

A Transactional Lawyer's Perspective on New Urbanism: Innovative Concepts in Mixed Use Development

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I. Introduction

- A. A transactional lawyer wears many hats in representing a developer, particularly a developer engaged in developing a mixed use project.**
- 1. Practical Advisor: the client may bounce many ideas off of the lawyer and the lawyer needs to be able to render sound business and common sense judgments about various courses of action the developer may follow.**
 - 2. Legal Advisor: the lawyer will need to advise the client on various facets of law including contract law, zoning and land use, finance law, land division law, real estate law, environmental law, construction law, securities law, etc.**
 - 3. Negotiator: the lawyer may be called upon to negotiate on the client's behalf with land sellers, municipal authorities, lenders, state regulators, tenants, etc.**
 - 4. Draftsman: the lawyer will be called upon to draft numerous documents from the simplest letters to the most complex leases, development agreements and/or partnership agreements.**

B. This presentation will touch on many of those skills.

II. Understand the Client's Goals

A. Discreet tasks vs. the broader picture. It is important to understand the big picture and how all of the parts will ultimately fit together.

- 1. Is the developer going to build out the whole project himself or is he going to sell off pad sites (or site condominium units or lots) for other developers?**
- 2. What are the elements of the project—how many residential units, how much commercial space, how much office space, will there be parking decks, etc.?**
- 3. What style will the residential component be—single family, townhome, high rise apartment style?**
- 4. Will the commercial space be destination commercial or will it merely provide services to the residential and office components?**
- 5. Will the office component be class A or small low rise clustered buildings or something else? Will it be specialized office space (e.g., medical office) or general office uses?**
- 6. Will there be sign rights given to others located off site or will all signs merely advertise the businesses being carried on in the development?**
- 7. How will the public access the site?**

The answers to these and many other questions will guide the lawyer's advice throughout the balance of the project.

III. Land Assemblage and the Purchase Agreement

A. Confidentiality is critical to the client's goals.

- 1. Keeping client confidences is a given. However, it bears repeating that confidentiality is critical in the lawyer's role in a large land assemblage. One slip up can cause serious harm to the client's efforts by increasing land cost or worse, by bringing competition.**
- 2. Confidentiality and non-compete letters should be signed by all title companies and brokers involved (see Attachment III A2). Limit the number of individuals within those offices that will have access to the client's files.**
- 3. To the extent that one or more land sellers must close their sales before all others, be certain that there is a strict and continuing confidentiality obligation, in the best scenario secured by a hold back**

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of a large portion of the purchase price until the remainder of the land is acquired by the client.

4. Understand site issues up front so that you can be in a position to counsel the client on how the assemblage may impact access and utilities issues down the road.

B. Why not an option agreement? It may involve parting with cash consideration up front and arguably it may preclude filing a claim of interest against the land (see Attachment III B).

1. Deposit refundability—to the extent conditions precedent under a purchase agreement are not satisfied, typically deposit monies are returned to the purchaser.

C. Time Frames: Typically the lengthiest time frame within which to conduct due diligence and close is what the client will seek.

D. Conditions Precedent (see Attachment III D):

1. Physical review—taking a physical inventory of the buildings and other structures on the land, including environmental, wetland, woodland and geotechnical studies.
2. Title review—reading all title encumbrances and reviewing certified surveys.
3. Financial review—to the extent the property being acquired is income producing, lease abstracts will need to be prepared and rental figures and monthly recoveries will need to be checked against bank deposits made by the seller. Also, tenant estoppel letters will need to be obtained.
4. Financing.
5. Site plan and zoning.
6. Adjacent property acquisition.
7. Tenant interests such as options to purchase and the like will need to be reviewed.

E. Warranties from the Seller:

1. No environmental issues.
2. No prior interests granted that would obligate the purchaser.
3. No knowledge of pending condemnation or special assessments.
4. The physical condition of all roofs, foundations and utilities systems is in good working order.
5. To the extent the property is income producing, the rental income is

at a certain level, the expenses are at a certain level and there are no defaults of the tenants under any leases and no defaults alleged by the tenants against the seller under those leases.

