate of use intensity for each use group as a beginning point, with a re-allocation procedure after a period of time once a use history can be determined.

5. Insurance. The CC&Rs should dictate minimum insurance requirements and set standards for insurers and criteria to determine whether an owner can self-insure. For shared facilities that are critical to the project’s operation, it may be appropriate to have a master insurance policy, with the property owners paying an allocated share of the premium cost, rather than attempting to allocate insurance coverages among several owners.

6. Casualties; Rebuilding. Also critical are the CC&Rs’ provisions concerning rebuilding following casualty. Since the guiding principle of the mixed-use project is the synergy created by the differing uses, it would be necessary to require reconstruction of any damaged or destroyed improvements in order to preserve the project’s integrity. There may need to be exceptions to the mandatory rebuilding rule, but these should be limited to avoid losing key project components. Moreover, where a property owner is required to rebuild, the CC&Rs often provide that the insurance proceeds are to be paid directly to a trustee or a master property owners association, rather than directly to the property owner. This allows the trustee or association to disburse the proceeds in stages as the reconstruction takes place, thus providing both an incentive to reconstruct an assurance and that adequate funds for the completion of the repairs are available. Care must be taken to address lender concerns in this context in order that the lender may feel comfortable entrusting proceeds to the trustee or association in exchange for relinquishing the right to have insurance proceeds pay down the mortgage debt.

7. Easements. Typically, the CC&Rs would establish the following types of easements:
(a) **Access easements.** Easements for access are needed to allow access not only to each owner’s particular property, but also to shared facilities such as parking garages, recreational amenities, and loading docks.

(b) **Structural support and encroachment easements.** Where buildings abut one another, or constructed on a “zero lot line” basis or share a common wall, each property owner will need easements to attach its improvements to, and receive structural support from, improvements on adjacent property. These easements commonly include an easement allowing improvements to encroach upon portions of adjacent property or common areas to the extent necessary, particularly during construction. The adjacent property owner will need protections in the easement that construction activity will be in accordance with the rules and regulations and conducted so as not to overly burden the adjacent property.

(c) **Construction and maintenance easements.** Easements for construction and subsequent maintenance of a property owner’s improvements or equipment are necessary to permit one property owner access through another property for the purpose of constructing and thereafter maintaining facilities such as utility lines and structural supports. The CC&Rs should define the scope of these activities and provide a level of protection to the burdened property, through notice requirements and scheduled hours for construction or maintenance work (with an exception for emergencies).

(d) **Utilities and equipment easements.** One perceived benefit of mixed-use development is the project’s ability to achieve economies through strategic placement of utility facilities throughout the project. Thus, the multiple use components can benefit from the single placement of utility lines and equipment. Utility easements are necessary so that each benefited party will have access for installation, maintenance, repair and replacement of utilities and equipment. The burdened property owner will want to ensure that controls are in place to govern the type of utilities or equipment installed and the hours and manner in which installation or repair takes place.

8. **Other Documents.** The CC&Rs may not be the only document needed for the horizontal mixed-use project. Besides the CC&Rs, the project may require or benefit from:

- A separate, multi-party REA governing the structured parking facility, particularly if there is a municipal corporation or community redevelopment agency providing the financing for the construction of the parking facility. This separate instrument will contain the specific agreements regarding the parking facility, so that the public agency will not be a party to the CC&Rs (which might give it a voice in any subsequent modifications).

- A tri-party maintenance and operation agreement among the retail developer, the office developer, and the major retailers (only) in order to spell out, perhaps in great detail, the use and operational requirements that are of interest to those parties (without the involvement of the owner(s) of the residential component of the project).

- A development agreement among the parties involved in the project’s initial construction and development, to deal separately with such issues as scheduling and special phasing/staging arrangements, especially where segments of the project may open while construction on other segments remains in progress.

9. **Governance.** Governance structures for a horizontal mixed-use project differ little in analysis from that of a vertical project (which is discussed in greater detail below). In simpler projects with few mixed-use components, a single association governing the entire project can be made to work. Within a single association, the separate uses are divided into classes, with each class given a weighted voting on matters consistent with such factors as land area, building area, building value, usage rights, or some other method of allocation. For more complex projects, a master association is preferable, to administer the areas within the project common to all users, with subsidiary associations operating each usage type of the project. This multiple layer approach to governance is more fully described below.
D. VERTICAL MIXED-USE PROJECT – STRUCTURING AS A CONDOMINIUM

The Texas condominium statute was completely redone in 1994 with the legislature’s adoption of the TUCA. Although the majority of the provisions of the Act are directed toward residential development, the Act has sufficient flexibility to permit its use in commercial/residential mixed-use developments. An important feature of the TUCA is the ability to subdivide units (TUCA Section 82.003(12)), thus allowing the creation of a two-tier mixed-use condominium structure where the building areas comprising each specific use are placed in a unit within the master condominium (e.g., a retail unit, an office unit, a residential unit) and then certain of the units themselves are condominiumized. As discussed below, this two-tiered structure aids not only project operations but governance as well.

