

BUYING, LEASING OR DEVELOPING IN A MIXED-USE PROJECT

WHAT DO IN-HOUSE ATTORNEYS NEED TO KNOW?



Speakers – Shannon Mandich



Shannon Mandich – Shannon is a partner at Sheppard Mullin where she represents residential and commercial developers and builders in connection with the development and sale of master-planned communities, mixed-use developments, planned unit developments, condominium projects and commercial/industrial projects. She has extensive experience preparing legal management and association documents and other real estate transactional documents, including Declarations of Covenants, Conditions and Restrictions (CC&Rs), license and easement agreements, cost-share agreements, maintenance agreements, purchase and sale agreements, disclosure statements and conveyance instruments. Shannon advises clients in connection with the Department of Real Estate subdivision regulatory process and other state, local and federal laws and regulations concerning the creation and operation of associations and the development and sale of property.

Speakers – Brooke Miller



Brooke has nearly 20 years of experience helping her clients successfully navigate land use planning, zoning, entitlements, environmental, local government and special districts law to expedite and defend their development projects. Brooke partners with clients to develop strategic approaches to land use entitlements. She leverages her expertise in state and local laws to help clients statewide secure development permits for housing, mixed-use, commercial, energy storage and other projects, minimizing risk whenever possible. Brooke has many years of experience working directly with agency staff and advising and presenting before local government officials at the county, city and special district levels. She also successfully defends her clients in litigation under the California Environmental Quality Act (CEQA), Subdivision Map Act and the California Planning and Zoning Law, including in published appellate decisions from the 2nd and 6th District Courts of Appeal.

Speakers – Rabia Paracha



Rabia is a seasoned real estate attorney at Sheppard Mullin Richter & Hampton LLP. She is a member of the firm's Real Estate, Energy, Land Use & Environmental Practice Group as well as the Corporate, Real Estate and Finance Team (CRAFT), Portfolio Transactions Team, and Multifamily Housing Team. She has over 10 years of experience in advising clients on a full range of real estate transactions. Investors, property owners, developers and landlords rely on her counsel when buying, selling and leasing real property across the United States. She is experienced at handling all asset classes, including retail, office, industrial, storage and multifamily properties. She is adept at leasing, sale-leasebacks, purchases and sales, management agreements, CC&Rs and other real estate matters. She is passionate about delivering solutions that meet the needs and objectives of her clients, keeping their long-term goals in mind. She serves a broad range of clientele, including publicly traded companies, real estate investment firms, retail chains and other real estate investors.

Rabia was the lead attorney on the successful closing of real estate transactions totaling more than \$6 Billion in the past two years alone. Rabia is trusted by clients as their go-to real estate attorney and recognized as a Rising Star by Super Lawyers and a Top Young Lawyer by Los Angeles Magazine in Southern California, 2020-2024.

Speakers – Kathryn Richman



As General Counsel for Hughes Marino, a nationwide commercial brokerage focused on the representation of tenants and buyers, Kathryn oversees all aspects of the legal affairs of the company. An in-house attorney her entire legal career, Kathryn has a unique business-oriented approach to providing legal services to both publicly reporting and privately held real estate companies. With more than two decades of experience in both commercial and residential real estate, she advises companies on corporate and business issues, risk management, contracts, and state and federal administrative and regulatory law.

Outline

What is mixed-use development?

- Governance structure
 - What are CC&Rs?
- Interplay with leases
- Interplay with development
- Lease or Purchase
 - Big picture: what would be helpful if you're buying or leasing in a mixed-use development?
 - Understand legal restrictions
 - Compliance with both residential and business licenses/ rules



Outline, continued

- Understand business considerations
 - Market considerations
 - Parking
 - Security
 - Cost share & responsibilities
- Development
 - Zoning
 - Change in use
 - Permitting
 - Due diligence
 - PSA considerations
 - Entitlements
 - CC&R amendments



What is a Mixed-Use Development?

- A type of development that combines multiple uses within a development area.
- Examples of uses include residential (for sale or rental), office, retail, medical, commercial, and/or industrial.
- Can be combined within a single building or in a “horizontal” area with uses side-by-side, or a combination.



- Basic Premise of Every Mixed Use Project:

- Commercial Owners: Want control but Developer must protect residential interests
- Residential Owners: Protected by Department of Real Estate Regulatory Requirements
- Due Diligence requires Prospective Owners and Tenants to understand (even read!) CC&Rs and Budgets
- Failure to understand the governance, easements, common area expenses, insurance, damage and destruction can result in a “Mixed Use Gap”!