F. Title Review:

1. **Critical to consider how title on one parcel may affect another parcel to be acquired down the road—example: a gas pipeline easement on one parcel being acquired may have onerous requirements with respect to constructing structures or roadways over the top of the easement area (e.g., the pipeline may need to be lowered or the land upon which the structures are to be built may need to be built up).**
2. **Catalog all encumbrances for future disposition.**
3. **Carefully review the chain of title to determine that all necessary parties are bound to the agreement for the developer to purchase (e.g., a parcel is owned by a single woman who took the property as part of a divorce settlement but no deed from the ex-husband is found in the chain of title—it would be important to obtain the husband’s signature on a deed and even on the purchase agreement).**

G. Environmental Review: Not only is a determination about the levels of contamination important, but also a thorough wetlands and woodlands inventory may be crucial, particularly in light of state law and local ordinances. In certain purchases, a BEA (i.e., baseline environmental assessment) may be called for. If possible, the purchaser may want to quiz the seller about any historical uses of the property of which the seller may be aware (e.g., former gas station use, former dry cleaners use, etc.).

H. Notices: little considered, but always critical. In representing a purchaser, its obviously best that notices are deemed given on posting to whatever delivery service is used. It is important to spell this out in the purchase agreement. Invariably, decisions to buy are made on the last day and if the notice provision states that notices are effective on delivery and there is nobody available from the seller to receive delivery, the purchaser may be out of luck and, worse, if the “cat is out of the bag” on the development, it may prove costly to the purchaser on the second go round with the seller.

I. Confidentiality: again, as noted above, critical to have the seller covenant that the very existence of the transaction will not be divulged to any third party.

J. Notice of Claim of Interest: once the purchase agreement is signed, it is critical to file a notice of claim of interest as the same will serve to protect the purchaser in the event of a dispute with a seller.

K. The Closing

- 1. Title Insurance:**
 - a. One Policy:** Although multiple parcels may be purchased at one time, it is best to obtain one master policy of title insurance as, to the extent there is an insured loss, the larger policy with the aggregated value will surely provide more coverage.
 - b. Contiguity Endorsements:** To the extent multiple parcels are involved, it is quite important to obtain a contiguity endorsement to the title insurance policy to insure that there are no gaps or gores between parcels. Failure to obtain this coverage may require the developer to start a quiet title action with respect to small strips lying between acquired parcels and this process will slow down the development and hurt financeability.
 - c. To the extent that one or more parcels are required to be acquired prior to the balance of the land, several of the title companies will now waive the survey exception from among the standard exceptions if the seller will provide a copy of a prior survey and if the seller will sign an affidavit that there have been no changes to the site since the date of that survey.**
- 2. Purchase Price Allocation in Multi-Parcel Purchase:** to the extent the developer's plans call for selling off pad sites to other developers, if it is possible to allocate portions of the purchase prices paid, the developer would be wise to try to load up the allocation of prices to those pads to be sold off first so as to reduce any potential gain from those sales.
- 3. Transfer Taxes on Re-Sale:** Again, to the extent that the developer plans to sell of pad sites to others, it may be wise on the purchase of the land to structure the purchases so that there are separate entities owning the various pad sites. In this fashion, transfer taxes on the sale of the pad sites may be eliminated by selling entity interests as opposed to land. However, this presents some complicating factors to be considered:
 - a. The legal descriptions of the pad sites must be set before the land acquisition by the original developer.**
 - b. Setting the legal descriptions in advance may reveal that lot splits are needed so that a land owner seller can convey one portion of his land to one of the developer's entities and another portion of his land to another of the developer's entities. Local ordinances on lot splits should be carefully reviewed both for the required content of materials to be submitted with the split**

application and for the time frame that will be involved to obtain the split.

- c. Bear in mind that, although there will be no transfer tax on the sale of entity interests (a clear benefit to the developer-seller), the sale of more than 50% of the beneficial interest in an entity will “uncap” the subject property for real estate tax purposes (a potential detriment to the party acquiring from the developer).
4. Closings with multiple land sellers should be staggered and if possible, conducted through an escrow procedure so that the sellers do not start comparing notes.