The condominium structure is usually preferable for Texas vertical mixed-use projects, for several reasons:

(a) Statutes Well Understood. The market place has had over two generations to accustom itself to the nature and structure of condominiums. The current version of the Texas condominium law is adequate for most mixed-use projects, including the more complex ones involving numerous types of different usages. The advantage of being able to control the entire development initially through one ownership device (i.e., until the individual units are sold) is significant from the standpoint of project construction/development financing.

(b) Flexible Document. Although the creation of a Condominium Declaration (with its attendant drawings specifying each unit) is an expensive proposition, once in place the condominium structure allows much more flexible redevelopment of the project than would a platting of a vertical subdivision. Platting statutes and regulations are commonly much more complex and the process more politicized than the process of amending a Condominium Declaration to change unit boundaries or to designate different uses.

(c) Targeted Lenders. As real estate lenders become more sophisticated and specialized, lenders are more interested in underwriting and funding loans within particular categories or sub-categories of usage. For example, multi-family lenders may find themselves uncomfortable in evaluating a single project which mixes multi-family, office, retail and hotel uses. The condominium structure allows the developer to compartmentalize each portion of the project by use, and thereby find permanent financing with specialized lenders. Moreover, this structure fits well with the lending community’s current desire to have the separate use components owned in “single purpose entities” or SPEs.

(d) Componentizing Value. When the multi-use project is segregated by type of uses into separate condominium units, oftentimes the value of the separate parts is greater than the whole. Each condominium unit can be looked at separately for valuation purposes, and the negative aspects of one particular usage (i.e., a soft multi-family market) would not necessarily impair the value of the other components.

(e) Market Changes. The mixed-use condominium may afford greater future flexibility as the market changes. For example, a hotel could be converted into for-sale condominium units, through sub-condominiumization of the hotel condominium unit. Retail units could be converted into office, or vice versa.

(f) Exit Strategy. Structuring a mixed-use project as a condominium affords the developer flexibility in designing favorable exit strategy scenarios. A residential unit can be developed as a single condominium unit with rental-only apartment units, or sub-condominiumized into individual units for sale. The developer can retain ownership of the units that best suits his or her expertise and sell off those components which others may be more adept at operating or managing.

1. Tier Structuring. As noted above, the project may employ a two-tier condominium legal structure to optimize the organizational
and operational advantages. See chart attached as Exhibit A.

2. Critical Components of the Condominium Declaration.

(a) Regulation of Uses. The uses for each condominium unit must be carefully thought through for definition, limits and permitted uses. There is naturally tension between the commercial and residential uses, particularly where the commercial uses are retail or hotel. The uses specified must contain sensible limits and prohibitions against disruptive behaviors to allow each different use to coexist as a “good neighbor” to the others. Furthermore, developer’s counsel must carefully check zoning ordinances, recorded restrictive covenants, easements and plats to assure that the uses permitted under the Condominium Declaration are not inconsistent with pre-existing requirements. The Condominium Declaration must provide to each unit, particularly retail units, a sufficiently broad permitted use to allow the unit owner to enjoy his space or operate his business in customary fashion. Commercial unit owners (and their lenders) must have assurances that the Declaration’s use clauses cannot be amended without their consent. Residential unit owners will value limitations on the commercial uses in order to produce a livable environment, particularly in evenings and nights. Of course, there is a natural trade-off here, since the attractiveness of a mixed-use development may be its late-night entertainment offerings, and overly restrictive use requirements may hamper the project’s success.

(b) Easements. A mixed-use condominium project will require numerous easements, each of which must be designated by legal description under the statutory requirements. TUCA Section 82.059(5). Although the TUCA provides expressly for some easements, there may be others necessitated or advisable given the nature of the specific project. The following list of easements is a place to start:

Access, parking, loading, construction, support and encroachment, utilities, elevator, amenities (such as swimming pool, jogging trails, exercise area, outdoor pavilion), signage, stairs and stairwells, garbage chutes, rooftop usage, telecommunications, common element easements, and easements in connection with any future development area.

