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MAKING THE MIX WORK: STRUCTURING, OPERATING, AND FINANCING MIXED-USE, MIXED-OWNERSHIP DEVELOPMENTS

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Introduction

Mixed-use, mixed-ownership developments represent some of the most dynamic and legally complex real estate projects. These developments combine diverse uses—residential, commercial, retail, hospitality, and more—within a single, integrated community, often involving multiple owners and stakeholders. The article explores the essential themes of structuring, operating, and financing these projects, highlighting the legal frameworks, management challenges, and financial considerations that developers, attorneys, and lenders must navigate. By breaking down the intricacies of ownership structures, governance, cost allocation, and dispute resolution, this article provides practical guidance for harmonizing varied interests and ensuring the long-term success of mixed-use, mixed-ownership communities.

Part 1 - Structuring the Mix:

The modern mixed-use, mixed-ownership development does it all: it is a place to eat, shop, catch a movie, rest in a hotel room, and (should you choose) make it your home with a residential condominium or apartment. Of course, every development is different, but the modern mixed-use, mixed-ownership project can be one of the most legally complex creatures in the jungle.

At its highest expression, a mixed-use, mixed-ownership development has multiple ownership of subdivided components across multiple buildings, all joined within a master development regime. The subdivision of the mixed-use development may be vertical, horizontal, or some combination of both. Ownership may be residential, commercial, condo or co-op, leasehold or fee. Uses may be residential, retail, restaurant, entertainment, office, parking, storage, or common areas. A variety of legal structures can be used to corral and harmonize these disparate users, including condominium regimes (master and sub), reciprocal easement agreements, management agreements, and operating agreements. These projects can often be large, expensive, and complicated from every angle.

The purpose of these mixed-use, mixed-ownership developments is to create a vibrant community of multiple users, unlocking maximum value for developers and maximum benefit for users. For the lawyer structuring such a mixed-use, mixed-ownership project, the challenge is always the same: harmonizing diverse uses into a cohesive community. If the whole is not greater than the sum of its parts, there is little reason to pursue a mixed-use, mixed-ownership project.

I. Thinking from the Ground Up

For most commercial real estate lawyers, the words “mixed-use, mixed-ownership development” conjure an all-in-one development of mall, multiplex, hotel, and residences, parking structures, or possibly parks or open space, with users spread across multiple buildings. These complex structures are the focus of this paper; more on this below.

But before dissecting this beast, what is mixed-use, mixed-ownership really about?

As every law student knows after their first 1L property lecture, the first principle of property is that of limited rights: property is a “bundle of sticks.” The sticks are elements of ownership: rights of possession, use, enjoyment, exclusion, and disposition. No owner has complete ownership; no bundle is a full set of sticks.

The maxim *Cujus est Solum Ejus Est Usque ad Coelum* is a common law maxim which translates “to whomsoever the soil belongs, he owns also to the sky and to the depths.”¹ Considering how little Latin lingers in modern U.S. law, this is a surprisingly durable phrase. A Lexis search shows over two hundred (200) cases with at least five (5) courts citing to the Latin in the last six (6) years, including the U.S. Court of Appeals for the Tenth Circuit, which wrestled diligently with the concept in a 2025 case involving rights to access public land over private property.²

Perhaps not surprisingly, the Latin went down to defeat. The private landowner’s rights, the court ruled, are not exclusive. The landowner must grant access.

Exclusive ownership is a shiny object, enduring in its appeal to property rights advocates. Alas, true exclusivity is rare in these modern times.

The private parcel in the farthest corner of the country guarded with white knuckles and a gun is still subject to a myriad of mixed uses: the flight of planes in the sky (see for example, Wyo. Stat. § 10-4-302), birds in the air (see Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712), and ultimately the right of the sovereign to condemn (U.S. Const. amend V). Real property law is not about the relationship between people and land, it is about relationships among those with interests in land. Even the mountaintop must be shared with the birds in the sky.

II. Structuring the Mix – Simple to Complicated

Opposite this idyll is the mixed-use, mixed-ownership development. As noted above, the modern urban mixed-use, mixed-ownership project may require a high order of complexity to harmonize its disparate users (more on that below). Shared use, shared rights, and shared obligations are frequently involved. But not all mixed-use, mixed-ownership requires complexity, and most real estate lawyers are dealing with simpler forms of mixed-use, mixed-ownership every day. Use rights may be reserved by statute (migrating birds), prescription (the easement), common or constitutional law (eminent domain), or servitude.

This last category—the real property servitude—is at issue here. Generally, mixed-use, mixed-ownership developments are a species of planned development or common interest community under state statute. Whether or not backed by statute, the recorded covenants and declaration(s) setting forth the servitudes are the crucial elements. The legal structure needs only be robust enough to harmonize use.

While the tools in the lawyer’s toolbox for mixed-use development are numerous in number and unlimited in variety, we refer in this paper to “CC&Rs” (Covenants, Conditions & Restrictions), “REAs” (Reciprocal Easement Agreements) and “Declarations”. All are species of servitude that create nonpossessory rights that run with the land, however we attach no specific definition to these terms and rely on context and the reader’s rough familiarity with each to inform meaning.

¹ See Van Atta, David M., Peterson, Edward A., and Leeds, Matthew J., *Cost Allocations in Mixed Use Ownership Development*, ACREL, October 2014.

² See *Iron Bar Holdings, LLC v. Cape*, 131 F.4th 1153 (10th Cir. 2025).

Note on governing law: there is wide variation between state laws governing common interest communities. Twenty-four (24) states have adopted the Uniform Condominium Act, the Uniform Planned Community Act, or the Uniform Common Interest Ownership Act. Other states (including large markets like Florida, New York, and California) have their own regimes. This paper will not attempt to spell out state-specific requirements.

- **General Plan Development.**

The simplest form of recorded servitudes for mixed-use development may be the “General Plan Development” under recorded CC&Rs, a type of development that every real estate lawyer has likely seen.

The *Restatement (Third) of Property (Servitudes)* defines the “General Plan Development” as: a “real-estate development or neighborhood in which individually owned lots or units are burdened by a servitude imposed to effectuate a plan of land-use controls for the benefit of the property owners in the development or neighborhood.” Think development under a simple set of recorded CC&Rs.

A general plan development is not typically within the scope of state common interest community statutes. Under the Uniform Common Interest Ownership Act (“UCIOA”), only communities where a party—by virtue of ownership of a unit—is obligated to pay for real estate taxes, insurance, maintenance, or other costs are subject to the UCIOA. On the other hand, for those general plan developments under CC&Rs that do not impose costs on owners, the UCIOA would not be applicable. But, importantly, CC&Rs can still be a vehicle to provide for mixed-use, mixed-ownership. For example, CC&Rs for a residential subdivision may restrict a lot or two to commercial use to allow a convenience store or a small strip mall in a residential subdivision.

A general plan development under CC&Rs does have downsides. Typically, there is no association to enforce the covenants, manage issues, or resolve complaints. Enforcement is left to lawsuits brought by individual subdivision owners—a costly, inefficient enforcement mechanism whose only certain results are legal fees and bad blood.

