

# **MIXING IT UP: AVOIDING COSTLY MISTAKES IN MIXED-USE LEASES**

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## **Mixing It Up: Avoiding Costly Mistakes in Mixed-Use Leases**

### **I. INTRODUCTION**

For much of our country's history, mixed-use development has been associated with dense, landlocked older cities as a matter of necessity. However, changing market dynamics and personal preferences have now created demand for mixed-use developments in areas that historically have not had such development constraints. For example, in recent years the Texas real estate market has experienced a growing premium placed on developments that offer living, hotel, office and shopping uses in a neighborhood environment. This movement, known as "New Urbanism", advocates organized, sustainable growth through high density housing and mixed-use development in a pedestrian friendly environment. New Urbanism appeals not only to the public who enjoy the convenience of working, dining, shopping and living in close proximity, but also to real estate developers who have seen that structuring mixed-use projects allows them to maximize the use and value of the development as a whole. In order to ensure that a mixed-use project is attractive to purchasers and tenants, financeable by lenders and feasible as a profitable business model, the developer must carefully structure the development from a practical and legal standpoint.

Since mixed-use projects often involve dense developments that integrate a variety of uses separated both horizontally and vertically, real estate professionals have been forced to re-examine their leases to address issues which are unique to these types of developments. This paper will analyze those provisions in commercial leases that are most likely to be affected by the location of the premises in a mixed-use project. A particular emphasis will be placed on the impact that a condominium form of governance has on leases. However, prior to addressing the leasing issues which arise in modern mixed-use developments, it is first important to understand the history of mixed-use development in America, as well as the various types of mixed-use projects one may encounter.

### **II. THE HISTORY OF MIXED-USE DEVELOPMENT**

**A. The Decline of Traditional Mixed-Use Development.** Mixing uses in a single development was a common practice in this country since the early 20th Century. In the early 1900s, these developments were often located within walking distance of a transit stop and the core commercial area. Mixing residential, retail, office, open space and public uses in a walkable environment made it convenient for people to travel by trolley car, bicycle, foot or, in rare circumstances, automobile.

However, two factors contributed to the decline of mixed-use developments beginning in the early 1900s. First, the mass production of the automobile created more mobility among people, thereby reducing the public's dependence on dense developments where people could live within walking distance of their shopping, working, schooling, worship and recreational activities. The second factor leading to the decline of mixed-use developments was the development of modern zoning and land use practices. As America developed into an industrialized nation, people began to realize that the pollution produced by many of the buildings in which people worked was detrimental to those who live nearby. As a result, local

governments adopted Euclidian zoning policies, which separated land uses according to function.<sup>1</sup> The primary intent of these zoning laws was to segregate residential communities from industrial uses which were hazardous to the health of the community. While this initially still allowed for some mixed-use development (such as mixing residential buildings with retail space), throughout the first half of the 20th Century, municipal zoning codes increasingly segregated land uses such that by the 1950s, mixed-use development was essentially non-existent. Houses were segregated from virtually every other type of use, creating the suburban bedroom communities that are still prevalent today.

**B. The Resurgence of Mixed-Use Development.** The trend toward Euclidian zoning began to change in the 1960s and 70s as municipalities began to deal with the decay of their inner cities. City planners understood that mixed-use development would be a critical component in their efforts to revitalize the urban areas of many large cities. This realization coincided with the publication in 1961 of the book *The Death and Life of Great American Cities* by Jane Jacobs, perhaps the most influential book written on urban planning during the modern age. The book squarely placed the blame for the decay of inner-cities on the Euclidian zoning policies requiring a separation of uses. Communities, she argued, thrive when they develop a dense and mixed-use urban environment that preserves the uniqueness inherent in individual neighborhoods. As a result, some city planners were persuaded to reconsider mixed-use development as a means of saving their inner-cities.

**C. The ULI Perspective – Planned Unit Developments.** In 1976 the Urban Land Institute published a technical bulletin entitled, *Mixed-use Development: New Ways of Land Use*, which defined a "mixed-use development" as a relatively large scale real estate project characterized by "(i) three or more significant revenue producing uses..., (ii) significant functional and physical integration of project components... and (iii) development in conformance with a coherent plan."<sup>2</sup> This definition was no doubt colored by the redevelopment taking place in some of the inner-cities, but also by the proliferation of planned unit developments ("PUDS") in the 1960s and 70s, which allowed developers to essentially create their own zoning for large scale mixed-use developments, thereby allowing a mix of uses not otherwise permitted by the zoning codes. The development of a PUD required large tracts of available land and cooperative government. A good example of a PUD in Texas created during this period is The Woodlands, north of Houston. Although large-scale PUDS comprise an important part of the history and definition of mixed-use development, because of the scarcity of large tracts of land near most desirable urban centers, they are likely not the future of mixed-use development.

Today, mixed-use as a development type seems to have come full circle. Mixed-use development now is conceptually more akin to the mixed-use commercial corner common in the early 20th Century. While the 1970's concept of mixed-use development was oriented toward

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<sup>1</sup> Euclidian zoning traces its roots to *Village of Euclid v. Amber Realty Company*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed.303 (1926), where the United States Supreme court upheld a zoning code which divided the Village of Euclid, Ohio, into six separate use zones, three classes of height zones and four different density zones.

<sup>2</sup> Witherspoon, Robert, Jon P. Abbett, and Robert M. Gladstone. 1976, *Mixed-Use Developments; New Ways of Land Use*. Washington D.C.: ULI.

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