Each easement must be analyzed as to whether it is exclusive or non-exclusive, and whether it is assignable apart from its benefited unit. The Condominium Declaration must specify which unit owner(s) is responsible for the maintenance and repair of each easement designated. Certain rights may be more in the nature of a license than an easement (e.g., use of the hotel fitness center and swimming pool by residential unit owners). Use rights of this latter type may be better governed by separate license agreements administered by the condominium association.

(c) Common Elements. As noted, the designation for common elements for a mixed-use condominium project is critical. All space that is not within the actual boundaries of each unit (i.e., the four walls, floor and ceiling of each office space, retail shop, or residential dwelling) constitutes “common elements”. All space that is used by one or more but not all of the condominium unit owners is designated “limited common elements” by statute. TUCA Section 82.003(17). If a common element is not a limited common element, then the statute designates it as a “general common element”. TUCA Section 82.003(14). Examples of limited common elements include balconies and patios, storage units, and restricted-use parking areas. Individual parking spaces appurtenant to a residential unit are typically limited common elements. Parking surface lots and garages can be common areas or can be included within a unit depending on the nature of usage and the relationship of unit owners and their operators. For complex projects, it may be advantageous to place all of the general “common elements” into a separate condominium unit, so long as there are at least some common elements (e.g., the real property and the building structural components) outside that unit. Creating such a “shared facilities unit” may be useful in controlling the quality of the overall project through the governance of the shared facilities unit by the Master Association. Limited common elements can then be attributed to each
unit as appropriate, by designating within the
Condominium Declaration item such as “office
limited common elements”, “retail limited
common elements”, etc.

(d) Casualty and Condemnation. Texas
condominium law requires its statutory
provisions to control in connection with casualty
or condemnation affecting the condominium
project. Section 82.111 of the TUCA, which
deals with insurance and the administration of
insurance proceeds following a casualty, cannot
be varied if there is a residential component in
the condominium. Similarly, Section 82.007 of
the TUCA, dealing with condemnation, cannot
be varied either by the Condominium
Declaration or agreement of the unit owners. It
is worth noting that the TUCA allows the use of
an insurance trustee if the Association deems
such procedure appropriate. Since a casualty is
likely to affect different unit owners
disproportionately, it is advisable that the
Condominium Declaration of a mixed-use
project require that insurance proceeds be
administered by an insurance trustee.

(e) Future Development Rights. Sometimes
the project developer has additional land or
additional space within the project where future
development may take place. More commonly,
the developer is proceeding with the project in
phases, with the use designation of the future
phases to be determined as the success of the
project dictates. In other words, the future
development area could be later designated as
office, retail or residential (or combinations)
depending on which product type produces the
greatest success. Reservations of areas for
future development must be done within the
Condominium Declaration. The developer, as
the declarant under the Condominium
Declaration, must reserve “development rights,”
which are specified in the statute to mean “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;

C. “Subdivide units or convert units into
common elements.” TUCA Section 82.003(12).

The future development area can be added as a
separate additional unit to the condominium and
then further subdivided at a later date. However,
the development rights must be specifically set
forth and reserved in the Condominium
Declaration in order for the developer to retain
those rights for the future. Moreover, easements
relating to the construction, development and
operation of the improvements within the future
development area must all be reserved in the
Condominium Declaration, including addressing
of additional parking, access, signage, utilities
and other considerations.

III. OPERATIONAL AND DESIGN
ISSUES WITHIN THE MIXED-USE
PROJECT

A mixed-use project is more difficult to design
and operate than one with a single use. Mistakes
in design or operation are multiplied many times
in a mixed-use project as opposed to a
traditional single-use project – even complex
ones. Mixing uses complicates how people use
the project and its components. Here are several
“flash points” that deserve counsel’s attention:

A. PARKING: Creating workable parking
for a mixed-use project is typically the most
difficult task for the developer. Typically,
mixed-use projects should benefit from overall
lower parking ratios on the theory that shared
parking should be occurring. But making this
theory work in reality is often a challenges.

(a) The project’s parking plan must meet all
applicable codes and ordinances, keeping in
mind that different parking ratios may apply for
the differing uses within the project and the
municipality may or may not allow relief from
the cumulative effect of those usages. Some
municipalities are capable of recognizing that
the parking used by the office tenants and
visitors during the day would largely be
available for the use of the residential owners
and their guests by night. However, the
residents and their guests may compete for
parking spaces with retail customers,
particularly if the retail component includes
restaurants, bars, theaters or other late-night venues.