Meanwhile, general plan development CC&Rs can be fiendishly difficult to amend, often requiring supermajorities of subdivision owners without the governing hand of an association or developer. If or when circumstances change and the covenants no longer suit, they can either burden the property, squelching values, or owners may simply start ignoring restrictions. Suit for enforcement may be met with a defense of abandonment, with a defendant arguing a restriction is so widely ignored as to be abandoned and unenforceable. In this light, the unmanaged “General Plan Development” can become a swamp of weakly enforced, entangling restrictions that benefit none and burden all.

What is needed is something with some teeth: the Planned Community.

- **Planned Community.**

A “Planned Community” is a species of general plan development with a mandatory homeowners’ association (HOA) or owners’ association and a requirement that owners pay mandatory assessments for the maintenance of property owned (or used) in common with other

Planned Community owners, such as signs, lighting, or other facilities. Under UCIOA, a planned community is the classic residential (or commercial) development with the homeowners' association or owners' association charged with managing the community, including levying and expending community funds for common purposes.

Generally formed via a recorded Declaration, the Planned Community sits on the spectrum between the general plan development and the condominium.

Unlike the General Plan Development with CC&Rs, where generally there are neither assessments nor an association, a Planned Community's owners are automatically association members and subject to mandatory dues and the development is run by an owners' association. On the other hand, unlike condominium projects, Planned Community as legal lots are not always divided for separate unit ownership nor have common elements under common or joint ownership.

The Planned Community can be a highly effective tool—especially when coupled with an REA, which prescribes rights and responsibilities for shared project (or building) elements such as roadways, drainage, parking, or shared building foundations—to manage multiple users and competing interests in a single project.

The Planned Community Declaration sets forth permitted uses, shared rights and obligations, rules, and regulations. The owners' association enforces the Declaration and, frequently, mandates specific committees to review, approve, and enforce architectural compliance. The Declaration provides the right of the association to collect and enforce fees from owners.

Meanwhile, the REA (which can be part of or recorded separately from the Declaration) allows for shared use and shared cost of certain areas. Under an REA, the underlying property remains private (as opposed to common under a condominium) subject to the REA easements. REAs are created under common law and have no statutory basis. Issues such as assessments or enforcement mechanisms must be addressed in the REA document.

Dispute resolution procedures may be spelled out, creating a path for complaint and resolution without resort to lawsuits. Taken together, the Declaration and REA (or a combined agreement) for the Planned Community can provide a sufficient structure for limited mixed-use, mixed-ownership development and operations.

For example, an industrial park with multiple buildings, each with multiple tenants and each with a diverse range of industrial and commercial uses, can be easily managed under an approved subdivision plat and recorded Declaration, creating a Planned Community with an owners' association and a comprehensive set of reciprocal easements for ingress, egress, landscaping, parking, drainage, and maintenance of common elements, such as lighting, signage, paved areas, etc. Use restrictions can delineate permitted uses and utility usage, with tools to minimize conflict and enhance individual user needs.

The Planned Community structure, combined with an REA, allows for different ownership of various buildings, allows for a range of uses, provides rights for use and access to development facilities, and establishes a mechanism for owners and occupants to pay for maintenance and repair of common elements. However, the Planned Community structure will not be sufficient if there

are further demands on the proposed development. For example, extensive common elements requiring separate management or which are subject to disproportionate use, subdivided units within buildings, or the need to harmonize inherently non-compatible uses (such as retail and residential or industrial and office) would quickly render the Planned Community structure inadequate.

Enter the modern mixed-use, mixed-ownership development.

III. The Modern Mixed-Use Development:

Mixed-use development is about creating community. This could involve, for example, a new retail center, an industrial center, renewal of an historic area, or converting and regenerating older office buildings. Often such mixed-use developments are ground-up planned projects and frequently are now in-fill developments. When all members of the community are doing the same thing, harmony comes easy (or at least easier). When the uses diverge, the community can go out of tune.

The basic structure is the master mixed-use vertical and perhaps horizontal subdivision or condominium projects.

For example, suppose a developer of a vertical tower over a parking garage wants three uses: lower-level retail, hotel above, and residential condominiums on top. The answer could be a master mixed-use vertical subdivision and/or condominium regime with three units or separate ownership parcels: for separate retail, hotel, and residential ownership and uses.

Because condominiums are formed under statute, the applicable state condominium law is a key driver of the project.

Frequently a master association is formed to operate these developments. A master association generally serves as an umbrella organization that governs the community of the various separate units or parcels, often with multiple smaller “subassociations”. This master association might own the core common elements—buildings, roads, exterior improvements—and manage the whole project, enforcing rules and collecting assessments for common costs. Costs are allocated among the master parcel or master units. (More on this below. Allocation must be carefully structured as allocation based on percentage square feet may not reflect actual benefits of and burdens to the shared elements.)

Crucially, each master parcel or master unit often is provided rights to submit the master parcel or master unit to a subcondominium regime. Each master parcel or master unit may—but is not required to—further divide the master unit into a series of smaller condominium units. For example, the residential master unit might be divided into 200 residential condominium units; the retail master unit could be divided into 20 commercial condominium units; and the hotel master unit would not necessarily be further subdivided. Each master unit—residential, retail, and hotel—continues to be liable for its master condominium dues. Meanwhile, each subcondominium operates under its own rules subject to the master condominium.

What are the benefits of organizing under a mixed-use, mixed-ownership subdivision or master condominium structure?

First, it allows the developer to separately finance and/or sell off portions of the project as development proceeds. Second, it allows the separate portions of the master subdivision or condominium project to be financed separately from the other elements. Third, it could potentially allow a larger, longer period of developer control by having the developer control the master association and maintain the base building structures and other core common elements.

Downsides are complexity, difficulties in managing allocations, and risks of conflict among disparate users.

Here are some principles for organizing the master mixed-use, mixed-ownership subdivision or master condominium, with, perhaps, subcondominium components, and managing competing users. The “Master Declaration” is the constitution and will require advance input from potential owners, tenants, investors, and lenders.

- ***Governance and Control.*** Large projects require long periods of developer control in order to complete organization, finance, sale, and leasing. Through a Master Declaration, a developer can exercise control through completion, maintaining architectural and maintenance standards. Note that a Master Declaration can (and usually should) exempt the declarant (generally the developer) from certain restrictions (for example, a declarant will want special rights to amend the Master Declaration and association governance documents, select board members, add or withdraw property from a project, or convert property to common areas).

Control will almost certainly be shared with anchor tenants, if any. While commercial tenants have no interest in operating the association, they do want control if the association fails to do its job or other users interfere with their use. For example, anchor tenants may seek self-help rights if the association does not perform, allowing them to offset assessments if the tenant pays to cure the issue. Anchor tenants may want specific rights, such as loading dock access or signage protection.

Lenders and investors will also want to protect their respective interests in the master mixed-use project and maintain some rights to protect those interests. They want to assure adequate maintenance, insurance, and replacement reserves, and they want approval rights over major changes.