L. The Holdout Land Seller

1. The developer must firmly indicate to the land sellers that: (a) there is a time limit to their dealings with them and that if at the end of that time a deal is not signed, there will never be a deal, and (b) no parcel is critical to the developer’s project and that, to the extent the project is public knowledge, the development will go on with or without the holdout’s parcel.
2. If all else fails, condemnation may be an option to the extent that the municipality is so inclined to help the developer in that way and there is a sufficient public purpose (see Poletown Neighborhood Council v City of Detroit 410 Mich 616 (1981)).

IV. Financing

A. Land Acquisition and Development Loans

1. Loan terms must provide sufficient time within which to obtain the necessary land use approvals so that any acquisition loan can be satisfied.
2. Any loan should be of sufficient size so that an interest reserve can be established in order that the developer is not coming out of pocket monthly to make debt service payments.
3. To the extent necessary in the situation where the developer will be selling off pad sites, mortgage release provisions should be negotiated.

B. Public Funding

1. Public funding for construction of roads and sewers, etc. All such facilities (for example, the main street), would necessarily have to be accessible to the general public. City responsibility for maintenance, repair, repaving, etc., might be helpful.
2. Public funding for construction of parking decks. For example, bonds can be issued by or for the City parking or building authority

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provided there is a sufficient revenue stream from the deck or decks to service the bonds and that the decks are accessible through public rights of way (dedicated streets or easements). The developer needs to be careful, here, though, when it comes to issues of giving up control of the parking decks. Issues of municipal reliability in terms of operating the parking decks need to be considered — in an upscale development, the municipality may be the wrong entity from a service point to be operating the parking decks.

3. **Special assessment districts.** A developer can sometimes negotiate special assessments to build roads, utilities, etc., that are required for project feasibility and/or site plan approval, assuming that direct public funding is not available. The costs are funded up front through City issued bonds and repaid by developer's property in lengthy installments (e.g., over 10 or more years). In some cases, the rate of interest may be attractively low due to tax exempt bonds. At a minimum, such financing has the advantage of longer payment periods.
4. **DDA.** Within cities, townships and villages in Michigan a downtown development authority has fairly broad powers to aid projects in creative ways, including roads, infrastructure, public and possibly private amenities, etc. Its main source of funds is tax increment financing from city taxes and some minor taxing jurisdictions (not K-12 funds), from the project improvements and possibly other properties. The developer's project must be included within the DDA district, as such, an amendment to the district may need to be undertaken to qualify the land for the DDA financing.
5. **L DFA.** A local development financing authority district can be located anywhere in a city, and upon establishing an L DFA district, tax increment financing from taxes generated by a specific project can be used, especially for infrastructure supporting the project. The problem here is qualifying. The act has been amended to provide for support for "certified business parks," and although this sounds promising on the surface, there appears to be a heavy emphasis in the definition on high-tech uses, even of office space.
6. **Brownfield Authority Act.** This act provides primarily for tax increment financing (sometimes including K-12 funds) for environmental remediation, and single business tax credits. To qualify, the site either needs to be a "facility" in terms of environmental contamination levels as set forth in the Environmental Response Act, or, in qualified cities and the development must be intended to rectify obsolete facilities or "blighted" property regardless of the environmental conditions.

7. **Urban Land Assembly Act.** This act provides some funding for infrastructure development. It appears that commercial property, to be benefited thereby, must be in a DDA district.
8. **Community Development Block Grants.** These are oriented toward low income areas and are locally administered. Sometimes these funds have been used for clearing blighted blocks.
9. **Obsolete Properties Rehabilitation Act.** Certain municipalities in Michigan eligible for aid under this program, which is primarily intended to confer tax abatements. In order to qualify, the site needs to be part of a “property rehabilitation district” under this act.
10. **Personal property tax abatements** may be available under some legislation. There are 85 distressed communities in Michigan that qualify for this program. This would apply to abatement of state and local personal property taxes. Generally a real estate developer would not significantly benefit from personal property tax abatement, but major tenants (e.g., a hotel in particular) might. The same reasoning might apply to the benefits of the single business tax credits under the Brownfield Act, as discussed above, and such benefits can be a significant inducement to some potential occupants.
11. **Single business tax credits** designed to attract new businesses bringing jobs, high-tech and office, to the State. This program applies only in the event of competition between states, including Michigan, for a new business, and has some significant threshold requirements.
12. **Renaissance Zones.** To the extent the municipality in which the development is located has a Renaissance Zone, there are substantial tax relief inducements which may be available.
13. **Job training programs, etc.** While not real estate related, inquiry about job training programs and other possible financial credits for new hires and the like should be made with the municipality. The same might be an inducement to potential tenants of the project.
14. **Business development programs.** Most counties in Michigan have a development office that might be interested in partnering an effort to seek major tenants from outside the area and internationally.