(b) The parking plan must also work with the design of the buildings and the traffic flow of the adjoining streets. Parking spaces for individual residential units may need to be “reserved” in order to facilitate the marketability of the residential units; in that case, the parking space may actually be made part of the unit itself or appurtenant as a limited common element. For a hotel within a mixed-use project, designation of a hotel parking area (typically to the exclusion of other uses) may be necessary in order to permit the financeability and the marketability of the hotel unit. With daytime events, around-the-clock restaurants, and overnight guests, the hotel unit may have nearly constant demand for use of parking spaces. In similar fashion, parking for the residential unit(s) should be segregated to encourage the residents to use the designated parking and avoid using the retail units’ parking spaces. The retail unit owners will need to have parking specifically designated as close to the retail spaces as possible, given the public’s preferences over proximity of retail parking. The use of access gates, key cards, enforcement of designated and reserved parking, and signage for visitors and business guests are typically necessary for the parking component of the project.

(c) Parking rules and regulations must address the varying timing, security and access needs of diverse users. The rules should establish operational constraints to avoid “poaching” by others on the free parking available to retail customers.

(d) If parking structures are constructed with the use of municipal bond financing, additional issues will arise. The project documentation will need to clarify, for the benefit of the municipal authority, that if the municipal authority takes title to the parking structure, any assessments for common area charges are not to constitute indebtedness of the authority, and liability for assessments is limited to the authority’s ownership rights. Even where the municipal authority does not own the parking structure, the authority, at the insistence of bond counsel, will typically need to require that the parking remain open to the public. This will set up tension with the residential users, who will want their parking segregated, restricted and secure. Bond counsel may also try to insist on preserving the right to determine the rate to be charged for parking (if any charge is permitted at all) and sometimes the right to change the garage to a non-parking use. The project developer must foresee these conflict areas and negotiate accordingly.

(e) If the project includes a supermarket or other large format user whose customers use shopping carts, the parking plan must take into account that customers will need pick-up locations that are easy to find and large elevators to get their shopping carts easily to the parking area.

(f) If the parking is underground, good design practices, including openness, lighting and easy access to the project, will be needed to overcome any reluctance that customers may have.

(g) If the mixed-use project is to be phased, counsel should consider whether parking requirements for future phases should be relaxed, or conversely whether additional structured parking needs to be added.

B. ACCESS TO THE PROJECT. Access to the project itself by private vehicles, pedestrians and public transit is complicated by the density of the project. Each use has its own unique needs for access to that zone of use which may conflict with other uses and their need for access. Once in the project, how a customer, visitor or resident obtains access among the uses – pedestrian and vehicles – can be complicated, but is essential to success of the project.

C. VISIBILITY. In mixed-use projects, there is a need to fit a large amount of square footage on a parcel and to efficiently use the land for each use. In addition, some non-retail uses, particularly residential, require sensitivity to traffic, light and aesthetics. Traditionally, retail users want maximum visibility. The
following are suggestions on resolving the potential conflict over retail visibility:

(a) The extent to which retail must yield to its desire for visibility must depend on the context for its customers in the market and the trade area. If customers are used to finding retail in less than visible locations, retailers should be willing to compromise.

(b) Building signage can sometimes be a substitute for free-standing signage; free-standing signage can sometimes be a substitute for building visibility.

(c) Retailers must be able to retain “brand” appearance, but should become part of the context of the center. Architectural elements can sometimes replace building visibility or help direct customers to an entrance.

(d) Some projects find success in segregating or grouping uses – giving each different use a different “face” or perhaps even changing orientation to the outside world so as to mitigate retail’s impact on other uses.

D. CONVENIENCE. Most retailers, have customers that demand easy “in and out” access to the stores. Most mixed-use designs encourage a stay at the project so you can live, work, buy and play at all the same location. A guiding principle of mixed-use design is to encourage pedestrian use of the project, but retailers must meet their customers’ demand for vehicle use. As a result, project designers must focus on “intuitive” design - the ability for customers to access all aspects of the project whether in vehicles or on foot, without excessive thought or inquiry.

