

**Presented:**

2007 BERNARD O. DOW LEASING INSTITUTE

April 19-20, 2007  
Plano, Texas**Avoiding Mix-Ups in Mixed-Use Leases****T. Andrew Dow**T. Andrew Dow  
WINSTEAD PC  
Dallas, Texas[adow@winstead.com](mailto:adow@winstead.com)  
214-745-5387

# "AVOIDING MIX-UPS IN MIXED USE LEASES"

April 19, 2007

- I. INTRODUCTION
- II. THE HISTORY OF MIXED USE DEVELOPMENT
  - A. The Decline of Traditional Mixed Use Development
  - B. The Resurgence of Mixed-Use Development
  - C. The ULI Perspective – Planned Unit Developments
  - D. The Current Mixed-Use Madness
- III. FACTORS AFFECTING MIXED-USE DEVELOPMENT LEASES
  - A. General
  - B. The Legal Structure of the Development
    - 1. The Condominium Craze
    - 2. Subdivisions within Subdivisions
    - 3. Relationship to Landlord Lease Obligations
  - C. The Ownership Structure of the Development
- IV. MIXED-USE LEASING ISSUES
  - A. Common Area Maintenance/Landlord Services.
    - 1. Who Do The Services Benefit?
    - 2. The Proportionate Share Approach
    - 3. The "Trust Me" Approach
    - 4. Beware of Hidden Costs
  - B. Parking Issues
    - 1. Shared Parking Ratios

- 2. Segregation of Parking Areas
- 3. Comprehensive Plan
- C. Taxes
- D. Noise, Odors and Nuisances
- E. Operating Hours
- F. Signage
- G. Access and Deliveries
- H. Other Exterior Restrictions
- I. Use Issues
- J. Security
- V. CONCLUSION

## Avoiding Mix-Ups 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. As a result, mixed-use development has become extremely popular in the current real estate environment and many experts believe that this trend will continue into the foreseeable future. Since mixed-use projects involve dense developments that integrate a variety of uses separated by horizontal and vertical planes, 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 issues which are unique to leases in mixed-use projects. 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 into the early 20th Century. In the early 1900's, these developments were often located within walking distance of a transit stop and 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 demise of mixed-use developments beginning in the early 1900's. First, the mass production of the automobile created more mobility among people, thereby eliminating the need for 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 1950's, 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 1960's and 70's as municipalities began to

---

<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 91926), where the United States Supreme court upheld a zoning code which divided the Village of Euclid, Ohio, into six separate use zones, three zones and four different density zones.

## Avoiding Mix-Ups in Mixed-Use Leases

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 1960's and 70's, 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, just north of Houston.

Although large-scale PUD's 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. Indeed, even 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 referenced at the beginning of this discussion. While the 1970's concept of mixed-use developments was oriented toward creating activities and event centers, today's concept of mixed-use is oriented more towards integrating commercial and housing activity on a smaller scale that is pedestrian friendly and linked to transit. The Mockingbird Station project in Dallas is a perfect example of this.

**D. The Current Mixed-Use Madness.** So why has the pendulum swung back toward the types of mixed-use developments which were common over 100 years ago? History often repeats itself. There appears to be a growing realization among city planners and developers that Jane Jacobs was correct. Creating sustainable neighborhoods necessarily involves mixing uses to create an environment which is unique and vibrant.

In addition, While the redevelopment of obsolete inner city buildings and blighted areas is nothing new to the older cities of the Northeast and Midwest, in today's high growth Sun Belt cities, second generation development is just beginning. Cities such as Dallas, Houston and Phoenix are a couple of hundred years younger than some of their eastern counterparts and are just beginning

---

<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.

## Avoiding Mix-Ups in Mixed-Use Leases

to mature as urban environments. As our outward expansion has extended beyond reasonable commuting distance, redevelopment of urban areas is becoming a viable if not necessary concept. Therefore, much as was the case with the Rust Belt cities during the 60's and 70's, the need to revitalize these cities has caused developers and municipalities to turn to mixed-use.

Why do mixed-use developments revitalize cities? First, a proper mix of use populates and activates neighborhoods not only during the day, but also in the evening. This creates a vibrant community where people are encouraged to gather and congregate with their neighbors. In addition, mixed-use developments reduce the need to use a car for every trip, thereby reducing traffic congestion and pollution. These and other factors make the community more healthy, safe and desirable. In short, this type of development allows for neighborhoods to become sustainable over time.