- ***Shared Elements.*** Every shared element needs a home. Usually, a master project developer constructs the base building components. At times, the build-out of the interiors or various components are then allocated to the developer or interest holder of these sub-components. There needs to be one or more associations to maintain the components and provide insurance for the components. In a strong master association structure, these components may fall to the master association, but this risks a disproportionate burden on the owners of the master project parcels or condominiums, if they do not use the component. Building structural elements are generally under the control of the master association, unless they are separable to the subassociation. Special concerns may arise with facades, equipment rooms, roofs, parking garages, and special amenities, such as pools or marinas.

Note that large mixed-use projects can have economies of scale. For example, a master insurance policy that insures an entire project (both units and common areas) for casualty can be significantly cheaper than separate insurance.

- ***Decision-Making and Voting.*** Decision-making in the master association, balancing the rights and obligations of the component parcels or condominium components among the owners of the various components or subcondominiums, can be complex. Anchor tenants or anchor owners may demand protections through board seats, voting allocations, and majority or supermajority thresholds for different matters.
- ***Dispute Resolution.*** Disputes will arise. A dispute resolution process that provides a degree of certainty and clarity is essential. For example, a process may provide for negotiation, mediation, and arbitration (binding if permitted). Remember, the goal of dispute resolution in the mixed-use context is achieving resolution and compliance (not victory and damages).
- ***Cost Sharing; Expense Allocation.*** In a simple residential condominium, unit owners share costs by unit or percentage interest. In a mixed-use development, different uses present different insurance risks, different utility needs, different improvements and replacements, and different common area maintenance needs. Some users will not want all services. For example, residential condominium owners may want a high degree of security; others less. See Part 3, below.
- ***Managing Use Restrictions.*** Residential and commercial interests must be balanced and protected. Mixed-use developments with multiple ownerships require management of time (hours of operation), management of activities (restriction on noise, odors, smoke, hours of operation), and management of the physical space (availability of parking areas or amenities such as gyms), among user groups.
 - Commercial Users and Owners: Commercial owners want flexibility for different uses, signage, and layout as times change. Commercial owners are concerned with services such as delivery and trash removal, as commercial use can generate noise and odors. They need flexibility to have a functional space.
 - Residential Users and Owners: Residential owners want consistency and control. Residential users want to minimize traffic, noise, and change to protect residential value, but also want 24/7 access and a high degree of security.
- ***Architectural Consistency.*** The developer will want to maintain control over architectural design through development. Thereafter, control will usually shift to one or more associations or architectural or alterations review committees. Often commercial owners or users will want control over exterior design, signage and maintenance.
- ***Residential Condominium Requirements.*** Drafting the Declaration and other documents for the residential portion of the mixed-use development must meet Internal

Revenue Code requirements³ and secondary market requirements under FHA, Fannie Mae, Freddie Mac and, in some instances, state law and state regulatory requirements for residential projects.⁴

- ***Leasing Commercial Condominium Units.*** Drafting governing documents for a mixed-use, mixed-ownership project (the Declaration and association documents as well as the leases) requires special attention. For example, in a typical lease the landlord is responsible for building maintenance and repair. In the mixed-use development, these are often association obligations. The Declaration, association bylaws, and leases all need to address this point. Further, the Declaration and lease should permit a landlord to transfer landlord obligations to the association, and the tenant will want the right to enforce obligations directly against the association. A Master Declaration may give an anchor tenant rights to prohibit certain association action (such as an amendment to the Declaration) without the tenant's consent.

Part 2 - Financing the Mix:

The development of mixed-use, mixed-ownership projects is understandably intimidating, especially for the outside observer or the neophyte, but also for the experienced developer and attorney. Much of this intimidation is due to the complexity of these developments and the myriad transactions and agreements required to get them off the ground. As with all aspects of mixed-use, mixed-ownership development, securing the necessary financing requires multiple entities to not only work together, but also to have a fundamental understanding of each other's goals. Complexity not only engenders hesitation in the minds of developers; it can also cause the same reaction in the minds of lenders. However, before going any further, it is critical to embrace the fact that a certain level of complexity is, by the nature of mixed-use, mixed-ownership projects, a necessary element. That said, as with other complex endeavors, deconstructing a project into its constituent parts and systematically taking the elements step by step will facilitate successfully tackling a complex project.

By way of a simple example, even the most inexperienced person, given the need and the lifeline of a Betty Crocker pre-mix from the grocery store aisle, could find a way to mix, bake, decorate, and present a simple sheet cake. So, too, does the single-use, single-owner real property development present an achievable goal for most developers, lenders, and attorneys with basic knowledge of and experience with the tasks involved. Perhaps one can push the boat out a bit with more adventurous flavors and toppings—in the case of cakes—or with ownership structures and the capital stack—in the case of real estate development. But at the end of the day, our sheet cake is not that intimidating, nor to most experienced developers, lenders, and real estate counsel, is the development of similar-use, single-owner projects, like an office building, warehouse complex, shopping center, or multi-family building.

Why, then, in the case of cakes, does it feel like such a leap to tackle, say, a wedding cake? The core ingredients are the same, albeit their portions are scaled up and the procedures repeated more often. Similarly with the archetypical mixed-use, mixed-ownership development, we have

³ See Internal Revenue Code § 528, which exempts homeowners' associations from income tax provided they meet certain requirements.

⁴ See, for example, FNMA requirements described in Fannie Mae Single Family Seller Guide B4-2.1-03.

ingredients seen over and over again in urban and suburban areas around the country: multi-family residential, retail, office, hospitality, amenities, and the use of public-private partnerships. But now, as with the wedding cake, the steps involved, the number of eyes watching and critiquing the end product, and the stakes have increased, apparently exponentially. Likely no one other than the baker (developer) is taking pictures for Instagram of the sheet cake (or the new in-line shopping center, except for marketing vacant space). But that wedding cake is a centerpiece, and so, to many communities and stakeholders, is a mixed-use, mixed-ownership development meant to revitalize or “placemake” a city center, suburb, or exurb.

The increased importance of mixed-use, mixed-ownership developments often causes the underlying complexity in these developments to feel like a millstone around the neck of those involved. Perhaps the better way to approach a mixed-use, mixed-ownership project is to see it for what it is: little more than baking a sheet cake, but ten times over, each with different ingredients, shapes, sizes, and decoration, then combined into an assemblage for presentation. Although complexity and the stakes may increase, for lenders involved in mixed-use, mixed-ownership development, the fundamentals remain generally the same. The complexities have not created a world of new challenges so much as some new expressions of the same challenges. Therefore, lenders will often undertake mixed-use, mixed-ownership deals with similar concerns and reluctance to take risks they have always had, using the same tools and approaches to help their borrowers and protect themselves.

But first, how can the mixed-use, mixed-ownership developer help themselves?

