

THE DEVELOPMENT AGREEMENT: A BENEFICIAL TOOL TO DEVELOP SINGLE LOT COMMERCIAL CONDOMINIUMS

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As real estate developers look for more creative strategies to develop mixed-use projects on a single site, use of a condominium structure has become more common. This structure gives the developer the ability to develop the uses in the project for which it has experience and to sell the condominium units designated for other uses to third parties who may be more experienced with developing, financing and operating improvements for those designated uses. The condominium structure also allows more autonomous control of each unit by its owner than if the owners jointly owned the project in a joint venture structure, however, there will still need to be cooperation among the owners for the project to be efficiently developed. Accordingly, it is in the owners' best interest to enter into a development or cooperation agreement at the beginning of a project to set forth the process for cooperating and communicating through completion of the project. Following completion, the declaration of condominium (or similar document) will control the governance of the project.

Starting with the design phase, the owners will need to cooperate to ensure that the units fit together within one core and shell structure and satisfy all zoning requirements and that all shared spaces, such as parking areas, fitness centers and lifesafety control rooms are designed to all owners' satisfaction. The development agreement should set forth the process for the owners to review, approve and modify the various levels of plans and drawings for the project. The development agreement should also set forth a schedule for each owner to achieve certain construction milestones and the mechanism by which such dates can be modified.

Usually one general contractor will construct the entire exterior/core and shell of the building, with separate budgets allocating costs for each unit. The owners will need to agree in the development agreement on the process for reviewing the construction work, proposing change orders to the contractor, paying for the work and enforcing warranties. Following completion of

the core and shell, each owner will separately construct the interior of its unit but, again, cooperation is required. The owners will want the development agreement to include requirements for making sure that the contractors do not interfere with each other with respect to staging and storing construction materials, ingress and egress from the building (especially if there are shared lobbies and access points), as well as processes for testing various building systems. Qualifications and insurance requirements for contractors must also be agreed upon.

If any reimbursements are due from one owner to the other for construction by one owner of a portion of the project included within the other owner's unit or that is solely for the other owner's benefit, the development agreement should include the process for agreeing on the amount to be reimbursed and the work to be completed.

The development agreement will also set forth the rights and remedies of the owners with respect to each other in the

event that one owner does not perform as required. These remedies may include delay damages, specific performance, self-help and calling completion guarantees. Each owner's respective lender is also going to require certain rights and remedies, too. Because each condominium unit can be, and often is, separately financed, but is part of one integrated building, lenders to the development of one unit are usually going to want rights to cure both non-performance by its borrower and also by the other unit owners (if another unit owner's lender elects not to cure). The level of dependency of the units on one another (degree of shared space, shared building systems, shared parking, etc.), will factor into the rights and remedies of a lender with respect to the unit not serving as its collateral. If it is not possible for one unit to be completed and opened without the completion of another unit, each lender may require similar rights and remedies with respect to the units serving and not serving as its collateral, including self-help, to ensure completion of the project. If lenders are identified early enough in the process, their rights and remedies can be included in the development agreement; otherwise, the owners will need to enter into separate agreements with each lender.

In addition to each lender requiring typical assignments of the construction, architect and other third party development related agreements from its borrower, a construction lender to one unit may also require assignments or

other agreed upon mechanics for enforcing each of the other unit owners' rights under their third party development related agreements as well in the event any such owner fails to perform its obligations and its lender elects not to cure. These enforcement mechanisms may be included in the development agreement or in separate stand-alone agreements.

Regardless of the number of commercial condominium units, unit owners or lenders or how complicated a commercial condominium project may become, use of a development agreement to provide the framework for guiding the parties from the start of the project through completion is key to avoiding disputes and delays in development. ■



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