However, mixed-use is not only for urban environments. The recent population shift to the South and West has changed the demographics of the Sun Belt cities. Many of the migrants are coming from the Northeast and Midwest, where they are not as dependent on the automobile for transportation and enjoy the more dense, urban life style. As a result of this migration, developers have discovered that mixed-use can even work in suburban areas, as evidenced by the success of developments such as Southlake Town Center in Southlake and Legacy Town Center in Plano. Modern trends and personal preferences have caused many people to yearn for the days where they do not have to get in their automobile to go to a restaurant, catch a movie or get a haircut. As a result, many suburbs have jumped on the mixed-use band wagon and

have encouraged this type of development as well.

### **III. FACTORS AFFECTING MIXED-USE DEVELOPMENT LEASES**

This trend back to mixed-use development creates many issues which must be addressed in leases in order to create a successful mixed-use development. However, before these issues are addressed, it is first important to understand that all mixed-use developments are different and therefore create different issues in the legal documentation.

**A. General.** As previously discussed, the term "mixed-use development" is a broad term that can include anything from a three story apartment building with ground floor retail to a major planned development. The leasing issues which arise will vary depending upon the nature of the development. For example, if the integrated uses of a mixed-use development are under multiple ownership, many issues arise with respect to access, common area maintenance and the like, which may not be issues if the entire project is owned by one landlord. Similarly, if the mixed-use project is vertically subdivided (i.e., where multiple uses are segregated by floor in the same building), the parties will have access and cost sharing issues which are different from those arising in connection with a typical horizontal subdivision.

**B. The Legal Structure of the Development.** The legal structure of the development will also create issues which will need to be addressed in the leases. The appropriate legal structure for a mixed-use project is typically a function of the nature of ownership and use of the various components of the project, as well as the

## Avoiding Mix-Ups in Mixed-Use Leases

legal structures that are available under applicable law.

1. The Condominium Craze. Historically, mixed-use projects were accomplished through a horizontal or vertical subdivision, involving complicated conveyances of air-space rights, overlaid with various reciprocal easements, covenants and restrictions. However, many developers have recently opted for a condominium structure for their mixed-use projects. There are several advantages to creating a condominium structure. First, the law is fairly well established since virtually all states have enacted some form of condominium statute. This allows the developer to be fairly certain as to how the parties will be treated over time. In addition, both lenders and title insurance companies are now comfortable with this form of ownership and are willing to lend money and insure title on the project.

2. Subdivisions within Subdivisions. The condominium structure has the further advantage of allowing the developer to create vertical subdivisions within a larger horizontal development. This is done by forming sub-condominium regimes within a larger master condominium structure. This allows the developer to create condominium units based on the separate uses, and then to further condominiumize the space within each of those units. For example, a developer in a mixed-use condominium may create a master condominium structure including five units: a retail unit, a office unit, a hotel unit, a residential unit and a parking unit. Within any of those units, the developer may create a sub-condominium allowing such unit to be further subdivided. The typical example would be the residential unit, which would be further subdivided and sold off as individual residential condominium units.

The entire Victory Park development surrounding the American Airlines Center in Dallas is structured in this manner.

3. Relationship to Landlord Lease Obligations. The condominium structure is also favorable because it allows the developer to globally address many of the issues discussed later in this paper. Traditional landlord obligations (such as insurance, casualty restoration, repairs and maintenance, establishment of rules and regulations, etc.) may become matters for the condominium association and will be addressed in the Condominium Declaration. While the association may handle these matters on a project wide basis, the landlord for each unit would pass through the condominium association assessments to the various tenants. This is also advantageous to the landlord/developer, because it often eliminates the ability of the tenant to have a say in these matters. However, developer puts a burden on the landlord/developer to fairly allocate expenses and protect the tenants or it will have a difficult time attracting quality tenants to the development.