At the risk of stretching our previous metaphor to the breaking point, the developer looking to begin a mixed-use, mixed-ownership project should initially focus on their *mise en place*, that is, as a trained baker would do, preparing and organizing all necessary ingredients and equipment before baking: it is all about preparation. As this paper will examine in Part 3, attention to the new or altered details of a mixed-use, mixed-ownership project, when drafting the various documents which will govern it, is critical. Careful drafting also helps when the project begins to approach lenders for financial support. Just as the various project documents must provide clarity to the parties vis à vis their responsibilities to each other and to the project, well-drafted documentation will provide any lender(s) with clarity regarding what they can expect from the project and how they should examine requests for funding.

In a 2024 analysis published by the Urban Land Institute, Beth Mattson-Teig noted that “[b]orrowers are adapting to a market where lenders are in the driver’s seat and it’s a very different environment when it comes to rates, leverage, terms, and underwriting.”⁵ If lenders are in the driver’s seat, then it is a wise move for developers to present potential lenders with a precise road map. This will permit lenders to approach their decision-making framework with the best possible information.

Back to the Basics: The Lenders’ Framework

⁵ Mattson-Tieg, Beth. “Construction Financing Outlook: Developers Scramble to Line Up Both Debt and Equity,” Topics: Capital Markets and Finance, URBAN LAND INSTITUTE, May 1, 2024, <https://urbanland.uli.org/construction-financing-outlook-developers-scramble-to-line-up-both-debt-and-equity>, last accessed: Jan. 10, 2026.

While mixed-use, mixed-ownership projects appear to many to be at the sharp end of New Urbanism and similar movements in development and land use, there is little evidence to indicate that these shifts in use have triggered significant substantive change in how lenders approach these projects. One of the leading treatises on commercial loan practices still persists in framing a lender’s credit analysis in terms of the “Five P’s”: People, Purpose, Payment, Protection, and Perspective.⁶ While mixed-use, mixed-ownership projects may add a few wrinkles to this time-honored approach, the Five P’s still hold a dominant position in the minds of lenders who are evaluating the creditworthiness of an entity looking to take on a mixed-use, mixed-ownership development.

People

Critically, the development of mixed-use, mixed-ownership projects often involves not only multiple entities, but also significant interaction with one or more political subdivisions, such as a city, port authority, or quasi-public entities such as community improvement corporations and special improvement districts. This is certainly not a new concept, as the idea was noted in an article that is now more than a decade old.

Because many urban developments are constructed on land purchased or leased from a municipality, lenders and their counsel will need to scrutinize the applicable purchase and sale agreement or ground lease under which the municipality agrees to sell or lease the land to the developer. Each land disposition agreement (LDA) typically contains covenants regarding the borrower’s construction of the project, which provide that upon breach the municipality can require the property be reconveyed to the municipality.⁷

With mixed-use, mixed-ownership, therefore, lenders not only need to focus upon the multiple private corporate entities, individuals, and other lenders who are involved (where, say, if developers choose to hold ownership of the mixed-use, mixed-ownership project as a condominium, the lender will likely want to confirm that the borrower with whom they are doing business “controls the management of the condominium association throughout the term of the loan”⁸), but also the presence of political subdivisions, which often adds to the complexity of the mix. For example, a project site may be ground leased from a municipality, then subleased to a port authority, and concurrently sub-subleased to the developers to benefit from economic development incentives. Such a situation makes the lender’s diligence work critical. Understanding who is involved, and how those entities are structured, allows the lender to properly weigh the risks that arise under the People analysis.

People+

The added wrinkle to the People analysis with mixed-use, mixed-ownership projects is most likely to arise not just with the number of borrowers, but also with the number of lenders. The scale and scope of mixed-use, mixed-ownership developments will often require the lending

⁶ 1 COMMERCIAL LOAN DOCUMENTATION GUIDE § 2.06, Credit Analysis: A Decision-Making Framework (rev. 2024).

⁷ Lemont, Eric D. “Key Issues in Financing Mixed-Use Developments,” 28 PROBATE & PROPERTY 61, 62 (2014).

⁸ *Id.*

power of multiple lenders. Therefore, when considering *who* is involved with a transaction, lenders will also be looking to protect themselves and their investments from the other lenders at the table. There may also be different lenders, for construction lending and take-out lenders for the different mixed-use components. A lender on a retail commercial component may not be interested in a hotel component or a residential component.

This step in the analysis also returns us to the question of careful drafting. The language of REAs and other cross-party agreements must be examined to assure a lender that it is protected. For what will happen if the lender forecloses on that portion of a mixed-use, mixed-ownership development for which they are secured, only to find that the reciprocal agreements in place between the borrower, their sibling developers, and those developers' lenders will not allow the lender in question to access or use the foreclosed property?⁹

Similarly, a challenging situation will arise when multiple lenders are funding a single component of a mixed-use, mixed-ownership project. Often in this case, a lender will advance its funds to an administrative agent along with the other lenders in the syndicate. But the question of who has the power to make decisions, and whether that power should be, for example, a reflection of the pro rata share of each lender's contribution, can cause debilitating challenges to the project if not clearly addressed in the written agreement(s) between the parties involved.

When working with a mixed-use, mixed-ownership project, a lender's "People" analysis goes beyond the scope of that other creditworthiness chestnut—the three C's of character, capacity, and collateral—to account for the presence of multiple owners and multiple lenders. However, scrutinizing the "People", which is at the heart of a lender's credit analysis, has not been fundamentally changed by the growth of mixed-use, mixed-ownership developments.

Purpose, with Perspective

The COMMERCIAL LOAN DOCUMENTATION GUIDE focuses its brief examination of how lenders examine "Purpose" upon the reasons why a borrower may want to take out a commercial loan, *e.g.*, to secure working capital, to invest in the acquisition of new assets, to replace the funding from other creditors, or to replace equity.¹⁰ For the purposes of the present mixed-use, mixed-ownership examination, "Purpose" will be paired with another of the Five P's: "Perspective". This consideration is simply and succinctly described thus: "Does the credit make sense within the basic risk and reward framework?"¹¹

In the world of mixed-use, mixed-ownership development, the "Perspective" analysis sheds invaluable light upon the "Purpose" analysis, because it places the project within its market context. A recent article published by the website propertymetrics.com includes this consideration within its "qualitative review" step when examining commercial loan underwriting.¹² Market conditions, according to the article, are among the qualitative factors that can "make or break a

⁹ *Id.* at 63.

¹⁰ 1 COMMERCIAL LOAN DOCUMENTATION GUIDE § 2.06(2).

¹¹ *Id.*

¹² Schmidt, Robert. "CRE Loan Underwriting: A Practical Guide," PROPERTYMETRICS, Sep. 21, 2025, <https://propertymetrics.com/blog/how-commercial-real-estate-loan-underwriting-works/>, last accessed Jan. 10, 2026.

deal.”¹³ Does the market in question want what the mixed-use, mixed-ownership developer is bringing to the area? Or, perhaps, is this particular mixed-use, mixed-ownership project going to serve as the toehold for a broader revitalization of the neighborhood in question? Are the types of uses being featured in this mixed-use, mixed-ownership project those that the community lacks, but are likely willing to support? A lender’s understanding of how the market is likely to react to a mixed-use, mixed-ownership development will impact how they view the risks versus the rewards.

