

DEVELOPMENT CHECKLIST

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DEVELOPMENT CHECKLIST

I. WHAT IS DEVELOPMENT LAW?

What is development law and why is it so popular? Development law is not a specific area of real estate law, rather it is providing legal services during the process of developing a new project on raw land or the redevelopment of existing projects. It is not a specific legal topic, but rather a legal field. Development law involves virtually all aspects of real estate law expertise.

Many attorneys and real estate professionals consider development law to be the most challenging (difficult), rewarding (frustrating) and exciting (scary) real estate law field. The mindset of the typical developer is entrepreneurial, with a positive, aggressive and driven attitude; an interesting client! Even when a large institution is the developer, the employees directly responsible for development activities have many of the personality characteristics of an independent developer.

In today's economic environment, the most prevalent developments are retail, sometimes with a mixed use component of office or residential. These projects are more complex than a straight office or industrial development due to the interaction of different uses and/or different retailers.

II. ELEMENTS OF DEVELOPMENT LAW

A. Legal Subjects. Development law encompasses all types of real estate law topics, including the following:

- ? Acquisition
- ? Title/survey
- ? Land use
- ? Environmental
- ? Ground leasing
- ? Construction financing
- ? Construction
- ? Leasing
- ? Permanent financing
- ? Sale
- ? Dispute resolution
- ? Condemnation
- ? Governmental regulation

- B. Legal Tasks. The development attorney has 3 critical legal tasks:
- ? New documentation drafting and negotiating
 - ? Existing documentation review
 - ? Due diligence.

Development law requires the review and analysis of existing documentation, the negotiation through conclusion of new documentation (or the revision of existing documentation) and due diligence. These tasks are set forth in the Development Checklist attached. The tasks relevant to a particular development project will depend upon the size and type of project. The Development Checklist attached is an example form which is a good start for a typical development project where a new development will occur on raw land.

The lead development attorney does not need to perform all tasks regarding a development project and, in fact, may not have strengths in all areas. However, the lead development attorney must understand the critical issues relevant to all tasks, so that they may be appropriately assigned and that the development attorney can intelligently review decisions relating to those tasks. Tasks may be assigned to the client and/or its staff, to non-legal professionals or to others in the lead development attorney's law firm (attorneys and paralegals), subject to coordination by the lead attorney. The lead development attorney must learn the skills of an effective delegator and supervisor.

C. Coordination. Often, a real estate professional working on a development project will be required to coordinate with numerous parties in order to properly complete their assigned task. The lead development attorney is seen as the primary coordinator of significant components of the development projects, particularly significant aspects of the due diligence process. The coordinated parties may include the following:

- ? Buyer/owner
- ? Seller
- ? Seller's real estate broker
- ? Seller's attorney
- ? Title company
- ? Engineer
- ? Architect
- ? Land planner
- ? Surveyor
- ? Geotechnical engineer
- ? Other site and design team members
- ? Environmental assessment provider
- ? Lender
- ? Lender's attorney
- ? Local governments
- ? Local government attorneys

Coordination often comes naturally to the development attorney/professional. Major strides toward coordination can be achieved through the use of a critical dates list (also known as a timeline or time tickler) which sets forth critical dates in the process, and various checklists (such as the checklist attached to this article), plus the judicious use of status letters/memos. The attorney/professional must have a readily available list of all involved parties in a project, such as the "cast of characters" included in the attached checklist.

D. Pushing the Process (Maintaining and massaging a development timeline). Sometimes, an attorney/professional in a development project will be assigned with creating a development timeline, particularly as part of the due diligence process. During the feasibility period of the land acquisition contract, significant due diligence must be achieved and many tasks must be accomplished in order for the developer to be comfortable in going "at risk", not only in acquiring the land for a development project, but committing substantial funds for a construction loan, various professional fees and the like. The attached checklist incorporated a timeline/critical dates list. Often, simply having transparency in the process such that all parties are aware of all deadlines instills sufficient accountability that no party wants to be tardy, as all parties will be aware of that fact.

Often, scheduling a routine conference call is helpful not only to keep parties coordinated, but to establish time discipline in the development process. When someone knows they will be asked at a particular time regarding the status of tasks assigned to them; *miraculously*, action has been taken toward the completion of those tasks immediately prior to the time of the report or conference call.

Although the developer's intent when placing land under contract for a new development project is to allow sufficient time under the feasibility period to have all the due diligence and necessary tasks completed which are a condition precedent to the project being a "go", it is not always possible to have either a sufficiently long feasibility period, or the option to extend the feasibility period. Even where there is no contractual basis for an extension of the feasibility period, often it can be extended on an ad hoc basis based on the demonstration of substantial need and a good faith commitment of funds toward the project. Usually, the seller of land for the development project will insist on additional earnest money, the release of prior earnest money or the payment of non-refundable (and sometime non-applicable to the purchase price) extension consideration. Since obtaining such extensions can be problematic and expensive, a developer will often task its attorney/professional with the assignment to "push the process" for due diligence and the tasks which are a condition precedent to proceeding with the project. Then, when extensions are required to contract period, the attorney/professional is tasked with negotiating those extensions and justifying them.

