MOST MIXED USE PROJECTS are governed by a Declaration of Covenants, Easements, Restrictions and Operating Agreement (“REA” or “COREA”), a Declaration of Condominium in the case of a mixed use condominium or a combination of both. The REA or Declaration of Condominium (“Governing Documents”) is the constitution or the comprehensive statement of the rights and duties of the owners.

UNDERSTANDING THE PROJECT • The content of a project’s Governing Documents is driven primarily by four factors:
• Is the developer the sole decision-maker on content? If there is more than one developer or a large tenant, there will likely be extensive negotiations with the other players;
• What is governed? A single high-rise building with multiple uses or several buildings, each with its own independent systems?

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• Are the uses roughly equivalent, or is there a dominant use?
• What areas and facilities will be shared?

This article is intended to serve as a guide for soliciting the information necessary to prepare the Governing Documents for a mixed use project.

**Drafting The Governing Documents**

The Governing Documents have to reflect the realities of the project. There is no particular formula to follow, but there are many factual considerations. These typically include:

- Understanding the project and how it will function;
- Understanding the business objectives of the lead developer, co-developers, other owners, and in a commercial development, the lead or anchor tenants;
- Determining how the project will be subdivided, identifying each parcel or unit (“Parcel”), its boundaries, and uses;
- Determining the basic governance and management structure, including the most effective means of handling operation, maintenance, insurance, and reconstruction obligations, and voting, assessment, and lien rights;
- Identifying all areas, components, or facilities of the project which will be used by or benefit all of the Parcels (“General Shared Facilities”) and identifying all areas, components, or facilities of the project which will be used by more than one but not all of the Parcels (“Limited Shared Facilities”). General Shared Facilities and Limited Shared Facilities may be referred to collectively as “Shared Facilities”;
- Identifying all areas, components, or facilities of the project which serve only one Parcel but are located outside the boundaries of the Parcel (“Single User Remote Facilities”);
- Identify any off-site or adjoining public or dedicated areas which are the responsibility of the project under any agreements with governmental entities (“Perimeter Areas”)?
- Establishing the public and private objectives of each major Shared Facility, Single User Remote Facility, and off-site improvement serving the project;
- For each such Shared Facility, determining who will use it, own it, operate it, and maintain it, and how the costs of operating, insuring, maintaining, repairing, and rebuilding it will be allocated;
- Defining the rights and obligations of the lead developer, co-developers, Parcel owners, and anchor tenants;
- Establishing a mechanism for resolving disputes and handling conflicting uses;
- Establishing how to address changes in the project, including redevelopment of all or portions of the project for redevelopment or termination;
- Setting standards for the appearance, operation, repair, and reconstruction of each portion the property;
- Establishing architectural guidelines, review, and approval processes and the responsibilities of the decision-maker;
- Evaluating marketing and sales/leasing issues triggered by the Interstate Land Sales Full Disclosure Act, applicable condominium acts, or common interest ownership acts, other laws and statutes, and the requirements of FNMA/ FHLMC, if applicable.

**Analyzing The Site, Existing Improvements, And Proposed Improvements**

The Governing Documents must also necessarily account for the physical realities of the site itself. So a careful review should address the following issues and questions:

- What are the proposed uses, and are they consistent with land use and zoning designa-
tions, development orders, permits, approvals, and the like?