V. Parcel Division

A. Platting vs. Condominiumizing

1. **Land Division Act (see Attachment V A1):** Assuming a 40 acre tract of land, only 7 parcels (i.e., 4 for the first 10 acres and 1 for each additional whole 10 acres after the first 10 acres) may be created (unless road improvements are made, but that will only marginally

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add to the number of permitted parcels) that are exempt from the platting requirements of the Land Division Act.

- a. Platting to achieve land divisions is time consuming and provides little flexibility to the developer. A large mixed use development may take several years to build out and therefore as markets for real estate use change over time, the course of the development may change, too, over time. As such, the developer needs flexibility in dealing with land divisions in order to react to the marketplace. Platting does not provide that flexibility.
2. Condominiums provide great flexibility to the developer (see Attachment V A2).
 - a. Ability to add land to the condominium.
 - b. Ability to change unit sizes in the future.
 - c. Site condominium vs. vertical condominium. In a large mixed use development, it is likely that the land will be divided by a "site" condominium, while residential components will be divided with a so-called "vertical" condominium. Some counties will not permit a "condominium on top of a condominium" which leaves the developer in the position of having to vacate the first condominium in the area to be developed for the "vertical condominium" when that time arises (it may be that the vertical component is not the first to be developed). It is certainly possible to mix a "site" condominium with a "vertical" condominium, but this can only be achieved where the developer's plans are clearly laid out well in advance (for the vertical condominium, the developer will need to know its architectural plans so that the same can be included in the condominium documents).
 3. Residential condominium vs. business condominium. Purchase price of \$250,000.00 or more and use for other than residential or recreational purposes is the test and to the extent that a condominium is a "business" condominium, the disclosure requirements are substantially relaxed.

B. Creation of a Condominium

1. Section 71 notices to governmental agencies.
2. Condominium Subdivision Plan from engineer/architect.
3. Master Deed and Bylaws.
4. Reservation Agreement.
5. Escrow Agreement.

C. Content of Master Deed and Bylaws (see Attachment V C).

- 1. Condominium Subdivision Plan as Exhibit B.**
 - a. It is important to note that on the Exhibit B Condominium Subdivision Plan, the improvements should all be labeled as “need not be built” improvements so as to avoid so-called “developer liability” for failure to complete any of the improvements or failure to complete them in any particular fashion.**
 - b. The lawyer’s role in preparing the condominium documents will involve not only drafting the master deed and bylaws, but also checking and re-checking the engineer’s work to confirm that the drawing on the Condominium Subdivision Plan incorporates the client’s design as well as meeting with any legal requirements.**
- 2. Legal description.**
- 3. Division of share of costs of maintaining/repairing/replacing the common areas among the unit owners. This calculation goes to the establishment of the so-called “percentages of value.” Under the Condominium Act, these percentages can also stand for the co-owner’s vote in the association of co-owners that will administer the common elements of the condominium, although that is not necessarily required. In the alternative, the vote can be done on a “one owner-one vote” basis.**
- 4. Easements.**
 - a. In a large mixed use development, many easements will be necessary, including vehicular and pedestrian access and sign easements, in addition to the typical utilities easements. All of these easements can and should be memorialized in the master deed for the condominium. To the extent separate easement documents are executed, they should be referred to in the master deed.**
- 5. Dedication of internal roadways for public use.**
 - a. In the master deed, the developer should reserve the right to dedicate the roadways to the public. In order to do this, the roadways will have to be built to public standards.**
- 6. Unusual maintenance requirements (open space/recreational areas?).**
- 7. Provisions regarding amendments (with or without City approval, with or without major tenant approval, with or without mortgagee approval?).**
 - a. It is critical to the concept of flexibility that the developer**