E. Counseling / Assessing Risk. The development process, whether due diligence on a land acquisition, negotiating necessary agreements with third parties which are a condition precedent to moving forward with the project (such as loan commitments, pre-sale contract, ground leases, letters of intent from significant tenants,

development agreements with local governments, etc.), and the relationship between the various parties to a development often involves conflict, delay, impediments, and miscellaneous problems (both solvable and insolvable) which require a developer to continually re-analyze the risk of moving forward with the project. Sometimes the decision is whether or not to spend additional funds, and other times the risk is to proceed with less than optimal documentation (particularly when dealing with an institutional third party with greater leverage). Title, survey and other due diligence issues (particularly in redevelopment or land assemblage), environmental and governmental problems may exist where there is no "100%" solution, but rather the need for the developer to assume various levels of risk. The review and analysis of these risks and the providing of wise advice to the developer is the pinnacle of development law. It divides the successful development attorney from the novice.

The following excerpt is part of the Chair's Farewell Message by Douglas W. Becker of San Antonio, Texas, outgoing Chair of the State Bar's Real Estate Probate & Trust Law Section from the July 2005 Reporter:

"Our Section is comprised primarily of lawyers having transactional and estate planning practices. As such, our job is to help clients achieve their stated goals. However, we should never forget that the words printed on our law licenses say that we are also counselors, not just attorneys. Our jobs are not just to give our clients what they want, but to counsel them about their plans. I often hear attorneys say that, unless asked, they never volunteer their own opinions about their clients' planned course of action. My own view is that we should never hesitate to share our personal opinions about what our clients want to achieve. In fact, I think that our clients expect that we will voice our opinions, and will assume that our silence is tantamount to approval. Don't just be an order taker."

This advice is particularly relevant to the development attorney.

F. Dispute Resolution. Strong people and negotiating skills are critical to facilitate a smooth development project. Sometimes the developer may have "scorched the earth" in trying to close a deal relating to the project or in trying to push elements of the process to conclusion faster than a third party desired. When feathers are ruffled, often the development attorney/professional will be called in to provide a new face, a reasonable voice and act as an intermediary between parties. Sometimes the development attorney/professional is a direct intermediary, and other times an intermediary working through the other party's counsel. Often, the development attorney/professional can more clearly hear and understand the third party's concerns and respond in a more reasoned, analytical and dispassionate manner than the developer (whose money and reputation is at risk). Serving in this capacity is not a talent taught in law school, but learned from practical experience as well as pointers from experienced practitioners.

III. LEARNING THE DEVELOPMENT BUSINESS

The successful development attorney/professional must learn the development *business*. Books on real estate development are available through book stores and public libraries, but an excellent source is the Urban Land Institute. There are a number of development treatises at www.uli.org, including:

- ? Office Development Today
- ? Professional Real Estate Development, 2nd Ed.
- ? Real Estate Development, 3rd Ed.
- ? Shopping Center Renovation
- ? Transit Oriented Development

Periodically, continuing legal education seminars are devoted to in depth presentations on development law topics which will have presentations covering a diverse array of development law issues.

An attorney/real estate professional interested in development law should attend presentations from real estate industry groups such as ULI, NAIOP, CCIM, CREW, SIOR, ACRP and the like, on topics relating to the development process. Many of these organizations are open to new membership without limitation, others require a recommendation and admission process, while others are open only to members and their invited guests.

IV. SKILL SET FOR DEVELOPMENT ATTORNEYS

The successful development attorney/professional requires additional skills than other successful real estate attorneys/professionals:

Necessary Talents:

- ? Understands the real estate development business, including its economics, processes, timing and risk
- ? Maintaining awareness of the "big picture" goals for the development project, rather than being obsessed with details and minutia
- ? A focus on the process and understanding of the relevance of the particular task
- ? Knowing when to abandon the pursuit of perfection on a particular task or topic in order to be timely
- ? The ability to evaluate the risks, rather than to list the risks
- ? The ability to be a peacemaker, a calming influence, a sounding board and an effective counselor

Characteristics:

- ? The "deal maker" . . . not the "deal breaker"

- ? Help get the project done within acceptable risk and timing parameters
- ? Protects their client from themselves: applying knowledge of both the business and legal aspects of development, provides wise counsel

Examples of tough decisions to be made in a development project:

- ? Whether the onerous lease required by a credit tenant is acceptable or not, considering that the lease satisfies a condition to construction financing
- ? Whether certain title risks are acceptable in a land assemblage on a portion of the property which will be in the parking field, but in front of the primary leased premises
- ? Whether to go "at risk" when various governmental approvals are not final
- ? Whether the amount of control given up in a limited partnership agreement to investor limited partners is acceptable

These client decisions will be made on a mixed consideration of business and legal issues. The successful development attorney/professional will develop the skill to assist the client in understanding and analyzing the legal risk and considering the legal risks in the context of the client's business goal.