Governance Structure

- Governance structure refers to the legal management documents that establish the reciprocal rights and responsibilities between multiple owners.
 - E.g., Reciprocal easement agreements (REA), Declaration of Covenants, Conditions, Conditions and Restrictions and Establishment of Easements (CC&Rs)
- Project Structures – may include subassociations and/or further subdivision, condominiums
- **Residential Associations** (Davis-Stirling Common Interest Development Act at Civil Code Section 4000 *et seq.*) v. **Commercial Association** (Commercial and Industrial Common Interest Development Act at Civil Code Section 6500 *et seq.*).

CC&Rs

- Main Components:
 - Easements
 - May establish property owners association. Alternatively, may designate a “Maintenance Party” or “Project Operator” to perform certain maintenance functions for common area and allocate costs to the owners.
 - Membership and Voting Rights
 - Designate “common area” – shared use areas. May be fee ownership or easements.
 - Assessments/Shared Expenses
 - Maintenance Obligations of each Owner and Association/Maintenance Party.
 - Use Restrictions
 - Architectural Review
 - Declarant Rights
 - Insurance
 - Lender Rights
 - Casualty/Condemnation
 - Term/Amendment Requirements
 - Enforcement

Tenants and Leases

- Tenants are typically designated as “permitted users” under CC&Rs for purposes of easement rights.
- However, the Owner of the parcel will typically remain the primary party under the CC&Rs for purposes of rights/obligations (e.g., assessments, enforcement, etc.)
- Sometimes large anchor tenants or tenants with substantial leverage negotiate special rights under CC&Rs (e.g., large retailers have requirements to limit any construction/maintenance activity in parking lots during busy holiday season; approval rights for any amendments).
- Sometimes CC&Rs provide for delegation of owner rights/obligations to ground tenants.



So Why is Understanding the Governance Structure Important?

Lease

- You may think your Landlord is in control of all decisions regarding the operation and maintenance of the building

CC&Rs

- May give control to an Association or specific owners

Do I Have Access Rights in the Building?

Lease

- Common Area may be all of the space outside your leased premises
- Tenant may have Access and Use Rights to all or most of the Common Area

CC&Rs

- Common Area may be owned by separate entities
- Access to areas such as the roof, corridors, hallways may be restricted

What Easements Do You Need to be Sure You Have?

- 01 Easement for essential building systems (fire and life safety, elevators, utilities)?
- 02 Access to the roof?
- 03 Utility Facility Easements?
- 04 Easements for your Outdoor Sales Areas?
- 05 Should I reserve an easement over the exterior facade?

Bottom Line:

Did I grant a tenant easements in a lease that I do not have in the Building?

Did I sign a lease where I think I have access rights which I really do not have because of the CC&Rs?

Who has Primary Responsibility for Maintenance?

Lease

- Landlord maintains the Building and Common Area

CC&Rs

- It may not be the Landlord – it could be a Master Association or even a Residential Association or a Maintenance Party

How Have Operating Costs Been Allocated Under the Budget?

Lease

- Typical CAM Costs and Exclusions

CC&Rs

- May be a DRE approved budget
- Full pass-through of costs without exclusions
- In a residential association, only statutory limits on increases – 20% for regular assessments and 5% for special assessments

Will I Be Able to Use the Premises For My Business?

Will Use Restrictions Impact Marketability of the Commercial Areas?

Lease

- May be used for any lawful retail or commercial purpose
- Limited restrictions
- Ensures you can conduct your business

CC&Rs

- Limitations can be extensive and may be enforced by Residential Owners!!
- May impact ability to use your commercial space for its intended purpose

What Do I Need to Look Out For?

- Protecting the Operational and Business Objectives of Commercial/Retail/ Hospitality Owners
- Limit ability of Residential Owners to control business uses and operations
 - Protect Hours of Operation
 - Protect Exclusives
 - Restaurant uses
 - Parking Rights
 - Quiet Enjoyment – Anything can be used against you?

Residential Owners can be very “sensitive”!



Are There Rules & Regulations or Architectural Guidelines That Can Be Used Against Me?

Leases

- Limited ability to restrict a tenant's use through rules
- Tenant improvements only require Landlord's consent

CC&Rs

- Rules Under the CC&Rs may be extensive
- Who enforces the Rules? Can the Rules be changed?
- Is there an architectural review process? If so, who controls it?

How Can Insurance Cause a Mixed Use Gap?

Lease

- Landlord insures the property owned by the Landlord

CC&Rs

- Landlord may only own a portion of the building

Subdivision of Existing Site

- A property owner may implement CC&Rs on an existing site in order to subdivide and increase flexibility for disposition of property. For example, a single parcel with multiple buildings may be subdivided into multiple parcels and CC&Rs must be established in order to establish reciprocal rights/obligations.
- **Best Practice**: If client has existing leases, ensure that CC&Rs do not conflict and are broad enough to cover any rights granted under leases. Leases can still be more restrictive.
- Standard lease forms may no longer work.
- Exclusive use rights
- CAM charges under leases v. assessments under CC&Rs.