C. The Ownership Structure of the Development. Another issue developers encounter in connection with mixed-use developments is whether to segregate the ownership of the various uses or keep ownership of the entire project in one entity. Many lenders and equity investors have historically preferred to participate in one particular product type in a mixed-use project either because they are not comfortable underwriting the variety of uses and the risk associated therewith or perhaps they have an internal restrictions against investing in a particular product type. Whatever the reason, in many cases different lenders (and sometimes different equity partners) are utilized in connection with the different uses developed within the

## Avoiding Mix-Ups in Mixed-Use Leases

same project. As a result, many owners have opted to segregate the ownership of various uses. Separating the ownership of the uses and individually financing them also provides the owner with additional exit strategy options, because it allows the owner to sell one portion of the project (and satisfy that loan) while retaining ownership (and the financing) of another. Of course, this benefit could also be derived through the use of the condominium structure, so long as the loan on the project allowed for a partial release of the unit being sold.

### **IV. MIXED-USE LEASING ISSUES**

While this paper does not attempt to address every issue which may come up in every type of mixed-use development, it does address many of the issues which are common to mixed-use development leases. The remainder of this paper will focus on those issues.

**A. Common Area Maintenance/Landlord Services.** One of the most significant issues facing landlords and tenants in mixed-use leases is the proper allocation of common area maintenance expenses among the tenants of various types. To illustrate this conundrum, consider the following questions:

- In the typical vertical development comprised of a ground floor retail use with upper floor office or residential use, should the ground floor retail tenants pay a share of the cost of maintenance of the elevators in the building or the building lobby, which primarily (or exclusively) benefit the upper floor tenants? This question

becomes even more interesting if the retail tenant has its own external store front and entry to the street.

- Likewise, in a retail/office mixed-use development, should the office tenants pay for expenses that benefit primarily the retail tenant, such as after-hours lighting and security?

The answers to these questions vary by project and no definitive answer exists. The economics of the particular transaction will play a role, as will the persuasive abilities of the parties at the negotiating table. However, while negotiating the lease either on behalf of the landlord or the tenant, one should recognize that these issues exist and attempt to address the pass-through of these types of expenses in a fair and equitable manner.

1. Who Do The Services Benefit? When analyzing landlord services in the context of a mixed-use development for purposes of determining the allocation of common area maintenance expenses, it is important to distinguish between those services that may relate only to a particular use (for example, a parking garage or portion of a garage dedicated solely for the use of the residential tenants), from those which will benefit the entire development (for example, landscaping). If the service benefits only a particular use, then it is fairly easy to segregate that cost and allocate it solely to that use. However, when a particular service benefits the entire development, the analysis becomes more difficult. For example, the developer/landlord, may wish to provide landscaping for the entire development and pass the cost through to the various uses in order to maintain consistency and quality



## Avoiding Mix-Ups in Mixed-Use Leases

control over the entire development. While this is a reasonable approach, the real question becomes what is the appropriate allocation for each particular use?

2. The Proportionate Share Approach. In some cases, the costs are allocated on a proportionate basis based on the square footage of the particular use. While this may be a reasonable approach in some instances, in many cases it is not because some tenants are heavier users of certain services than others. For example, a restaurant use, although relatively small in terms of square footage, will be a major trash producer and will produce far more trash than a typical office or residential tenant. Therefore, the developer must either segregate those services for purposes of passing through common area maintenance costs or attribute a larger portion of the cost to that tenant than its square footage would otherwise dictate.

3. The "Trust Me" Approach. Rather than providing a mathematical formula for determining the proper allocation of expenses, many landlord's/developers have instead opted for generic lease language which gives them the right to make such allocations as they deem reasonable based on the uses being made at the project. This approach understandably scares the users/tenants because the answer to the allocation question is left to the developer's judgment. However, if tempered by a reasonableness standard and right to object to an allocation which it deems to be unfair, many tenants have agreed to this approach. A potential compromise position is to provide a general formula for allocation based on square footage or some other reasonable factor, but allow the landlord/developer to make reasonable adjustments to that allocation based on its reasonable determination of the relative benefit to the particular users.

4. Beware of Hidden Costs. A final question with respect to common area maintenance costs relates to how the costs will be passed through. Depending upon the structure of the legal documentation creating the development, the lease may not provide the whole picture as to the costs being passed through to the tenants/users. There may in fact be a reciprocal easement agreement or condominium declaration that allocates certain costs which ultimately will be passed through to the tenant/user as well. In many cases, these costs were allocated prior to any leases being made in the project and there is little the tenant can do to change them. Therefore, it is recommended that a tenant/user in a mixed-use development always review all legal documentation surrounding the development in order to gain an accurate understanding of the expenses it will be required to pay.