THE BOTTOM LINE:

The successful development attorney/professional is *an advisor and counselor*, not just a paper pusher.

DEVELOPMENT CHECKLIST

PROJECT: _____
ATTORNEY/PROFESSIONAL: _____
DATE: _____

**THIS CHECKLIST FORM IS NOT ALL INCLUSIVE.
NEW ITEMS SHOULD BE ADDED AS RELEVANT FOR EACH PROJECT.
THIS CHECKLIST MUST BE UPDATED AS THE PROJECT PROCEEDS.
NEW REGULATIONS MAY REQUIRE ADDITIONAL REVIEW.**

RESOURCES: The resources referenced in this Checklist are seminar papers selected because they provide additional, in depth information on the topic and are readily available to any attorney on the web through either the State Bar of Texas CLE Department or the State Bar Real Estate, Probate and Trust Law. The website of the Real Estate, Probate and Trust Law (REPTL) is provided as a **free** service to members of the Real Estate, Probate and Trust Law Section. Section members need only go to www.reptl.org to sign on and gain access. The seminar materials posted on the REPTL website are being expanded on a regular basis. It is the REPTL goal that seminar materials from all real estate related seminars be available for free to REPTL members. The CLE Department of the State Bar maintains a large and diverse seminar paper data base. This data base is available for annual subscription of \$295.00. If you are a speaker at any State Bar CLE seminar, the CLE Department provides you one year free membership as a gratuity. You can go on to www.texasbar.com and go to the Online Library and select a particular CLE seminar to obtain a copy of a particular article. The price of each individual article is \$29.00. Commercial real estate related seminars are currently as follows:

Advanced Real Estate Law	1998 to present
Advanced Real Estate Drafting	1998 to present
Doing the Real Estate Deal:	
The Ultimate Environmental Toolkit	2000
Changing Face of Water Rights	2002 to present
Nuts & Bolts of Texas Water Rights	2003
Suing & Defending Gov. Entities	1998 to present

Unfortunately, CLE Departments at University of Texas, South Texas College of Law, and the University of Houston do not yet maintain searchable data bases on seminar materials provided through their CLE Departments. Winstead, Sechrest & Minick has a significant real estate department and has been very active in speaking on real estate law topics and has a number of real estate law materials available on its firm website www.winstead.com/pressroom/articles/.

Since seminar papers are often presented on a routine basis, it is recommended that if you are utilizing a lawyer's seminar paper as part of your research, you consider contacting that lawyer to determine if the paper has been recently updated, as most lawyers will be happy to email the updated version to you.

An extensive glossary of technical development terms is contained in *Annotated Due Diligence Checklist with Sample Consultant Forms and Glossary of Terms*, by Jerry C. Saegert – 2001 Advanced Real Estate Law, available at www.texasbarcle.com.

The base for the checklist included in this presentation is the checklist contained in *Annotated Due Diligence Checklist*, which is used by permission and provided the author an excellent starting point. Jerry Saegert was a frequent speaker on commercial real estate law topics and was a posthumous recipient of the Lifetime Achievement Award from the State Bar Real Estate, Probate and Trust Law section.

I. CAST OF CHARACTERS

LIST ALL PARTIES INVOLVED IN THE PROJECT

Buyer/Owner: _____
Email: _____
Address: _____
Phone: _____ Fax: _____
Cell: _____

Seller: _____
Email: _____
Address: _____
Phone: _____ Fax: _____
Cell: _____

Real Estate Broker: _____ Represents: _____
Email: _____
Address: _____
Phone: _____ Fax: _____
Cell: _____

Real Estate Broker: _____ Represents: _____
Email: _____
Address: _____
Phone: _____ Fax: _____
Cell: _____

Seller's Attorney: _____
Email: _____
Address: _____
Phone: _____ Fax: _____
Cell: _____

Buyer's/Owner's Attorney: _____
Email: _____
Address: _____
Phone: _____ Fax: _____
Cell: _____

Title Company: _____
Email: _____
Address: _____
Phone: _____ Fax: _____
Cell: _____

Engineer: _____
Email: _____
Address: _____
Phone: _____ Fax: _____
Cell: _____

Architect: _____
Email: _____
Address: _____
Phone: _____ Fax: _____
Cell: _____

Land Planner: _____
Email: _____
Address: _____
Phone: _____ Fax: _____
Cell: _____

