Planning Issues In Mixed-Use Developments

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Traditional zoning has created some problems, and mixed-use developments can solve some of them. The challenge is bringing them into being in an imperfect framework of zoning laws.

TRADITIONAL ZONING CONCEPTS, characterized as “Euclidian Zoning,” from Village of Euclid v. Ambler Realty Company, 272 U.S. 365 (1926), have fallen out of favor. The rigid differentiation between different types of land uses have been blamed for a variety of ills in urban areas, including sprawl, inefficient use of land, and perpetuation of over-reliance on the automobile. Increased mixed-use development is the logical outgrowth of new theories applied to zoning and land use regulation.

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This article is intended to provide a brief overview of the planning concepts and issues involved in mixed-use developments. Included in the discussion are considerations relating to using different legal structures, such as condominiums and vertical subdivisions, to facilitate the development.

NEW IDEAS IN PLANNING AND ZONING

• Municipalities have applied new concepts to allow departures from traditional zoning concepts of uniform lot sizes and setbacks. Zoning codes have been amended to allow clustering to achieve density while preserving open space. Planned unit developments (“PUDs”) have been adopted to allow varying lot sizes and a mixture of residential unit types. These regulatory developments have been primarily focused on residential development to foster specific goals of maintaining density while preserving open spaces.

Overlays, Conditional Uses, And Special Designations

Municipalities have also used zoning overlays, conditional use permits, and special zoning designations to accommodate commercial development in areas with non-commercial land use designations. These regulatory schemes are generally characterized by a high degree of discretion on the part of planning staffs and municipal legislative bodies, which can lead to an application process that is expensive and time-consuming.

New Urbanism

More recently, the concept of “new urbanism” has been thrust into the continuing evolution of tradition zoning concepts. New urbanism is sometimes called “traditional neighborhood development” and “smart growth.” While traditional zoning is characterized by distinct use, density, and height designations, new urbanism focuses upon development at the neighborhood level. Development that makes streets “pedestrian friendly” is encouraged. Mixed-use development at the neighborhood level is encouraged, so that residents can live in a variety of housing types near their work and commercial services.

The Advantages

New urbanism, with its emphasis upon neighborhood development and the creation of density sufficient to support development of commercial centers within each neighborhood, is consistent with statewide planning initiatives that have been adopted to control growth, preserve farmland, and generally increase urban densities. (An example of this type of legislation is the Washington State Growth Management Act, which establishes urban growth boundaries in an effort to contain sprawl beyond established urban developments.) These planning concepts are also compatible with current economic trends of high land prices, increased development costs, and limited funds from municipal governments to fund infrastructure improvements. Increased development at the neighborhood level makes economic sense, which, in the final analysis, will be the determinative factor in deciding whether new urbanism is a viable planning theory. For a more complete listing of the various elements of new urbanism, as well as a listing of the various statutory schemes adopted in various jurisdictions that embrace the doctrine, see the web site for the Congress of New Urbanism at http://www.cnu.org.

The Possible Disadvantage

Zoning codes that embrace the concepts of new urbanism, however, tend to focus on visual examples of design criteria to be achieved. That can be expected from a regulatory regime designed to achieve a certain “look and feel” at street level, which is easier to depict visually
than explain verbally. In the long run, this may result in increased complaints from developers. Requirements that are visual in nature are more subjective than a detailed written code, and more subjective code requirements have the tendency to increase the time and cost incurred in the planning process and produce less predictable results.

**THE MECHANICS OF MIXED-USE DEVELOPMENT** • The recent developments in zoning regulation have encouraged increased mixed-use development. In general, developers seeking a mixed-use project encompassing residential, commercial, and even manufacturing uses will find a receptive audience in municipal planning staffs that have adopted the tenets of new urbanism. This does not mean, however, that the permitting process for mixed-use projects has become less rigorous.

**Permitting Concerns**

The first question for any proposed mixed-use project is whether the zoning and building regulations of the municipality in which the project is located will accommodate the development. Even if there is a statutory framework in place that will allow the construction of the mixed-use project, the developer will still have to make the necessary distinct-use permit applications. This process in most jurisdictions remains much the same as it has always been—new urbanism is a new idea, but the permit process is not.