Within the context of mixed-use, mixed-ownership developments, a lender’s examination of “Purpose” (*i.e.*, why the borrower wants the money) goes hand-in-hand with their examination of “Perspective” (*i.e.*, how the funds will be put to work, and whether the market is supportive of those efforts). In many localities, mixed-use, mixed-ownership projects are still seen as tools for brand-new development or for revitalization. In both instances, consideration of what is being offered and to whom it is being targeted must be sensitive to what the particular market can bear, and what type and pace of growth it can tolerate. Lenders, therefore, will be highly attuned to these questions, and developers must be prepared with the clearest possible answers.

Payment

“The real test of a lending officer is the ability at the outset of a loan to establish a ‘roadmap to repayment.’”¹⁴ It is not surprising that, at the end of the day, a lender’s primary concern is ensuring repayment. Financing a mixed-use, mixed-ownership development, however, introduces an interesting challenge to this straightforward intent. As the number of borrowers increases, so too does the risk of one of those borrowers being out in front of their skis.

In a 1998 article published by the Minneapolis Fed, analyst Nicole Bennett discussed this situation within the context of identifying and filling the gaps in the funding structures for mixed-use projects.¹⁵ What makes these projects attractive to borrowers may also create situations where those borrowers are overextended.

For example, a small business borrower who wants to purchase a mixed-use property may not have enough equity, cash flow and personal assets to cover the cost of necessary renovations, such as a new roof or interior remodeling. In another instance, a developer interested in constructing an apartment building with street-level retail space may have experience with multi-family housing but not with commercial-retail development.¹⁶

Mixed-use, mixed-ownership projects, while often bringing together experienced developers, may not always create situations where those developers, on their own, are strictly within their wheelhouse. Smaller developers may be introduced to bring specific expertise, but do not have the financial power to match the risk tolerance of their sibling developers. Retail

¹³ *Id.*

¹⁴ 1 COMMERCIAL LOAN DOCUMENTATION GUIDE § 2.06(3).

¹⁵ Bennett, Nicole. “Mixed-use development: Through the lenders’ looking glass” Federal Reserve Bank of Minneapolis, Dec. 1, 1998, <https://www.minneapolisfed.org/article/1998/mixeduse-development-through-the-lenders-looking-glass>, last accessed: Jan. 10, 2026.

¹⁶ *Id.*

developers may find themselves encountering the challenges of residential development for the first time, while seasoned residential developers may be having the opposite experience.

For lenders, mixed-use, mixed-ownership projects create a situation where the confidence and certainty that comes with the parties involved “staying in their lane” may not be as strong as in other forms of development. This can add question marks to the “Payment” risk that is central to a lender’s analysis.

Protection

For a lender, the question of “Protection” is one of doing absolutely everything possible to future-proof a transaction. As has been discussed frequently in this article, the way in which written agreements between the parties involved are crafted will have a profound impact on how mixed-use, mixed-ownership developments are conceived and executed. When creating the financing agreements for these projects, lenders will continue to leverage the same tools they have had at their disposal for generations: loan terms to reallocate risk, separate agreements to better clarify relationships, and statutory provisions that provide added peace of mind.

As we have already seen, the complexities of mixed-use, mixed-ownership developments are often rooted in the number of entities involved and the scale of the projects themselves. There exists a reality that some of these entities may be part of a project that, on their own, they could not possibly sustain. In reaction to this, lenders are likely to trend more conservatively when looking at common lending metrics such as loan-to-value and debt service coverage ratio.¹⁷ In addition to this, lenders may attach a risk premium to mixed-use, mixed-ownership projects “because of the complexity of meshing multiple uses, the increased construction costs, and the longer development horizon.”¹⁸

With so many parties involved and numerous potential uses, lenders must perform extensive due diligence for mixed-use, mixed-ownership projects. Lenders must confirm that the contemplated uses comply with a myriad of laws and regulations, including zoning laws, building codes, and in the case of multi-family housing components, HUD and other federal regulations.¹⁹ If affordable housing components are involved, state and federal laws must be fully analyzed to determine project eligibility, mitigating against non-compliance.²⁰

Along with the loan terms and costs themselves, lenders involved in mixed-use, mixed-ownership developments will be particularly mindful of the priority of their loans. As projects expand in scope, the need for syndicated financing structures increases. These syndicates create challenges for lenders not only with respect to foreclosure rights and decision-making control—which were discussed above—but also regarding a lender’s priority within the overall financing structure, which is a critical consideration. This all invokes the need for intercreditor agreements being carefully drafted, after what is often extensive negotiation between the lenders involved.

¹⁷ Schmidt, Robert, *note 11 supra*.

¹⁸ Rabianski, Joseph S., et al. “Mixed-Use Development and Financial Feasibility: Part I – Economic and Financial Factors,” 24 REAL ESTATE ISSUES 1, 16 (2009).

¹⁹ See 24 CFR 200.73.

²⁰ See Cal Health & Saf Code § 51480.

Of the many considerations that go into forming project documents between lenders and developers, there is a particular trait present in mixed-use, mixed-ownership developments that could play a key role in how multiple lenders set the ground rules for their working relationship on a project. A 2007 paper for the NAIOP Research Foundation notes that “[t]wo differentiating terms about the uses in a mixed-use development appear in the literature. They are ‘cornerstone use’ and ‘dominant use.’”²¹ While the cornerstone use is “the most viable and profitable use in the project,” the dominant use “is the use that takes up the most space in the project.”²² According to the 2007 paper, it is not a given that the dominant use will also be the cornerstone use. Developers are in a key position to assist lenders by articulating as clearly as possible the role that the various uses within a mixed-use, mixed-ownership development play. This is nothing new for commercial real estate ventures—the concept of “anchor” tenants has been within the commercial real estate community (CRE) lexicon for decades. By clarifying the roles of uses within a development, developers can help lenders understand their position within the larger project and allocate the risks associated with such projects accordingly.

Statutory protections can also help lenders future-proof their involvement in mixed-use, mixed-ownership projects. The condominium form of ownership, while not without its own challenges and quirks, may provide express protection for lenders involved with the projects. For example, the condominium laws of two states—Ohio and Texas—provide priority protection for first mortgage lenders in relation to any condominium liens that may arise after the fact.²³ However, when dealing specifically with condominiums, these statutory protections bring with them the added risk of having multiple owners who may have a claim to collateral and the exercise of any remedies.

The development of mixed-use, mixed-ownership projects requires careful attention by all parties involved to the complexities that arise throughout the construction and operation of the undertaking. This complexity, however, should not precipitate fear and trembling of its own accord. Lenders involved with mixed-use, mixed-ownership developments make use of the same tools they have always used to weigh and allocate the risks involved. While the proliferation of mixed-use, mixed-ownership projects may seem new, the lender’s approach to financing these projects is not necessarily novel, but rather continually adaptive.

