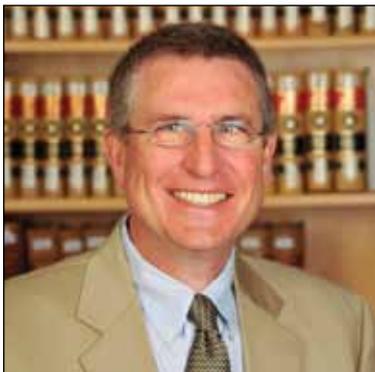


The Ten Stages Of A Real Estate Development Project



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By Rick Daley

A lawyer who understands the developer's business objectives at each of the ten stages of a real estate development project will add real value to the client's business.

MANY BOOKS AND ARTICLES have been written about the various elements and stages of a real estate development project. Most of those works are written from the perspective of the real estate developer and, hence, are heavily weighted toward the stages of a project's life cycle having to do with the developer's formulation of its initial vision and its subsequent testing of that vision to determine the feasibility of moving forward with the development project. The vision and feasibility stages of the real estate development process are uniquely the province of the developer as entrepreneur and visionary. The lawyer (almost by definition, neither a visionary, nor an entrepreneur) rarely plays anything but a minor, peripheral role in these initial two stages of the real estate development process.

The lawyer's role starts once his developer client has come up with its initial idea for the project and reached at least a preliminary conclusion as to the project's feasibility.

From the perspective of the real estate development lawyer, the 10 stages of a real estate development project are as follows:

1. Gaining control of the site;
2. Securing essential governmental approvals and incentives;
3. Forming and capitalizing the project entity;
4. Closing the land acquisition;
5. Securing construction financing;
6. Designing and constructing the project;
7. Negotiating the project lease;
8. Executing an interim exit strategy;
9. Operating the project; and
10. Selling the project.

These 10 stages are present, in some fashion, in every real estate project. They do not, however, occur in any neat, sequential order. It is a rare deal indeed where at least three of the stages do not converge and play themselves out over exactly the same period of time. By way of example, it is far from unusual for the real estate development lawyer to be negotiating a contract with a landowner seeking control of the site at the exact same time he is negotiating a construction loan commitment with a bank and the specifics of a tax abatement package with representatives of the local municipality.

This article will examine in summary fashion the lawyer's perspective on each of the 10 stages of a real estate development project. That examination will first focus on the developer's business objectives and then will move on to a discussion of the lawyer's activities in support of those business objectives.

Stage 1: Gaining Control Of The Site

Developer's Business Objectives. It is assumed for the purposes of this discussion that the developer has already selected a site that it believes is an ideal (or at least acceptable) location for the creation of a project to satisfy the needs of its targeted customer. Once that site is selected, the developer's business objective is to gain control of that site as quickly and cheaply as possible.

It is quite likely at this stage of the project's life that the developer has made only a preliminary decision on the feasibility of the project. While the developer probably feels pretty good about the location of the site, the developer has likely not yet worked out the final project economics, secured debt or equity financing, or actually locked down a customer for the project. All it knows is that the project has potential if it is located on the selected site. The developer's goal at this stage of the game is simply to tie up the site long enough to permit the developer to do all those things that are necessary to permit it to reach a final conclusion on whether the project is a "go" or a "no go." All the developer has in mind when he tells his lawyer to "tie up" the site is the taking of whatever minimal actions are required to prevent its competitors from swooping in to gain control of the land and, therefore, the project's potential.

Lawyer's Job. This stage is where the real estate development lawyer has the first opportunity to add value to his client's project. The lawyer's activities during this stage are as follows:

- *Learn the business deal.* Before putting pen to paper (or, in today's world, "fingers to keyboard"), the real estate development lawyer must first acquire a solid working knowledge of all aspects of his client's project, including the project's targeted customer, product type, financial projections and development schedule;
- *Prepare the "what if" list.* This is where the lawyer's value-add shines at its brightest. It falls to the real estate development lawyer to go through the mental gymnastics of identifying all those foreseeable events and conditions, the occurrence or existence of which could lead the developer to decide to scrap the project. These are what my first mentor called "what ifs" — what if the land is not zoned for commercial development, what if hazardous substances are found on the

site, what if title to the land is unmarketable, etc. Once those what ifs are identified, the lawyer must then figure out how best to protect his client from their occurrence by either (1) identifying a method to confirm their non-existence in the subject project (for example, by requiring the receipt of a clean environmental report certifying that no adverse environmental condition exists on the land); or (2) providing an acceptable exit strategy for his client if the what ifs are found to exist in the project (for example, the grant to the developer of a right to terminate its obligation to purchase the land if an adverse environmental condition is found to exist on the land);

- *Select the right form of contract.* Purchase agreements are a lot like clothing — there is no one agreement that is right for every occasion. Just as one would not wear flannel pajamas to a wedding, the real estate development lawyer should not use his 100-page, killer form, purchase agreement to paper his client's purchase of a two acre tract from an unsophisticated farmer;
- *Prepare and negotiate a contract that serves his client's objective.* In preparing the purchase contract, the real estate development lawyer must always keep in mind what his client's business objective is at this stage of the project — that is, to gain legal control of the land long enough to permit the developer to figure out if the project is feasible. Preparing a contract that serves this business objective, while at the same time protecting the client from the existence of the dreaded what ifs, is an art form that must be mastered by any lawyer who aspires to success in the real estate development field.

Stage 2: Securing Governmental Approvals And Incentives

Developer's Business Objectives. Before the developer purchases the land, it wants to have in

hand all those governmental approvals that are essential to the developer's decision to move forward with the development of the project. The identity of the "essential" governmental approvals will vary from deal to deal, depending on the uniqueness of the deal and the political climate in the jurisdiction in which the project is situated. At the bare minimum, the developer will want to know that the property is zoned to permit its development in the contemplated manner and that any governmental incentives needed to make the project's economics work are in place (for example, the grant of a tax abatement or the government's agreement to fund the construction of needed off-site infrastructure). In an ideal world, the developer will have received all requisite governmental approvals prior to its purchase of the land (culminating in the issuance of a building permit for the full construction of the project). However, the real estate developer does not live in an ideal world and is almost always willing to proceed with the land purchase before its receipt of those governmental approvals that are either perfunctory in nature or that the developer's experience tells it will eventually be issued without any controversy or unreasonable delay.

Lawyer's Job. This is the one stage where the extent of the real estate development lawyer's participation can vary a great deal from project to project. The real estate development lawyer must first sit down with his developer client to determine which governmental approvals fall into the "essential" category mentioned above. It is quite common for the developer to take the lead in securing those governmental approvals, which, while essential to the project, are not perceived to be the subject of much political controversy. Unfortunately, in today's politically divisive culture, very few governmental actions fall into the noncontroversial category. It is the real estate development lawyer's job to be sufficiently well-versed in the legal parameters surrounding the sought after governmental approval, so that he