E. CONSTRUCTION AND RENOVATION. Untimely construction or renovation can be an annoyance to the “neighbors” in the project. Major construction work near the retail space may have to be curtailed during the busiest retail periods of the year. At least, the work should be subject to the consent of the major retailers. Likewise, construction adjacent to offices should avoid the workday, and work around the residential areas should be kept to a minimum during nights, evening, early mornings and weekends.

F. LIGHTING CONTROLS. Residential and retail owners have different lighting needs, which translate into the need for regulating the hours of lighting and allocating the electrical costs of lighting. Accommodation of multiple users may require establishment of uniform lighting hours, perhaps with a process for “purchasing” the right to extend those hours, up to a limit. The retailers may need to “buy” late-night lighting privileges from the residential owners association at a pre-set price, up to, say, a specified number of total hours per month.

G. NOISE. As with lighting, noisy activities must be regulated as well. Setting hours for cessation of outdoor activities is one answer. Sometimes, more creative solutions are necessary. For example, a hotel overlooked a central retail area where live music was often featured; when the hotel was not fully booked, the hotel placed guests in rooms on the opposite side of the hotel; when the hotel was fully booked, the music ended earlier.

H. COMMON AREA MAINTENANCE COST ISSUES. Allocating the costs of operating and maintaining the common areas of a mixed-use project in a fair and equitable manner can be challenging.

1. Costs of maintaining common area that exclusively benefits one use should be allocated completely to that use even if located on other property – for example, vertical transportation from a parking structure exclusively used by residential units, utilities exclusively serving residential units, and signage used to market residential unit sales or rentals.

2. Costs of common area that is shared but not equally are more difficult to allocate – for example, loading and trash areas. A simple floor area fraction often will not work (and would be difficult to calculate since floor area of retail, office and residential uses may not accurately reflect intensity of use). In the case of a condominium, the TUCA permits the allocation of expenses to be made on a basis other than the unit owner’s common interest percentage.
(However, the statute further provides that the allocations may not discriminate in favor of units owned by the declarant.) Several alternative methods of expense allocation include the following:

(a) Allocation based on common interest percentages (the simplest formulation).

(b) Delegation to the Master Association of the responsibility to allocate expenses reasonably and fairly (which shifts the expense allocation analysis to one of control over the Master Association).

(c) Installation of submeters or other check devices for the utilities and other services provided to the project component, with expenses then allocated based on meter readings (not always available or practical).

(d) Allocation of expenses based on anticipated usage (i.e., those unit owners that use that portion of the property are allocated its expense based on the extent of usage).

(e) Allocation of expenses based on third-party reports of actual usage after a reasonable period of usage studied by the third party.

(f) Allocation of expenses based on the appraised value of each participating unit.

(g) A schedule is prepared (usually by the project developer) identifying each category of expense and assigning a percentage allocation among unit owners for each expense category.

3. How should the impact of phasing be addressed? If a floor area to floor area ratio is utilized as the cost sharing formula, are only completed buildings included in the denominator, or are all buildings shown on the site plan included even if not yet built?

I. PHASING. Phasing occurs in single-use projects for many reasons. Phasing is even more likely in mixed-use projects. For example, a residential developer may wait until there are sufficient households under roof to develop land or space that has been designated for retail use. Some impacts of phasing on mixed-use projects have been noted earlier. Cost sharing issues are particularly susceptible to the implications of phasing.

1. Parking Structure Costs

(a) If residential or office uses are developed in a later phase than the retail development, and if the parking for the first phase can be constructed on grade but parking for future phases must be structured, are the residential and office developers responsible for the increased costs attributable to structured parking?

(b) If a retailer expands its existing buildings in a subsequent phase, similar issues may arise. If more than one retailer expands, how is limited grade parking availability allocated?

(c) The project documents should specify to what extent completion of all parking is a condition to the opening of any expansion.

2. Infrastructure Costs

(a) In a vertical mixed-use project, the upper level development may be constructed upon a podium providing structural support. If the upper level development is constructed in a future phase, when is the podium constructed? How are the incremental construction costs that are attributable to the podium and to other above-grade construction to be allocated?

(b) The potential interference of such later construction on existing operations in a vertical development might be even greater than in a horizontal phased development and should be carefully dealt with in the project documents. Later construction may have to be scheduled around peak seasonal retailing periods, for example.

3. Calculation of cost sharing formula.

(a) Land area to land area: This customary sharing formula, that may work well for horizontal development, is difficult to apply in the context of a vertical project. As noted above, floor area ratios in mixed-use projects
may be inequitable given the disparate intensity of usage among the types of uses in the project.