Part 3 - Operating the Mix

Mixed-use, mixed-ownership projects involve complex management and operational issues that must be considered when drafting legal documents for these types of projects. These projects are not necessarily similar in their constitution or makeup. Mixed-use, mixed-ownership projects can be perceived as very urban projects that have multiple uses within a single or combined building structures. There can also be shared use amenities and facilities, as well as separately owned and separately managed and operated facilities within these complexes. Although mixed-use, mixed-ownership projects are often conceived in urban settings—where uses are typically stacked side by side and on top of each other within a cohesive building or a group

²¹ Rabianski, Joseph S. and J. Sherwood Clements, “Mixed-Use Developments: A Review of Professional Literature,” The National Association of Industrial and Office Properties Research Foundation (Nov. 2007), 5.

²² *Id.*

²³ See O.R.C. § 5311.18, *see also* Tex. Prop. Code § 82.001, *et seq.*

of combined structures—such projects can also be found in a more lateral, rather than vertical, context.

Besides REAs and Declarations (whether condominium or not), the general form of documentation for mixed-use, mixed-ownership projects may also include additional easement agreements, subassociation condominium documents, operating agreements, and management agreements.²⁴

When drafting these documents, it is important to be concise and realistic, while also considering all the potential variables and issues that may need to be addressed, both now and in future operations.

There are key decisions to be considered:

When preparing legal documentation for mixed-use, mixed-ownership projects, it is essential to consider key variables: who owns what, who manages what, who pays for what, and who uses what.

When a complex project involves multiple owners and possibly lenders for various components, it is important to carefully craft documents that integrate the different components and uses, while also establishing a management process that is straightforward and easy to understand and implement.

As projects age, concerns often arise about how to address changing markets and evolving marketplace conditions for large-scale developments. When drafting legal documents for such projects, it is important to allow for some flexibility to accommodate future market changes, while also establishing clear legal standards for project operations. Achieving a fine balance between operational rigidity and the flexibility needed for future modifications is essential for the long-term success of mixed-use developments.

Key areas of discussion include: establishing management responsibilities and decision-making processes; addressing financial issues such as calculating budgets, assessments, and allocating costs to various components; describing use limitations and use restrictions for the different components; defining easements and cross-easements related to the various components; developing clear decision-making procedures; and managing potential disputes, including outlining different forms of dispute resolution.

Common Legal Ownership and Management Structures

As noted, there are various types of development processes and legal documents that can be utilized for mixed-use, mixed-ownership projects. This list is neither exhaustive nor meant to be exclusive, as more than one of these types of documents might be employed for a more complex project.

²⁴ (See Van Atta. David. M., *Mixed Use, Mixed Ownership Developments; Air Space Subdivision Techniques and issues; The ACREL Papers*, Spring, 2003)

- Zoning, Permitting, Subdivision Maps, Plats and Condominium Plans: Depending on the local and state regulatory framework, dividing spaces in a mixed-use development for varied ownerships may require working with local government agencies to create separately conveyable and financeable components or spaces. This is truly not a one-size-fits-all situation. The development entitlement process is highly localized; the procedures required in a municipality in California can differ significantly from those in Texas, New York, or Kansas. For projects with significant scale or impact, both community political issues and legal issues are likely to arise.

- Reciprocal or Cross-Easements and Operating Agreements

REAs define rights and responsibilities for shared building elements such as foundations, roofs, and common areas. They specify maintenance duties and cost allocation among ownership groups, and address operational challenges that arise from shared infrastructure.

- Condominium Regime/Subdivision

Dividing the project into legally separate condominium units or vertical airspace subdivisions is a common practice. This separation allows for individual ownership of residential, commercial, or retail components, and, perhaps, shared common use components, reducing risk and enabling tailored financing and tax treatments. Condominium Declarations or CC&Rs govern shared spaces, easement rights, and obligations. In some more complex projects, both REAs and condominium regime documents may be used.

- Owners' Associations

For mixed-use, mixed-ownership projects, it is often necessary to form one or more owners' associations to maintain common areas or property, manage day-to-day operations, establish budgets and assessments, set use restrictions, enforce rules, and resolve disputes. Governing documents—such as REAs, Declarations along with CC&Rs, and association bylaws—should allocate voting rights, management authority, and special approval or veto powers to protect the interests of distinct user groups.

- Special Purpose Entities (SPEs)

Establishing an SPE, such as a limited liability company (LLC) or partnership, can isolate liabilities and facilitate financing. Multiple ownership entities or partners in an SPE provide flexibility in investment while centralizing control for project management.

- Professional Management

The governing documents should consider mandating the employment of professional management firms, with the owner's association setting policies and the management firms handling execution. This approach balances control and expertise. Considerations for using professional management firms include the size and complexity of the project, the owners' experience with mixed-use operations, preferences for control versus convenience, budget constraints for professional services, and compliance with legal and governance

requirements. Professional management with clear governance structures offers the advantages of advanced technology and experience, which can contribute to the effective management of mixed-use, mixed-ownership projects.

- **Management Control and Decision-Making Provisions:**

No matter which form of project governance agreement is used, these agreements should outline which parties manage various aspects of the project, specify approval rights over design and use changes, cover use and leasing policies, and address major expenditures, insurance issues, and damage and destruction processes. Detailed provisions will be required to manage concerns such as parking issues, signage restrictions, separate usage patterns, and other externalities such as noise or odor issues. Additionally, well-thought-out dispute resolution mechanisms should be included.

Cross-Easement and Operating Agreements for Mixed-Use, Mixed-Ownership Projects

The following provides some guidance as to drafting reciprocal or cross-easements and operating agreements for mixed-use developments. It is crucial to include comprehensive, clear provisions that address ownership, shared use, maintenance, costs, and dispute resolution.

Essential Sections for Drafting Cross-Easement Agreements

1. **Identification of Parties:** Clearly identify all property owners involved and their interests in the properties covered by the agreement.
2. **Background/Recitals:** Describe the context, purpose, and the properties subject to the easement. Detailed property plans and legal descriptions should be included in the agreement or as exhibits.
3. **Definitions:** Define key terms such as “Easement Area,” “Common Area,” “Maintenance,” and “Costs.”
4. **Grant of Easements:** Specify the rights granted, such as access, use of shared infrastructure, utilities, parking, etc., and limitations on those rights.
5. **Scope and Use Limitations:** Detail permissible uses, restrictions, and hours of access to help prevent conflicts. Issues such as encroachments and future development rights should be addressed.
6. **Maintenance and Repair Responsibilities:** Allocate maintenance duties and specify standards for upkeep of easement areas.
7. **Voting and Approval Rights:** Voting rights—usually tied to ownership stakes—must be clearly stated and may include protections for minority owners or special approval rights on key issues, like budgets, capital improvements, or changes in use, to protect varied interests.
8. **Emergency access rights and security protocols** should be considered.

9. **Cost Sharing and Allocation:** Provide formulas or methods for sharing costs related to maintenance, repair, taxes, insurance, and improvements. Legal documents should clearly allocate operating costs and revenue shares based on actual usage or other fair bases to prevent disputes, as disproportionate assessments can cause conflicts among owners.