### **B. Parking Issues.**

1. Shared Parking Ratios. A critical feature of any successful mixed-use development is a parking plan which satisfies the needs of each of its various uses. While this can be a delicate balancing act, an attractive feature of mixed use developments is the potential ability to share the same parking spaces among compatible uses, thereby reducing the overall parking required for the site. For example, combining an office use, where most of the tenants are gone for the day by 5:00 p.m., with a retail/entertainment component, where most of the patrons do not arrive until the evening, allows the developer the potential to share the same parking spaces for each of those uses, thereby eliminating the need for the permitting authority to impose independent parking ratios. This reduces the construction cost and eliminates vast parking fields or garages which detract from

## Avoiding Mix-Ups in Mixed-Use Leases

the feel of a pedestrian friendly mixed-use environment. While some municipalities are now recognizing the parking efficiencies that can be created by mixed-use developments, many unfortunately have not updated their zoning ordinances to reflect this recognition. Therefore, developers still have an uphill zoning battle when trying to get these projects approved. Nevertheless, if the developer is permitted to share parking spaces among the various uses of the complex, the lease negotiators must be careful to ensure that adequate parking for each use will be available at the times that it is needed. This may require coordination with the landlord or the parking manager in the event certain activities overlap in order to ensure adequate availability of parking and orderly traffic flow during peak times.

2. Segregation of Parking Areas. In many cases, it is common for a landlord to charge office tenants for parking. However, charging for retail or residential parking would be extremely unusual. This may require the developer to segregate the parking areas based on use. Residential parkers especially will expect to have a reserved parking space to ensure that it is available for use at any time, regardless of what else is happening in the project. Retail tenants are also sensitive to parking issues and will want to make sure that their customers have adequate parking in close proximity to their store. This can often be a challenge in a mixed-use development, so the tenant may need to consider requiring reserved parking spaces or even valet parking.

3. Comprehensive Plan. Regardless of the nature of the development, the parking plan is one of the most significant issues that landlords and tenants will encounter during the negotiation process. In fact, it is perhaps the most

important issue retail tenants analyze when determining whether to lease space in a mixed-use project. Comprehensive parking rules and regulations must be developed in order to address the varying timing, security and access needs of the diverse users. These rules must set up operational constraints to avoid "poaching" by paying office parkers on free parking use by retail customers, must ensure reasonably proximate parking for all users to their space and must otherwise accommodate the special needs of all uses in the project. In negotiating a lease, the tenant must clearly define its parking needs and ensure that the lease provides adequate remedies should those needs be violated. On the other hand, the tenant will need to understand that a mixed-use development will not provide the same parking conveniences as a traditional shopping center and therefore the tenant will need to be prepared to compromise.

C. Taxes. Similar to common area maintenance costs, an issue that often arises in negotiating leases in mixed-use developments is the method of allocation of real property taxes. In many cases, a developer is able to subdivide (even vertically) the improvements into separate tax parcels so that each of the retail, office and residential components of a particular project are separate tax parcels. Subdivision is extremely helpful in allocating taxes in the various leases. However, in a vertical development, the allocation of taxes on the land becomes problematic because most taxing authorities will not separately allocate the value of the land among the various vertical uses. For example, in a project which includes a ground floor retail component with upper floor residential units, how should the taxes on the land be allocated? On one hand, owners of the residential units may argue that all of the taxes on the land should be attributable to

## Avoiding Mix-Ups in Mixed-Use Leases

the retail component, because the retail component sits on the land and would be required to pay those taxes whether the residential component existed or not. On the other hand, the owner of the retail component would argue that such an allocation would provide a windfall to the residential owners, who would then pay no taxes on the land. As with CAM costs, the landlord will need to devise an allocation which is fair and acceptable to both constituencies. Failure to do so at the commencement of the project could lead to major headaches down the road.