(b) Impact of mixed uses: Any element of construction, whether or not off site, may benefit one use in a disproportionate manner, compromising the equity of any cost sharing formula that does not take contemplated benefits (and, in some cases, burdens) into account.

(c) Impact of phasing: If undeveloped land is included in the denominator of any fractional cost sharing formula, the developer will be responsible for bearing the share for future phases prior to their development and sale. Performance of site work benefiting a phase only when the phase is developed solves this problem, but this may not be possible in the context of a vertical mixed-use project if municipal approval authorizes (and sets forth site work requirements contemplating) all phases.

4. A mixed-use project phased over time requires that retailers be more flexible in imposing use restrictions, but some retailers will still seek significant protections. Issues in this area may be addressed through the following:

(a) Project documentation may provide for geographical limits to a retailer's approval rights (the farther away, the fewer rights). These geographical limits might also be coupled with limits relating to potential future phasing. It may be more difficult for a developer to agree to limits on phases to be developed in the future if the nature and scope of such future development is not yet known.

(b) Counsel should be aware that, from a retailer's perspective, any approval rights (and any exclusive use restriction) afforded the retailer should benefit not only the retailer's existing premises but also any expansion or new location in the project. The flexibility inherent in a mixed-use project (including future phasing) may affect the location and size of the existing retailers.

(c) Project documentation should specify to what extent a retailer in a future phase will have the right to impose its exclusive use restriction upon occupants of prior phases. Larger occupants will insist upon complete protection over the entire project. A smaller occupant in a prior phase will need protection at least for its primary use; issues can arise if the smaller tenant’s permitted use clause allows broad ancillary uses.

(d) Counsel may need to scrutinize exclusive use provisions so that appropriate exceptions can be made as necessary for a mixed-use project. For example, the very broad prohibition in a supermarket lease against other food uses may need to be modified to recognize not only traditional restaurants but cart food vendors, theater food concessions, and office building food retailers (coffee, yogurt, sandwich shop, etc.)

(e) In the same vein, counsel should refine typical lease clauses that imply that a landlord controls all leasing in a project and therefore can enforce exclusive uses project-wide. A landlord may convey portions of a mixed-use project to others, including residential and office developers. A provision to the effect that a landlord will use commercially reasonable efforts to enforce exclusive use restrictions is more realistic. A retailer may insist that his or her exclusive use be included in recorded documents to bind the portions of the project intended to be encumbered by the exclusive.

(f) Project documentation should specify whose approval is required to waive (in whole or in part) any exclusive use provision. In mixed-use projects that involve several layers of documents, it is important to avoid the necessity of amending each document (and obtaining the approval of each party to each document) if the intent is that only the retailer imposing the exclusive use restriction (and perhaps the developer) should be the consenting party.

J. IMPACT ON DOCUMENTATION

1. Project documents should require detailed cooperation on design documents, emphasizing the design development phase. Counsel should bear in mind that a major retailer will often insist upon the right to terminate its
commitment to the project if the design is not acceptable.

2. Design development always takes longer than anticipated. The project documents should provide for adequate time to review, comment on and approve the design documents at each phase.

3. Retailers should determine which portions of the common area design or other project aspects (such as access, signage or visibility) are critical to their use of the project and their brand appearance.

4. Counsel should recognize that major retailers will want to control the location, size and design of the parking facilities and their relationship to various uses. Residential users are less concerned about location and more concerned about security, availability, and controlled access.

5. Counsel should determine the developer client’s visibility and convenience solutions and assumptions and ensure that they are incorporated into the project documents. For example, if the design approved by the developer assumes visibility over another portion, counsel must restrict height on the portion that must be low enough to retain visibility. View corridors or negative easements may be appropriate. If the developer assumes convenience is aided by a physical connection, say between a parking field and retail door, then the documents must require that connection be maintained in all situations.

6. Counsel will need to document all easements and operational issues surrounding retail delivery and back room issues – for example, how trucks access the loading dock, any restrictions on truck deliveries or, conversely, permitted periods for deliveries. These will need to coordinate with the rules governing noise, lighting, etc.

IV. GOVERNANCE.

The most critical governance issue in a mixed-use project is the balancing of control between the various unit owners. Here the term “control” has multiple meanings – decision-making over design elements, construction, and phasing; financial administration; maintenance, repair and replacement of the common area components; actual control of the property owners association(s); and dispute resolution mechanisms. Of course, the commercial owners (office, retail, hotel) rarely want to be involved with the various residential unit owners. Likewise, the residential unit owners will have no interest in the commercial units except as to “quality of life” operational issues. The Condominium Declaration or CC&Rs (and its related documents) must contemplate these various motivations so that the various parties can coexist within the same structure, not compete in the administration of the project’s operation, and resolve their disputes through a effective dispute resolution process.