10. **Insurance Requirements:** Delineate insurance coverage requirements and responsibilities for each project component, component owner, association, and management entity, both for the overall project and for individual components and spaces.

11. **Term, Amendment, Renewal, and Termination:** Define the duration of the easements and covenants and conditions, as well as the conditions under which they may be amended, renewed or terminated.

12. **Dispute Resolution:** Provide dispute resolution processes and procedures among the owners, users, and management entities, including mechanisms such as mediation or arbitration to handle disagreements.

13. **Legal Compliance and Governing Law:** Specify the applicable jurisdiction and require compliance with local laws and zoning regulations. Provisions should be included to ensure that the project documentation is established as covenants running with the land, binding future owners.

Whether stated in an REA, CC&Rs, Declaration, or an association's bylaws or rules, provisions should be incorporated to govern the management of shared facilities and common areas, such as:

- Defining management responsibilities and decision-making authority.
- Establishing protocols for day-to-day operations and enforcement of rules.
- Assessing and allocating costs and expenses for shared facilities and common services.
- Establishing governance and voting structures among owners.
- Setting procedures for financial reporting, budgets, and reserves.

Maintenance Cost Allocation and Dispute Resolution in Mixed-Use, Mixed-Ownership Projects

Maintenance Cost Allocations:

The mixed-use, mixed-ownership project documents must clearly lay out the process for determining common project costs and expenditures and the allocation of these costs and expenditures to the various project components. Some of these common costs may be allocated to all constituent components according to a formula, while other project costs may be best allocated to only certain project elements that use, or disproportionately use, some facilities as "cost centers." The mixed-use project governing documentation should address the methodology for allocating project costs, as well as the process for collecting and enforcing payment of common costs and expenses.

Common costs and expenses are often allocated proportionally based on usage or area. Maintenance costs are commonly allocated based on the relative square footage of the constituent components, unit ownership percentage, or usage levels of each party. The goal is to ensure transparency and proportionality by aligning costs with the benefits received.²⁵

At times, governing documents include caps on maintenance fees and require pre-approval for large or non-routine repairs beyond specified thresholds to control cost overruns and avoid surprises.

The governing documents should require that owners of each component receive detailed, itemized bills for maintenance expenses, and should include provisions specifying due dates, default dates, regular reconciliation, and audits. The project governing documents should require regular financial reports with appropriate explanations to owners. In some states, statutes may dictate the types and extent of such financial reporting, including the establishment of reserves for future capital expenditures.

A critical financial factor is providing for enforcement of payment and collections assessments, lien rights and stating priorities of such liens relative to mortgages on individual components.

Dispute Resolution Mechanisms

The project governing documents should state and define maintenance responsibilities, cost-sharing methods, and approval processes within agreements to reduce ambiguity that often leads to disputes. However, the possibility or eventuality of disputes must be addressed in the documentation. It should be noted that some states, such as California, have statutory provisions mandating dispute resolution processes for some forms of projects that contain certain types of residential components. It is generally considered good practice to include some form of alternative dispute resolution (ADR), such as mediation or arbitration, in mixed-use project governing documents rather than relying solely on litigation.

Mixed-Use, Mixed-Ownership Drafting Matrix

When drafting documentation for mixed-use developments, it is essential to have a comprehensive understanding of who owns each portion of the project, who uses each portion, who is responsible for maintenance and operations, and who pays whom for various costs and expenses related to project operations.

The “allocation agreement” or “matrix” approach to these issues is a common-sense business solution that, in many instances, can be highly practical and appropriate.

The allocation agreement matrix presumes: (a) that ownership does not necessarily provide full use of the owned component or limit use in another ownership component, and (b) that use does not necessarily follow ownership. Just because an owner holds title to a component does not mean they should have full maintenance and repair obligations for the facilities within that

²⁵ See: Matthew J. Leeds, Edward A. Peterson David M. Van Atta, Cost Allocations In Mixed Use, Mixed Ownership Developments, American College of Real Estate Lawyers, October, 2014.

component. Costs of maintaining various facilities throughout the mixed-use project may be allocated to different owners or users based on formulas or other criteria determined by factors other than ownership or use rights.

The Matrix:

Ownership: Who owns what components of the Project?

Review and account for fee title to parcels, airspace parcels or condominium units, as well as easement rights, whether jointly shared or exclusive.

Use: Who has usage rights to each component—whether joint use, exclusive use, or easement rights?

Maintenance and operational responsibility: Who operates and maintains the various facilities in the mixed-use project? Is there a single association, multiple associations, or are maintenance and operations allocated to one owner, several owners, or a manager?

Cost Allocations. Who pays for what? What are costs allocated to property owners, which cost items are assigned to each owner, and what percentages are allocated to the various owners?

Mixed-Use, Mixed-Ownership Developments—Operational and Management Concerns

Operational and Management Concerns: Whether the legal structure of the mixed-use development is a condominium project or another other form of separate ownership, such as separate airspace ownerships, the project documentation must establish a system for operating the overall facility and clearly define responsibilities for the various components that make up the project. Although some project improvements may be specific to individual units or airspace components—such as independent elevator lobbies and shafts, separate utility facilities, and, at times, distinct heating, ventilation, and air conditioning systems—there are almost always base facilities that are common to all of ownership units, including roof areas, building exteriors, common lobbies, and similar shared spaces. The project documentation must clearly specify who is responsible for each facility and how decisions will be made regarding the budgeting, management, maintenance, operation, and replacement of these facilities over time.

Provision must be made for allocating the costs of management, maintenance, repair, and replacement of these common facilities. Furthermore, there must be an enforcement mechanism to ensure that owners of the various distinct portions of the building fulfill their obligations to use, operate, maintain, repair, and replace their specific facilities and systems in a way that preserves the integrity of the overall project.

Parking facilities and structures often require special attention when drafting project documentation. Frequently, the parking area in the underground portion of a building is a separately divided airspace with distinct ownership. In some instances, this separate ownership is conveyed to the municipality for operation as a garage facility. In other cases, it is sold or leased to a separate entity to be operated as an independent business enterprise. The airspace containing the garage structure often also houses key building operating components, such as HVAC and elevator

facilities. Certain exclusions or easements for these types of facilities must be established to separate them from the garage areas.

Management Structure: In creating the mechanism for decision-making, the drafter of documents must anticipate areas of potential conflict and attempt to design a management system which best avoids such difficulties. Particularly where the building or project contains a residential ownership element, as well as commercial, office, and/or retail elements, it may be important to establish separate decision-making processes or bodies for the residential component, especially for matters that do not require the involvement of all project owners. Addressing this factor may encourage the developer to choose a legal structure other than the condominium regime for the mixed-use project. Depending on the laws of the jurisdiction, a condominium management system may have disadvantages in key areas such as voting controls, allocation of assessments, and the level of management control desired by the project sponsor. Establishing separate associations or a subassociation for the residential component is often advisable. Project components that require contributions from all owners for maintenance and operation should be managed through a joint powers agreement, master association, or another joint decision-making process. The main challenge is developing a reasonable formula or process for allocating costs and determining the weight of voting rights for each project component.