- Are there existing buildings which will remain? If so, will the uses stay the same or will the use change? With demolitions, consider potential environmental harm caused by asbestos, lead paint, and so on;
- How many buildings will be located on the site? How independent/separate are the buildings from one another?
- For what purposes will each building be used? How independent / separate are the uses from one another?
- How will the project and each building be divided?
- Which facilities/amenities will be General Shared Facilities?
- Which facilities/amenities will be Limited Shared Facilities, and which Parcels will use them?
- Which facilities/amenities will be Single User Remote Facilities, and which Parcel, owner, or tenant will use them?
- What facilities/areas will be Perimeter Areas?
- Where are the facilities/amenities located in relation to the users?
- What are the circulation and traffic patterns in the vicinity of the site, into the site, and within the site? What are the points of pedestrian and vehicular access into the site? Determine which roadways are dedicated and which federal, state or local government controls which roadways. Determine which roadways are privately owned, and who will control and maintain them;
- What are the utility requirements for the site and improvements? What on- and off-site improvements must be made (such as lift stations, oversizing/enhancing water and sewer facilities)? What are the drainage requirements?
- Consider what restrictions, conditions, and easements will need to encumber the land before selling and/or leasing of portions to builders and end-buyers;
- How will the project be financed (including use of mezzanine money) at acquisition, development/construction, and over the long term?
- How will parts of the project be developed? In phases or simultaneously?

Information And Insights
From The Development Team

Depending upon scope and cost of overall project, each of the following consultants may be retained by a developer as part of the “Development Team,” in addition to its real estate counsel:

- Land use and environmental counsel;
- Land planner;
- Architect;
- Landscape architect;
- Engineer;
- Traffic engineer;
- Surveyor;
- Noise abatement consultant,
- Geotechnical engineer,
- Moisture control consultant,
- Interior designer,
- Lighting consultant,
- Property manager,
- Marketing staff,
- Insurance or risk management consultant;
- (Perhaps) other specialists to overcome any site-specific problems.

Governing Documents must be carefully tailored to reflect the particularities of the site, improvements, uses, and users. The attorney preparing the Governing Documents must be
thoroughly familiar with the project and how it is intended by the owner/developer to be developed and constructed, sold or leased, and operated.

In addition to the comments of the development team, the drafter may be obligated to incorporate the requirements or recommendations of:
- Co-developers;
- Buyers or end users, such as major Parcel owners, or anchor or lead tenants such as national retailers, theaters, hotel operators/owners, or large office or commercial space users;
- Investors or lenders; and
- Governmental entities.

**DRAFTING ISSUES** In planning a mixed used development, the participants must consider as early as possible the following principal issues of ownership, maintenance, and management:
- Types, acreage (square footage), and locations of planned uses and the number of Parcels;
- Nature and extent of amenities and Shared Facilities, benefits, and services;
- Extent of control desired over various land uses and planned improvements;
- Configuration, ownership, and sharing of the site, spaces, and systems;
- Allocation and delegation of costs and responsibilities for maintenance of Shared Facilities, including common and public areas, landscaping and parking areas, parks, recreational facilities, and external site components;
- Allocation and delegation of costs and responsibilities for maintenance of Single User Remote Facilities;
- Governing/management structure;
- Trash disposal, receiving, deliveries, and other services;
- Security and safety—particularly at the boundaries between public and private areas and the boundaries between commercial and residential uses;
- For nonresidential uses, assignment of responsibility for grand opening, as well as continued promotion and marketing;
- Insurance sufficient to insulate the owners against liability for accidents or damage occurring to or within the Shared Facilities;
- For the commercial uses, the hours of operation and possible conflicts between the right of access to public spaces (such as public throughways within projects) and after-hours operations; and
- The target market.

**Analyzing The Uses**
What types of uses will the project encompass? Is there a dominant use? For different types of uses consider the following:
- **Residential.** What types of products and price points? Single family detached? Single family attached (townhouses, villas)? Multifamily (rental or condominium, or both)? If residential is the dominant use, with multiple builders, will there be a builders’ program?
- **Commercial.** Office? Retail, including particular uses such as restaurants and financial services? Hotel? Marina? Recreational? Industrial or light industrial?
- **Governmental.** Post office? Library? Courts? Government offices? Police or fire substation?
- **Garage/Parking.** Will the garage or parking facilities be a Shared Facility or a separate Parcel owned and controlled by a private party? On what terms will the Parcel owners, their tenants, and invitees have access to parking?
- **Club.** Will there be a club? What amenities are included in the club? Is membership mandatory or voluntary? What uses or users will be