A. LAYERED OR TIERED ASSOCIATIONS. An effective control structure commonly employed is the formation of a Master Association composed of representatives from each of the uses represented in the project: e.g., office, retail, residential, with sub-associations then established under it to govern each specific use. This structure is graphically depicted on the chart attached hereto as Exhibit B. This arrangement has particular merit where the project is organized as a condominium with a residential unit containing the multi-family component. The residential unit can be further sub-condominiumized into for-sale residential units without creating the possibility of the residential unit owners becoming involved in project governance or standards applicable to the commercial properties.

B. CONTROL STRUCTURES AND MECHANISMS. The following are examples of control mechanisms that can be used commonly depending on the type of project and the various components, either individually or in combination:

1. Voting by square footage. Simple square footage apportionment of voting will rarely seems to work effectively. Perhaps in small mixed-use projects, the disproportionalities of usages are not sufficiently
evident, but in most projects, the disparities militate for a control allocation more approximating true benefits and burdens.

2. Class voting by use. Class voting is useful if each class has an appropriate interest to protect in the matter subjected to a vote. Class voting can be further subdivided into differing proportions depending on subject matter – project-wide matters must be approved by a vote of all owners, while matters largely involving one or two uses require the vote of only the affected owners.

Here is an example of class voting by unit vote allocation, where the project involves several mixed uses and a parking garage which is separately owned:

- Votes for general matters not involving the parking garage are allocated on a square-footage basis among the owners, but the parking garage owner has no vote on such matters. As to any matter affecting the parking garage, the allocation is otherwise the same, but the parking garage owner is granted one vote, and he or she must vote affirmatively to pass any matter coming before the association involving the parking garage.

- As to any matter coming to a vote that could result in the termination of the project (such as the termination of the Condominium Declaration), the votes are allocated strictly on a square-footage basis, including the parking garage.

- For elections of the Board of Directors of the association, the election is made utilizing the principles of cumulative voting, and votes are allocated so that each unit will be capable of electing one Director to the Board (sometimes this means pooling of a group of votes to achieve sufficient aggregate votes). The parking garage is granted no vote in Director elections.

- Voting rights may be delegated by unit owners to others. For example, the hotel unit owner may authorize the hotel operator to cast the votes allocated to the hotel unit.

3. Control through tiered property owners associations. (Discussed above.)

C. THIRD-PARTY MANAGEMENT. Most project developers prefer to have their affiliated managers operate and maintain their projects, since management can generate substantial fees. On a less materialistic basis, the project developer may want to obtain management as an attempt to ensure that the quality of the project is maintained over time. If management is to be retained by the developer, disclosure may need to be made to unit purchasers and lessees as part of the project documentation.

The rights and responsibility of a property owners association which may be delegated to a manager should be specified in the project documentation, particularly in the governing documents of the property owners association(s). Generally, most of an association’s responsibilities for day-to-day operations may be delegated to a manager; however, such tasks as the adoption of the association’s annual budget or promulgation of rules and regulations may not be delegable. In larger projects, the association may be under a legal or owner-driven mandate to require that certain expenses of the project be sent out for competitive bid. A further challenge is the overlay of tiers of association responsibility. If the project is organized through a Master Association and several sub-associations, the tasks of management must be clearly delineated in the project documentation to avoid overlaps and gaps in the management and maintenance responsibilities.

D. TURNOVER. Control of the property owners association – and in the case of a tiered arrangement, the Master Association – is often a source of tension between the project developer and the subsequent unit owners. The project developer often wants to keep control of the association as long as possible in order to assure sell-out of the for-sale units. A developer-controlled association is more likely to be able to control association expenses and to limit amendments to the governing project documentation, particularly amendments which would compromise the quality of the project. As
a result, many developers seek the flexibility to maintain control over the association as long as they can. Timing of transition of control of the association from the developer to the owners (the “turnover”) may be governed by statute (e.g., FHA) or specified in the project documentation.

Each developer should analyze the optimal occasion for turnover of association control. Many developers review turnover as a method of achieving a key developer objective of limiting liability, particularly with regard to residential construction. However, it should be noted that turnover itself does not necessarily terminate developer liability for the acts of a developer-controlled association.