Maintenance and Repair: As the project is broken into several ownership increments, decisions must be made at the outset as to who is to be responsible for undertaking the maintenance, repair, and replacement of the different physical components of the project, and how such responsibility is to be administered. There may very well be a variety of levels of maintenance and repair concerns. In a complex project, there may be several buildings, as well as a variation of levels within a building. Generally, the responsibility for the overall structural integrity of a high-rise building cannot be divided and handled by several different ownerships. Either an entity with a well-conceived decision-making structure must be established to handle this responsibility, or one owner within the collective ownership must be delegated the responsibility, with the authority to assess the other owners for their proportionate share of the costs. As is discussed in a later section of this article, there are several different governance structures which might be considered. If maintenance and repair responsibilities for portions of the project are delegated to individual ownership interest, mechanisms for enforcement of these responsibilities are required. Consideration should be given to the appropriateness of adopting a system of fines and liens in this context, and as to whether “self-help” provisions in documents can be enforced under the applicable state law.

Project Governance: A question to be contemplated by the drafter of project documentation is whether there should be a formal entity established for governing the project. Where the number of different ownership interests are relatively few, such as two or three in number, and the matters of common involvement are straightforward, then such separate governing entity may not be necessary. However, under the laws of some states, the project structure may mandate the formation of some type of formal governing entity.²⁶ The documents must establish a system for decision-

²⁶In California, an airspace development will likely fall under the statutory definition of a “common interest development” in California Civil Code Section 4000, known as the Davis-Stirling Common Interest Development Act. As a result, an association for the development—whether incorporated or unincorporated—is required (Calif. Civil Code §4080). If there are no residential units in the mixed-use project, a different statutory regime may apply in California—the Commercial and Industrial Common Interest Development Act (California Civil Code Sections 6500 et

making on matters that require common involvement among the various ownership interests. There may be tension regarding which matters will require collective decision-making and how those decisions will be reached. Day-to-day operational matters must be differentiated from major decisions requiring such collective input and consensus. In most instances, one party or entity must be given the responsibility and authority to operate the premises. An initial budgeting process initiated by the controlling owner or the master association, with annual review by the other ownership interests, should suffice—except for major, nonrecurring type items. Critical concerns include: operation of the common areas of the premises, collection of proportionate shares of the costs from the separate ownerships, and issues of construction matters, such as alterations, additions, maintenance, and repair by individual ownership interests of separate elements. Some thought should be given to whether a separate entity, such as a master association, is necessary to oversee and enforce responsibilities in these matters. Such matters can be handled by an appointed committee of representatives from the ownership interests, with voting rights weighted to reflect their respective interests. However, it may be preferable to grant one ownership interest the authority over such issues, subject to oversight or arbitration in the event of disputes.

In certain, and probably most, instances, it will be warranted to organize a management structure involving a separate entity for overall project management and operation, as a master project association. Where there are many different ownership interests—such as a project with separate residential units and several other individually owned components, including subdivided retail or office units—a structure with individual ownership associations operating collectively under an umbrella master association or a joint powers agreement may be appropriate.

Project Flexibility, Certainty and Stability: Another question to be considered is how to deal with possible changes that may be needed as a mixed-use, mixed-ownership project ages. Traditionally, easement agreements and covenants and restrictions for real estate projects have been designed to provide certainty and rigidity, assuring owners, occupants, and financiers that their investment in the project will be sustained and not put at risk. However, markets and property utilization are likely to change over time, and the envisioned project—or parts of it—may become obsolete or no longer viable. Some argue that the governing documents should include a mechanism to address possible long-term future modifications to the project, as well as a system for reaching consensus on such modifications.

Termination of Mixed-Use Mixed-Ownership Projects:

In the past decade, disasters have nearly destroyed some communities, severely affecting common interest developments within them. However, we are not aware of any large-scale mixed-use, mixed-ownership project that has been impacted by such a disaster. That does not mean such an event could not occur in the future. Can the project governing documents include a process to address such a potential disaster scenario? For instance, if a principal developer controls a majority or a substantial portion of the mixed-use, mixed-ownership project, that developer may be able to retain enough authority to determine what actions should be taken in the event of a major disaster that adversely impacts the overall development. However, other stakeholders may have concerns

seq.)—which imposes far fewer operational requirements and mandates than the Davis-Stirling Common Interest Development Act.

about one party having such dominant control. In addition, lenders for the various components may also have issues with a single party holding that level of authority.

California statutes on common interest developments—whether for residential projects or those without residences—lack effective provisions for terminating a project if there is a disaster that completely destroys it. The Uniform Acts for common interest developments in other states, or other state statutes, may include more specific provisions for terminating a project.

It may be prudent to add some provisions to the master project governing documents to deal with making major modifications to the project governing documents or for terminating the project. However, there is tension between establishing certainty and rigidity in the project documents as compared to providing for some flexibility, if such flexibility is needed. There will also be issues and concerns for dealing with the lenders on the various components within the mixed-use, mixed-ownership project. In California, the ultimate recourse would be to seek a partition action in state court, if the goal is to terminate the project. There are major issues with this approach, such as how to serve all required parties, who would initiate the action, and who would pay the costs of pursuing it. Another approach would be to seek the appointment of a receiver to oversee the termination of the project and its management entities.

Drafters may want to consider adding provisions in the project governing documents that address termination of the project or modification of its legal structure if the project improvements are destroyed. These provisions could include establishing an insurance trustee to manage the insurance proceeds, granting emergency powers to the project's master board of directors to expedite decision-making, and suspending assessments on destroyed elements. Provisions are often included in project documents for a process to elect to rebuild the damaged or destroyed project improvements. This often includes having a vote of the project ownership and stakeholders and perhaps the levying of a special assessment to pay for costs and expenses not covered by insurance proceeds or other available funds.

Issues may arise regarding how to obtain a vote from owners or association members after a project is destroyed. Provisions should address how to hold meetings of members, establish decision-making processes for representatives of the various components, and create a voting mechanism for owners who are no longer occupying units and may be dispersed. Additionally, the documents may need to address lender priorities, procedures for paying off lenders in the event of damage and destruction, and the allocation of any remaining proceeds to component and unit owners after loans are satisfied.

Many of these complex projects have comprehensive land use permits and approvals, sometimes called planned development permits. It should be noted that changing the make-up of a mixed-use project or terminating it will very likely involve dealing with those permits with the local municipality.

Conclusion

As discussed throughout Parts 1, 2, and 3, successfully structuring, financing, and operating mixed-use, mixed-ownership developments requires careful attention to the legal, financial, and management complexities that arise. By harmonizing diverse interests through robust legal

frameworks, clear management structures, and fair cost allocation, developers, attorneys, and lenders can create vibrant, sustainable communities. The complexity of these projects is not a barrier, but an opportunity to innovate and adapt, ensuring long-term success for all stakeholders.