**Segregation Of Ownership**

A regulatory scheme for a mixed-use project must not only permit the proposed uses, but must also facilitate the financing and ownership structure for the development. Generally, this means that there exists some method to subdivide or otherwise segregate the ownership of the separate elements of the mixed-use project.

**Building Community Support**

While planning staffs may be sympathetic to mixed-use projects, neighbors of the project who believe they will suffer from increased traffic or oppose a particular use proposed for the project (such as a restaurant with a bar), still can be vocal opponents to any project.

The strategies used to confront these concerns have not changed. Developers must spend the time necessary to garner neighborhood support as well as spending the time necessary to demonstrate to planning staffs that the project not only complies with applicable code provisions, but also offers demonstrable benefits to the community in which it will be located.

**Getting Variances And Proposing Amendments**

If ordinances are not in place to allow a mixed-use project, the developer can pursue several strategies. A variance might be sought to allow the uses desired by the developer. The developer might even consider proposing amendments to the zoning and building codes that would allow the development. These processes tend to be very lengthy and expensive. Since variance or code changes involve legislative action, the entire process is subject to much more public input. This increases the need for community support for the developer’s plans.

**Specific Concerns**

There are some aspects of mixed-use projects that cause unique permitting concerns. For large projects that have various separate elements—an office structure, parking garage, retail component, and residential units—the developer must think about the sequence of construction. If development permits are issued for the entire project, several issues arise:

- Does the entire project have to be built in order for occupancy permits to be issued?
• Do the project authorizations have time durations so that if there is a delay in completing one element of the project, the authorization might expire?
• If elements of the project can be delayed or abandoned, are there some elements that must be constructed (such as the garage)?

**Builder Agreements**

To some extent, the developer faces some of the same issues in contracting for the construction of the project. If the project is constructed pursuant to a single construction contract, the developer will have some difficulty if a portion of the project is delayed or abandoned. Similarly, certain portions of the project may be constructed first, such as a garage, based on the assumption that the entire project will be built. If some of the elements of the project are abandoned or delayed, the first portions of the project may not be financially viable.

**Phased Projects And New Faces**

Large projects that are phased have an element of permit risk associated with the passage of time. This is particularly true of projects that are constructed through variances or special zoning designations adopted by the municipal legislative body. Municipal governments change over time. New members of the city council or planning commission may be hostile to the continued development of a phased project. If the project is likely to be developed over an extended period of time, the developer should attempt to build into its authorizations protection against the vagaries of changing political opinion.

**Flexibility And Exit Strategies**

All of these issues are different ways of emphasizing that the developer needs to think about an exit strategy as part of the authorization process. The more flexibility allowed in the project authorizations, the better.

**Structural Issues**

The second question that the developer faces after determining that the project can be legally built is what ownership structure is appropriate for the development. This is not an issue of whether a limited liability company undertakes the development, but rather how the ownership interests in the real property should be structured to facilitate the development.

State laws complicate this issue. It is not uncommon for states to impose platting or subdivision requirements upon the division of land for the purpose of sale or lease. Since several different parties may own mixed-use projects, structuring the project to comply with these requirements is essential, and the project must comply with local governmental requirements concerning the division of property.

**Condominium Or Subdivision?**

Typically, mixed-use developments are structured as either a condominium or some manner of vertical or horizontal subdivision. It may also be possible to vertically divide a project under the Uniform Common Interest Ownership Act, if that measure has been adopted by the jurisdiction in which the project is located. The appropriate structure for a project is normally a function of the structures that are available under applicable law and the ultimate ownership of the various elements of the project.

**Complications Of Subdivision Documentation**

Older mixed-use projects tend to be structured as subdivisions. Elaborate conveyances creating various airspaces were made. The parcels were then subjected to multiple reciprocal easements, covenants and restrictions. The different uses within the project made drafting these documents somewhat more complicated than the typical reciprocal easement that might be created to facilitate the development of an office park or residential subdivision.
Complications Of Condominium Documentation

More recently, developers have used a condominium structure for mixed-use projects. Virtually every state has a condominium statute and condominiums have been in existence for a long enough period of time so that lenders and buyers are used to this form of ownership.