E. DISPUTE RESOLUTION. Due to the nature of a mixed-use project involving different uses coexisting in a relatively small, defined space, the likelihood of disputes between owners is relatively high. Availing oneself of remedies through the judicial process may not be the most cost-effective or time-efficient method of dispute resolution. Customarily, mixed-use project developers include a dispute resolution mechanism within the Condominium Declaration to avoid costly courthouse battles.

1. Typically, the dispute resolution mechanisms favored involve a combination of mediation and arbitration. The disputing parties would be compelled to first proceed through mediation, and if unsuccessful after a period of time, then to binding “baseball” arbitration (where the arbitrators are compelled to choose between one or the other of the disputing parties’ final offers without adjustment or compromise). A workable dispute resolution mechanism is crucial to the success of a mixed-use project since the project documentation is likely to be filled with standards such as “materiality” and “reasonableness” qualifying the various rights and responsibilities.

2. Counsel should also recognize the need in certain instances for remedies such as injunctive relief, self-help rights, or “expedited” forms of arbitration to ensure that an owner within a mixed-use project has the ability to protect and preserve its asset in the event of non-

V. CONCLUSION

By nature, mixed-use projects are complicated, particularly in the need to balance competing or conflicting interests of the different users. While the structuring documentation – CC&Rs and/or Condominium Declaration – give counsel an overall framework in which to work, the proverbial devil is in the details: providing for the equitable balancing of each party’s interests. The key to success in preparing effective project documentation is initially a full and complete understanding of the project itself, the developer’s objectives, and the inter-workings of the project components, from a structural, operational and usage standpoint.

Robert Eury, President of Central Houston, Inc., when describing the public spaces of a mixed-use project, has compared a successful mixed-use project to an octopus, reaching out with its tentacles in many directions to draw in many different types of users, visitors, and customers. The trick for counsel is to prepare mixed-use project documentation that allows each “tentacle” to operate freely and effectively without getting them all tangled up.
Exhibit A

Master Condominium

Retail Unit

Shared Facilities Unit [Optional]

Hotel Unit

Parking Unit

Office Unit

Master Association

Residential Unit

Residential Condominium Units

Residential Owners Association
Exhibit B

Master Association

Director

Elects

Director

Elects

Commercial Owners Association

Director

Elects

Residential Condominium Association

Director

Residential Condo Units

Hotel Unit

Retail Unit

Office Unit
BIBLIOGRAPHY

Divita and Tselos, Condominiums for Retail and Mixed-Use Projects, 2005 UNITED STATES SHOPPING CENTER LAW CONFERENCE, INTERNATIONAL COUNCIL OF SHOPPING CENTERS.


Fishman, Insurance and Repair Issues, AMERICAN COLLEGE OF REAL ESTATE LAWYERS, MARCH 2003 PROGRAM.

Goldberg and Leeds, A Guide to Special Concerns in a Multi-Use Condominium: A Review by Annotated Example, AMERICAN COLLEGE OF REAL ESTATE LAWYERS, MARCH 2003 PROGRAM.

Halpern and Syverson, Mixed-Use Developments: Document Structuring and Other Challenges, 2005 UNITED STATES SHOPPING CENTER LAW CONFERENCE, INTERNATIONAL COUNCIL OF SHOPPING CENTERS.

Harbatkin, Multi-Family’s Rising Star in Mixed-Use Development, NAIOP DEVELOPMENT MAGAZINE’S MIXED-USE ROUNDTABLE, SUMMER 2005.

Leeds, So, You Thought You Were a Sophisticated Real Estate Lawyer: Mixed-Use Condominiums Overview, AMERICAN COLLEGE OF REAL ESTATE LAWYERS, MARCH 2003 PROGRAM.

Porter, Hot Topics, Tips & Trends from the World Hotels, Resorts, Recreational and Common Interest Communities, 2005 AMERICAN BAR ASSOCIATION SECTION ON REAL PROPERTY, PROBATE AND TRUST LAW SYMPOSIA.


Van Atta, Mixed-Use, Mixed Ownership Developments Air Space Subdivision Techniques and Issues, AMERICAN COLLEGE OF REAL ESTATE LAWYERS, MARCH 2003 PROGRAM.


Winston, Mixed-Use Condominiums, 2005 AMERICAN BAR ASSOCIATION SECTION ON REAL PROPERTY, PROBATE AND TRUST LAW SYMPOSIA.