Another potential method for allocating taxes attributable to the land is on a proportionate basis based on the square footage of the improvements. However, this method also is not perfect, as land that is used for commercial purposes often carries a higher value than land used for residential purposes. Therefore, the residential users would argue that they are paying more than their share of the value of the land if allocated purely on a square footage basis. Once again, the developer/landlord will need to find a solution to this issue which is fair and equitable and acceptable to each of the affected parties.

One potential compromise is to allocate the taxable value of the land based on the taxable value of the improvements allocated to each use. For example, if the retail improvements carry a taxable value of \$6,000,000.00 and the residential improvements carry a taxable value of \$4,000,000.00, then the taxable value of the land would be allocated 60% to the retail component of the development and 40% to the residential component. While no method of allocation is perfect, many landlords and tenants have found this approach acceptable.

**D. Noise, Odors and Nuisances.** An important planning aspect for any developer creating a mixed-use project (especially one with a residential component) is the minimization of noise, odors, and other nuisances that may accompany commercial uses. Ultimately, the residents will need to understand that living in a dense urban environment is a double-edged sword. While it carries many conveniences, it has some disadvantages as well. Nevertheless, the developer/landlord should make every effort to minimize the nuisance factor. In many cases this can be done by properly engineering the buildings prior to construction. For example, if the ground floor contemplates restaurant uses, the developer will want to make sure that the building is properly ventilated so that the odors from the restaurant do not eminent into the residential component. The developer may also want to engineer the building with extra barriers against sound in order to ensure that the night life at the street level of the development does not unreasonably disturb the residential tenants. Similarly, the developer/landlord will want to engineer the building so that trash storage and disposal does not create a nuisance. This will involve requiring restaurant tenants to segregate wet vs. dry trash and the development of trash chutes in order the segregate the trash in a common area, away from places where people gather. In short, the retail landlord must protect the other users of the development (such as the office tenants and the residential tenants) through the use of provisions in its retail/restaurant/entertainment leases, in order to ensure that the development is a compatible place for each of the uses.

**E. Operating Hours.** Another issue which is important to the creation of a thriving mixed-use development involves the operating hours of the

## Avoiding Mix-Ups in Mixed-Use Leases

retail/restaurant/entertainment component. If the developer is attempting to create a "live, work, play environment", it will want to ensure that the retail tenants stay open during extended hours. If all of the stores and restaurants close at 6:00 p.m., the residents will not realize the benefits of living in a mixed-use environment. On the other hand, the developer/landlord may also want to ensure that the night life shuts down at a reasonable time in order to protect the residential tenants. While the residential tenants may not want retail establishments closing at 6:00 p.m., they likely will not want them open all night long. This can be a delicate balance and the tenant mix of the retail component will dictate what the operating hours should be.

**F. Signage.** For most retail tenants, signage and visibility are important issues in selecting a site. However, signage and visibility can be a challenge in a dense mixed-use development. In many cases, tenants will have to live with less than perfect signage options, and trust that the mixed-use development will create an environment with enough traffic to justify its location. There are several ways in which the landlord and tenant may address this issue, including exterior building signage, off-site signage and nearby billboard advertising. Most landlords are sensitive to the tenants plight and will make every effort to accommodate a tenant's reasonable signage needs.

The landlord must also consider the effect that a tenant's signage will have on the other users of the development. The example comes to mind of the Seinfeld episode where the Kenny Rogers Roasters restaurant prevented Kramer from sleeping for several days because the neon glow from its sign turned his entire apartment red. As with most Seinfeld episodes, this scene was

humorous because many people have had a similar experience. In order to prevent this from occurring, the landlord must balance the retail tenants' desire to draw people to its store with bright lights against the residential tenants' desire to control its own internal environment.

**G. Access and Deliveries.** Mixed-use developments also create issues regarding the access of the various users to their space. For example, residential users will need unrestricted access to their home, while office tenants will want to restrict access to their space after hours. If both uses are located in the same building or use the same elevators, this creates an operational issue.

In addition, it is extremely important for the landlord in a mixed-use development to regulate the timing and location of deliveries to the various components of the project. This will require the management company to coordinate deliveries and schedules, especially if the various uses share a common loading dock. For example, the retail/restaurant uses may require daily deliveries at a specific time. On the other hand new residential tenants moving into the building may have more flexibility in terms of their need to use the freight elevators or loading docks. Ultimately, this is a coordination issue, but the leases must specify the rights of the parties with respect to access and use of the common loading areas.