reserves in the master deed the right to amend the master deed without obtaining any consents—no co-owners, no city and no mortgagee consents needed. This can be achieved by including language to the effect that so long as burdens are not materially increased and benefits are not materially decreased, then the developer will have the right to amend the master deed as it sees fit without obtaining any consents. With respect to the municipality, perhaps in any re-zoning or zoning ordinance text amendment, administrative consent rights can be created as opposed to full blown site plan approval hearings.

8. **Bylaws.**
 - a. **Building and Use Restrictions.** The developer will effectuate control over the uses of various portions of the project through these provisions in the bylaws. These are obviously critical to keeping the right mix of uses, and major commercial occupants will want to negotiate them carefully (to that end, the developer's ability to amend the master deed to accommodate such negotiations will be important).
 - b. **Corporate governance provisions with respect to the co-owners' association is also quite important.** The developer will want to retain control. In the alternative, recently developers of commercial condominiums have set them up without a co-owner's association. In lieu of the association, the management of the condominium is handled on a rotating basis by the various large owners. This form may not be appropriate where there will be smaller parcels as the small parcel owners will have a different agenda from the larger parcel owners.

D. Disclosure Statement—for Residential Condominiums

1. **Contents required are set forth in Section 84a(d) of the Condominium Act**
2. **Disclose unusual items about the condominium**

E. Unit Sales

1. **Reservations prior to recording of Master Deed.**
2. **There are various provisions in a purchase agreement required by Section 84 of the Condominium Act.**
 - a. **Funds paid to be deposited in escrow to secure completion of the "must be built" improvements.**
 - b. **Nine business day withdrawal rights (from the date of delivery of the required condominium documents).**

- c. **A statement requiring that sufficient funds/security shall be maintained by developer to assure completion of the “must be built” improvements.**

F. Advantages to development in condominium format vs. platted subdivision format.

1. **Timing (once land use approvals have been obtained, there are no “official” documents to be circulated for signature by the various governmental agencies as are required under the Land Division Act).**
2. **Flexibility can be drafted into the Master Deed.**
 - a. **Convertible Areas.**
 - b. **Expandable Condominium.**
 - c. **Relocation of Boundaries between Units.**
 - d. **Reservation of the right in the developer to amend the Master Deed without obtaining the consents of co-owners, mortgagees or municipalities.**

VI. Use Restrictions-Integration of Uses

A. Control over the various uses within the project is critically important.

Control can be achieved as follows:

1. **Condominium documents (as discussed above).**
2. **Through reciprocal easement agreements and building and use restrictions.**
3. **In tenant leases for commercial users within the project.**

Any or all of these methods of use control can be used. The transactional lawyer should track all use restrictions, wherever located, so that not only is there an integration of uses, but also so that rights are not granted to one user or one portion of the entire site that may conflict with rights granted to another user or another portion of the site.

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**Attachment III A2
Confidentiality Letter**

View online at <http://www.icle.org/partners/materials/2002CP7196/20022A7196-ex-III A2.pdf>.

**Attachment III B
Marketable Record Title Act 200 of 1945**

View online at
<http://www.michiganlegislature.org/mileg.asp?page=getObject&objName=mcl-Act-200-of-1945>.

**Attachment III D
Purchase Agreement Provisions**

View online at <http://www.icle.org/partners/materials/2002CP7196/20022A7196-exIIID.pdf>.

**Attachment VA
Chapter 560 Subdivision Control Act of 1967**

View online at
<http://www.michiganlegislature.org/mileg.asp?page=getObject&objName=mcl-288-1967-GENERAL-PROVISIONS>.

**Attachment VB
Chapter 559 Condominiums**

View online at
<http://www.michiganlegislature.org/mileg.asp?page=getObject&objName=mcl-Act-59-of-1978>.

**Attachment VC
Master Deed**

View online at <http://www.icle.org/partners/materials/2002CP7196/20022A7196-ex-VC.pdf>.