Best Practices – Unique Aspects of Mixed –Use Projects

- Protection of minority owners
- Address how diverse uses in close proximity will operate in harmony
- Use restrictions, nuisances
 - Grease interceptors
 - Noise (residential over restaurant)
- Balance ability of businesses to operate with potential disturbances



Best Practice: Consider emerging trends

- EV Parking
- Solar
- Ride share/delivery/drop-off parking spaces – consider allocation of parking to owners with flexibility for owner to decide how spaces are used/restricted.



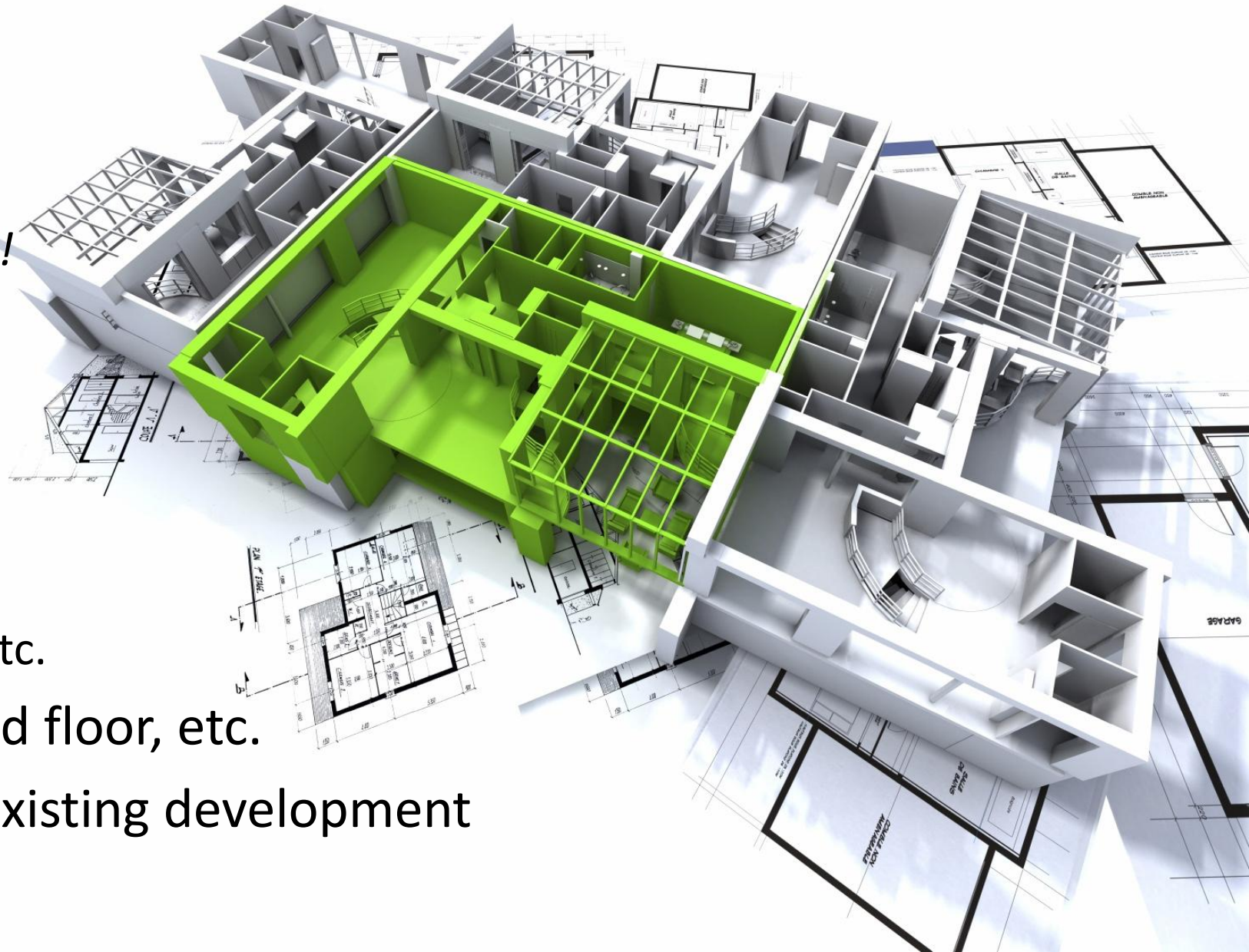
Best Practice: Redevelopment and Existing Developments

- Subdivision of single lot with multiple buildings into multiple lots to create value and increase flexibility for financing and sale.
- CC&Rs should address maintenance/repair/replacement obligations for utility infrastructure, but utility layout may be unknown with older projects.
- Electrical and irrigation water metering structure may not align with desired cost sharing.
- Construction Staging