States that have adopted more recent versions of the condominium statutes offer the ability to use “air-space” condominiums that are particularly well suited to mixed-use projects. These are boxes of space created by the condominium declaration. Within each air space unit, a physical structure can be built and further divided for the purpose of sale or lease. The documentation for these projects can become quite complex, however, with multiple declarations required for individual buildings.

Complications Arising From Condominium Statutes

In addition to the complexity of the documentation, it is possible that there are certain disadvantages associated with condominiums as a result of local condominium statutes. Requirements for owners’ associations and voting rights of the various unity owners imposed by the statute may not be to the liking of the developer. It may also not be clear under local law whether further subdivisions are required in addition to the creation of a condominium. Ultimately, the title insurance company that is responsible for issuing loan and owner policies for the project will have to be satisfied that whatever acts the developer has undertaken to subdivide the project comply with applicable law.

Ownership And Operation Issues

The ownership and operational issues arising from a mixed-use project are the same whether the property is subjected to a condominium declaration or is subdivided into various air space parcels. The documentation has to provide for overall management and control of the project and its shared elements. Landscaping needs to be maintained, elevators serving various elements need maintenance, shared utilities require maintenance, and a host of other issues need to be addressed that arise from several different types of users occupying space in close proximity with one another.

Some specific issues that have to be resolved and documented include:

• Who is the overall manager and what control, if any, do the owners of the project have over the manager?
• How are maintenance costs allocated?
• Is there an enforcement mechanism for the collection of maintenance fees?
• Who maintains insurance?
• Restrictions on the use of the various elements of the project are generally required to comply with the permits that authorized the construction of the project. How are use restrictions enforced?
• The various elements of the project have to be described in one or more of the basic documents governing the project. This includes description of the various elements of the project and all of the elements of the project that are used in common by the owners. How should these be described and defined?
• The possibility of damage and destruction needs to be addressed. How will insurance proceeds be allocated? What are the rebuilding obligations? What happens if an element is not rebuilt—such as a destroyed ground floor commercial unit that has an apartment condominium unit over it?
• What about the easements? All of the elements of the project need to be tied together with appropriate easements. Similarly, elements that are not to be shared need to be isolated for
the benefit of those who are supposed to use the element;
• Can a unit be modified following construction?
• Are there uniform architectural requirements?
• How are real estate taxes on the common elements to be allocated among the owners and collected?
• How should possible changes in use in the future need be handled?
• What form of dispute resolution should be used?
• What forms of lender protection should be provided? Adequate protection for project lenders must be included in the documentation to protect lenders against assessments and resolve issues such as ownership of insurance and condemnation proceeds;
• How should the structure of the project address the needs of specific owners? In projects in which a public entity is participating, the requirements of that entity will have to be addressed. This may require additional drafting to insure that required use restrictions are imposed on the project. For example, if a government-owned low-income housing element is included in the project, there may be a requirement for restrictions on the income level of tenants occupying the project.

CONCLUSION • All of the issues touched on in this article are complicated by the fact that the different owners of the project will have different concerns. The developer will want to provide the maximum amount of flexibility so that nothing interferes with its sales and leasing activities. Commercial users are generally concerned with being burdened by excessive expenses created by residential owners. Similarly, residential users have similar concerns, so the method of allocating operating expenses between the different users is difficult to do in a manner that ensures one group will not seek to take advantage of the other. Both sets of users will want a clear delineation of the areas which each can use and the areas for which each have maintenance responsibility.

Dealing with these issues is more complicated in a vertical development as opposed to a horizontal development. If a mixed-use project is located on adjacent parcels of property, traditional reciprocal easements dealing with access and maintenance of landscaping, roads, and utilities are often sufficient. When those same uses are stacked on top of one another in a vertical development, the interdependence of each element of the project creates additional complications.

These issues are not necessarily easier to address by vertical subdivisions or condominiums. The provisions of the documents used in either structure look surprisingly similar and address the same issues. The choice of the appropriate structure depends upon what will reach the desired result under local law, what structure is acceptable to title companies and lenders and, most importantly, what structure will find acceptance in the marketplace as the developer attempts to sell and lease the various elements of the project.

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