MULTI-COMPONENT OWNERS ASSOCIATIONS

Key Challenges in Management of Shared Areas

With the complexity and interdependence of the various components of mixed-use community, the challenges and the potential risks are increased over those associated with the typical single-use project.

Mixed-use projects are characterized by three or more different types of uses – typically retail, office, and residential, and sometimes including hotel or entertainment – all integrated by means of a master plan.

The challenge in creating a successful, smoothly running mixed-use community of divergent residential and commercial interests lies in how "sharing" is handled. Preparing the legal documentation for and administering a mixed-use community is largely an exercise in determining how to share and, more importantly, how to avoid sharing.

What is shared in a mixed-use community? Places such as driveways, corridors, plant rooms; things such as utilities, parking, governance; and costs associated with the shared areas, such as insurance, maintenance, utility and administration costs, are all shared to some extent in a mixed-use community.

In general the commercial owner, investor or lender wants to be able to see the edges of its asset. It wants the asset discreet and definable so that it can be readily appraised, financed and controlled. It can be confounding for the commercial interest holder to share with residential owners, especially when all uses are placed within the same owners association. Typically, the more the components of the commercial asset are shared with residential owners, the greater the challenge to commercial interest holders to achieve and maintain predictability and control.

The general thesis is, then, that the benefits of a mixed-use community can be maximized by minimizing sharing.

GOVERNENCE OF MIXED-USE PROJECTS

The most critical governance issue in a mixed- use project is the balancing of control between the various unit owners. Here the term "control" has multiple meanings – decision-making over design elements and fit-out; financial administration; maintenance, repair and replacement of the common area components; actual control of the property owners association(s); and dispute resolution mechanisms. The Jointly-Owned Property Declaration (JOPD) and its related documents like Building Management Statement (BMS) must must define community standards and control measures so that the various parties can coexist within the same structure, not compete in the administration of the project's operation, and resolve their disputes through a effective dispute resolution process.

The JOPD and BMS provide the vision and general framework for the regulation of the mixed-use community, together with standards and procedures for the management, operation and maintenance of the project.

SHARED FACILITIES COST ALLOCATION

Mixed use projects present challenges in the allocation of maintenance costs for common areas and shared facilities. Maintenance of improvements owned and used exclusively by one property owner should be the sole responsibility for that owner, even where the improvements are actually located on other property.

For shared facilities, cost allocations based upon usage or benefits is the most common.

Problems arise when either a key tenant or owner negotiates an exemption or discount from the normal cost allocation arrangement. This forces the remaining owners to bear an over-allocation of maintenance costs for those facilities. Proper cost allocation depends on many factors, including design, configuration, location, ownership, infrastructure, utilities, and specific characteristics of the project such as the type of use, intensity of use and potential disproportionate impacts of one or more segment of users over another. Although allocation based on square footages is convenient, oftentimes in mixed-use developments this type of cost allocation leads to unfair results since usage infrequently correlates well with floor areas. A more equitable allocation is based on the intensity of the anticipated or known use by the different user groups within the project.

Allocating the costs of operating and maintaining the common areas of a mixed-use project in a fair and equitable manner can be challenging.

1. Costs of maintaining common area that exclusively benefits one user should be allocated completely to that user even if located on other property.

2. Costs of common area that is shared but not equally are more difficult to allocate – for example, loading and trash areas where a simple floor area fraction often will not work.

Several methods of expense allocation include the following:

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

(b) Delegation to the Master Owners Association of the responsibility to allocate expenses reasonably and fairly.

(c) Installation of submeters or other check devices for the utilities and other services provided to the project component, with expenses then allocated based on meter readings.

(d) Allocation of expenses based on anticipated usage.

MANAGEMENT OF SHARED AREAS

In many cases OA managers use 'cross easements' approach to manage mixed-use communities. However, it may be possible to avoid using cross easements if the residences and commercial spaces are located on separate legal parcels or separate plots.

The benefit of using cross easements is that they create stable and predictable relationships that are not susceptible to change.

On the other hand, cross easements are less beneficial when the residences and commercial spaces, though on separate parcels, share lots of things and areas; Secondly, cross easements tend to be inflexible, perhaps a little too stable and predictable. They don't evolve well as a community evolves; they can't respond readily to new and unanticipated issues that a community encounters after the easement was drafted and recorded.

In cases where the commercial and residential components are in a single building or otherwise cannot be feasibly subdivided into separate parcels, then the community managers may need to look to the option of establishing separate owners associations for every component, leaving the shared areas within master association.

This enables the residential and commercial interest holders to control their own respective affairs.

The objective is to minimize the master association's obligations and interests while maximizing the ability of each element of the mixed-use community to exist without interference from the other.

In some simple mixed-use communities, multiple associations may not be necessary. The classic example is a large residential building with a coffee shop or a flower shop, and/or multiple shops owned by one owner. In this case the retail component lacks the critical mass to sustain its own association, and therefore the usual approach is to place everyone in a single owners association, but create different classes of membership for the residential owners and the retail owners. This approach also involves delegating as much authority as possible to each class to run its own affairs, except as to elements that must be shared.

It's therefore important for the mixed-use owners association with help of community managers to strategize how to manage sharing within their communities.

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