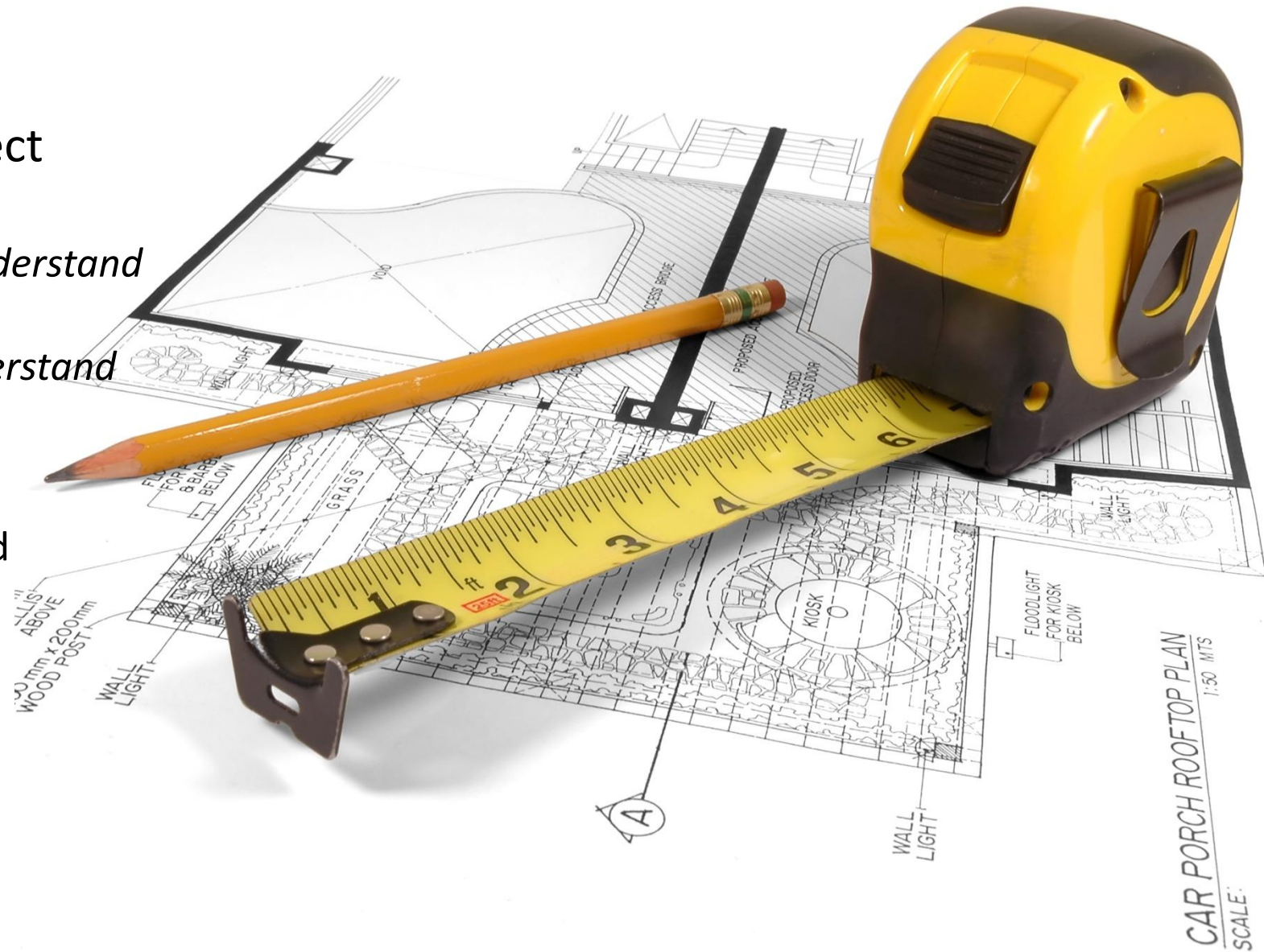
Development

- Start with Zoning
 - *Not as simple as it sounds!*
- Considerations include
 - General Plan
 - Community or Specific Plan
 - Design review
 - State law
 - Federal Law, Fair Housing, etc.
- Use, square footage, ground floor, etc.
- New development within existing development



Change in Use

- What if your development project needs a use change?
 - *Not always straightforward to understand use classifications*
 - *Some uses are not classified- understand the process to determine use*
- Local procedures
 - Vary by what needs to be changed
 - General Plan
 - Specific Plan
 - Zoning
 - Ex. City of San Diego UDP process
- Consider State and federal law



Legal review

- Due diligence
- Permitting
- Public Notices/ outreach
- Environmental Review



PSA Considerations

- Timing of milestones, closing
- What do you need?
 - Due diligence
 - Preliminary review
 - CC&Rs Amendments
 - Discretionary entitlements
 - Building permits



Contact Info



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