
Mixed-Use Condominiums: Design Questions and Risks

*By Jeffrey D. Keiner, Esq.**

Introduction

The design professional has always been caught between the appeal of aesthetic idealism and the demands of pragmatic functionality. To what extent should a design reflect the visual elegance of the Eiffel Tower? To what extent should a design reflect the raw functionality of the Three Gorges dam? New challenges have arisen of late, exacerbating the traditional aesthetic vs. functional tension inherent in most building designs. These challenges are being seen with the new kid on the block – the Mixed-Use Condominium.

Mixed-Use Condominiums, though not unheard of in the past, are increasingly popular projects. To stimulate inner-city development, cities are more frequently offering tax incentives for mixed-use facilities. Developers favor them because they are fashionable, and offer economic diversification. In the Mixed-Use Condominium, three traditionally separate designs, i.e., commercial, residential and retail, are combined in one facility. Thus, in a Mixed-Use Condominium, the designer faces all the traditional challenges multiplied by three.

Upfront Design Planning

For any construction project, the successful designer must adequately staff the design team, coordinate the preparation, and complete the design in time for the start of construction. These upfront tasks are significantly complicated on a mixed-use project.

Most designers and design firms have developed a degree of specialization. Some focus on offices, others design restaurants, retail tenancies, single family residences, apartments or condominiums. Except for a few larger design firms, most designers do not have permanent staffs with all these specialties. Yet all of these disciplines may be needed for the typical Mixed-Use Condominium project. Thus, hiring these design specialists becomes an important task soon after the lead designer is engaged. A sequencing, scheduling or design error can have a tremendous effect on cost. Aggressive and early attention to the contracts and coordination of the design team are indispensable.

Conflicting Design Aims

The differing, often conflicting, aims of residential design, retail tenancy design and commercial office design present many conundrums to design professionals. Consider the differing acoustical, mechanical, electrical, plumbing, structural, spatial, fire safety and landscaping needs of these three uses. Is an elevator for retail tenants and customers also to be used by the residents, or might separate elevators be necessary? Might duplicate spatial uses be necessary? How do you accommodate a resident's expectation of reasonable privacy with a retail tenant's desire to increase pedestrian traffic?

Requirements that might be peripheral concerns in a single-use facility can become paramount in a mixed-use facility. There are many competing uses. Will the retired condominium resident be permitted to walk his dog along a grassy fringe bordering a first-floor outdoor café? Where should a restaurant kitchen exhaust be located? Parking?

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Optimistic Cost Expectations

In addition to design and management challenges, the designer may face other unique challenges on a mixed-use project. The developer's expectations may differ from the ultimate unit owner. For a developer new to Mixed-Use Condominiums, there may be unrealistic cost expectations. The developer may expect a synergy of cost savings from combining multiple uses in a single facility. Unfortunately and counter-intuitively, a reverse-synergy of sorts, is more likely. The individual unit owner might also have higher quality expectations than the developer or commercial users in the facility.

The most economically cost efficient systems used in single-use facilities, such as a central A/C system, can be impractical for mixed uses. This loss of economic efficiency driven by the need for costly, redundant components may drive up the cost per square foot of construction. The developer's desire for economically diverse uses must be balanced against the potentially higher cost of construction.

Legal Pitfalls

The many variables attendant to mixed-use design also create a greater legal risk to the designer. Of particular concern in most jurisdictions are the statutory warranties to which developers and contractors may be bound in condominium construction. Though all condominiums may be covered by statutory warranty provisions, Mixed-Use Condominiums present a greater risk of claims because of design compromises that may not be necessary in a single-use condominium development. Technically the designer does not provide these statutory warranties, but the practical effect is that any time the owner or contractor is implicated in a claim for construction defects, the designer is likely to be dragged into the litigation. Moreover, since developers are often shell entities, the design professional is likely to be viewed as a target of opportunity for litigation.

The difficulty with condominium warranties is compound. First of all, the warranties usually survive the initial sale of the properties. Secondly, condominium construction has become legally notorious because of the nature of the end users – the condominium owners. Generally speaking, residential condominium owners tend to be highly vocal. The condominium board members, for fear of later being second-guessed, tend to be trigger-happy. Combine these legal and pragmatic ownership factors with the large number of units in a given project, and you have the “perfect storm” for construction and design claims.

Solutions?

If design professionals are involved in the process early enough and if input is possible, efforts can be made to minimize liability and tailor risk allocation not only through the owner-designer agreement, but also through the Declaration of Condominium, which typically outlines the responsibilities, obligations and rights of the developers, owners, and the condo association. Negotiated provisions in these Declarations, assuming the State board will approve them, may help minimize claims exposure. They can include: a) requiring a super-majority association vote to start litigation; b) pre-suit mediation requirements; c) jury trial waivers; d) limitation of liability clauses; e) prevailing-party attorneys' fees clauses; and f) the requirement for a pre-suit independent expert to evaluate the alleged defects.

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Conclusion

Design of the fashionable Mixed-Use Condominium, though not quite as challenging as the hypothetical reconciliation of the Three Gorges dam and the Eiffel Tower designs, presents the design professional with unique challenges and increased risk. Unless such projects are realistically and conservatively bid, contracts carefully prepared and the design properly staffed, Mixed-Use Condominiums can expose the design team to risks disproportionate to the fee. Likewise, if it goes well, they can be both aesthetically and practically rewarding.

**Jeffrey D. Keiner is the Chairman of the Litigation Department and a shareholder of Gray Robinson, P.A., a full-service law firm with 190 attorneys in ten Florida offices. Mr. Keiner concentrates on complex commercial, construction, professional liability, environmental and intellectual property litigation, arbitration and mediation. He represents numerous architectural and engineering firms across the country. Mr. Keiner wishes to acknowledge the assistance of Trevor B. Arnold, Esquire and Chris Carmody, Esquire of Gray Robinson, P.A. in the preparation of these materials.*

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