The landlord may also want to restrict the access of contractors to the project to specific hours. The residents will certainly object to construction of an adjacent office or retail space which begins before 7:00 in the morning. On the other hand, the office or retail tenant will want to perform its construction during non-peak

## **Avoiding Mix-Ups in Mixed-Use Leases**

hours, which often will conflict with the hours that the residents are at home. Therefore, the landlord will need to manage expectations and balance the competing objectives of the various components of the project. These restrictions on construction must be included in the leases in order for the landlord to properly manage this process. Although residents may understand that living in a mixed-use environment will necessarily involve interaction with commercial uses, they will want to attempt to make uses compatible with the residential life-style.

**H. Other Exterior Restrictions.** In order to maintain a symbiotic relationship between the uses, the landlord/developer must regulate the use of the common areas in a way that will create the environment which the developer/landlord seeks to establish. The landlord may want to restrict store fronts and window displays of the retail tenants, or establish view corridors and easements to ensure the desired aesthetic. This may also involve allowing restaurant tenants to use a portion of the common areas for outdoor seating, or allowing retail tenants to display merchandise on the sidewalks for so-called "sidewalk sales". While allowing such use can add charm and character to the development, it also creates several issues which must be addressed in the lease. If such uses are allowed, the lease should be absolutely clear as to how and when the space may be used, whether the tenant is paying rent on such space, insurance and indemnity obligations relating to such use and the like.

**I. Use Issues.** By definition, a mixed-use project will allow more uses than is typical in a standard retail shopping center. However, that does not mean that the individual users of the space are not

concerned about the use being made in other areas of the project. For example, residential users will be concerned about any use which adversely affects the quality of their residential life. Likewise, retail tenants will continue to be concerned about uses, such as restaurants and theatres, which will have an adverse impact on parking in the development. Therefore, although more uses may be allowed in a mixed-use project, the developer/landlord may find it necessary to identify areas within the project which will be exclusive to certain uses.

In addition, uses which may be undesirable in a typical retail shopping center, such as doctor offices, travel agencies or other service providers, may very well be desirable in a mixed-use context because of the residential component. As a result, it is impossible to determine what are desirable uses and undesirable uses in a mixed-use development until the components comprising the development are fully understood. After all, by definition, each mixed-use development is designed to create a neighborhood that is unique unto itself.

**J. Security.** Another important issue to consider in the mixed-use development is security. Regardless of whether the development is under one ownership or common ownership, it is important for the landlord/developer to maintain a consistent and uniform approach to security. Therefore, a central security force which patrols each of the various components of the development is critical. This enables the developer/landlord to maintain consistency among its security cameras, enforcement of rules and regulations and the like. The cost of security should be treated as a common area maintenance expense allocated to the

## Avoiding Mix-Ups in Mixed-Use Leases

various components as discussed in that section of this paper.

### V. CONCLUSION

Mixed-use development is an exciting component of today's real estate market. Because of its popularity, many developers who have historically focused on a single product type are being forced to deal with issues that are foreign to them. Likewise, many tenants who have historically located in single use developments are now being required to adjust their practices to accommodate the needs of different uses. This presentation has examined many of the issues to be considered when negotiating a lease in a mixed-use project. However, because of the density and interdependence of the uses within such a development, both landlords and tenants will need to enter the negotiations and a relationship with a spirit of cooperation and compromise. Retail tenants may not enjoy every benefit they have been accustomed to in a typical shopping center environment. Landlords will need to take extra precautions to protect the tenants from disruption which may be caused by other users of the project. If the developer does not create a complimentary tenant mix with adequate protection for the various components, or the tenants do not share the vision of the landlord for the project, the development is destined to fail. However, careful documentation and a spirit of cooperation will solve most of these issues and lead to a beneficial relationship for all parties involved.

NOTE: The following pages contain photos and renderings of the types of mixed-use developments discussed in this presentation. The first couple of pages illustrate the traditional mixed-use neighborhood with ground floor retail and upper floor

residential. The remainder of the photos and renderings show Victory Park, a former Brownfields site turned into a major mixed-use development surrounding the American Airlines Center in Dallas.