Surveyor: _____
Email: _____
Address: _____
Phone: _____ Fax: _____
Cell: _____

Geo-technical Engineer: _____
Email: _____
Address: _____
Phone: _____ Fax: _____
Cell: _____

Other Site and Design Team Members:

Email: _____
Address: _____
Phone: _____ Fax: _____
Cell: _____

Environmental Assessment Provider:

Email: _____
Address: _____
Phone: _____ Fax: _____
Cell: _____

Lender:

Email: _____
Address: _____
Phone: _____ Fax: _____
Cell: _____

Lender's Attorney:

Email: _____
Address: _____
Phone: _____ Fax: _____
Cell: _____

Local Governments and their Attorneys:

Email: _____
Address: _____
Phone: _____ Fax: _____
Cell: _____

Email: _____
Address: _____
Phone: _____ Fax: _____
Cell: _____

Email: _____
 Address: _____
 Phone: _____ Fax: _____
 Cell: _____

II. TIMELINE

LIST ALL DEADLINES AND CRITICAL DATES (WITH RELEVANT DOCUMENT PROVISION AND RESPONSIBLE PARTY)

<u>Event</u>	<u>Section</u>	<u>Deadline</u>	<u>Compliance Date</u>	<u>Responsible Party</u>
Effective Date.	_____	_____	_____	_____
Deadline to deposit Earnest Money in the amount of \$_____.	_____	_____	_____	_____
Deadline to deliver to Seller the Option Consideration in the amount of \$_____.	_____	_____	_____	_____
Deadline for Seller to deliver various documents and information	_____	_____	_____	_____
Deadline for Title Company to deliver the Title Commitment and copies of title exceptions to Purchaser.	_____	_____	_____	_____
Deadline for Seller to deliver _____ to Purchaser for its review.	_____	_____	_____	_____

<u>Event</u>	<u>Section</u>	<u>Deadline</u>	<u>Compliance Date</u>	<u>Responsible Party</u>
Deadline for _____ to obtain a Survey from a surveyor reasonably acceptable to _____.	_____	_____	_____	_____
Deadline for Purchaser to review title and Survey and notify Seller of its objections.	_____	_____	_____	_____
Deadline for Purchaser to object to additional title exceptions which appear on any updated Commitment or Survey.	_____	_____	_____	_____
Deadline for Seller to notify Buyer which objections Seller will cure. [If no notice given, Seller is deemed to have elected not to cure.]	_____	_____	_____	_____
Deadline for Purchaser to elect to terminate the Agreement or waive uncured Title Objections. [Purchaser's failure to send written notice of its election will be deemed an election to waive Title Objections.]	_____	_____	_____	_____
Last day of Contingency Period and Purchaser's right to terminate Contract by delivering written notice to Seller and the Title Company.	_____	_____	_____	_____

<u>Event</u>	<u>Section</u>	<u>Deadline</u>	<u>Compliance Date</u>	<u>Responsible Party</u>
Last day to extend Contingency Period for an additional ____ days by notifying Seller and the Title Company [and releasing the Earnest Money to Seller.]	_____	_____	_____	_____
Last day for Seller and Purchaser to mutually agree on the _____ or either party may terminate the Contract.	_____	_____	_____	_____
Last day of Extended Contingency Period	_____	_____	_____	_____
Deadline for Purchaser to deposit Additional Earnest Money in the amount of \$_____ in order to extend Closing for _____ additional days.	_____	_____	_____	_____
Closing.	_____	_____	_____	_____
		Or		
		If Extended:		

III. PROJECT

A. Type (describe fully, including all alternatives): _____

B. Size

1. Square Footage Net Rentable Area _____
2. Projected number of floors _____
3. Preliminary Site Plan – (attach)

- C. Known Subdivision Issues: _____
- D. Known Utility Issues: _____
- E. Known use issues relevant to land use controls like zoning or restrictive covenants: _____
- F. Other Relevant Issues: _____

IV. CONTRACT INFORMATION

LIST ALL INFORMATION RELEVANT TO THE DEVELOPMENT OF THE LAND INTO THE PROJECT

- A. Property Information
 - 1. Legal description of property?
 - 2. Legal description of easements?
 - 3. Platted?
 - 4. Within limits or ETJ of a municipality?
 - 5. Within a watershed protection area or other specially regulated area?
 - 6. Within a special district- MUD, RUD, PID, TIRZ, Man. District, etc.?
 - 7. What county is the property in?
- B. Minerals and Crops
 - 1. What minerals will be conveyed?
 - 2. What reservations will be required?
 - 3. What about surface protection against mineral reservations?
 - 4. Are mineral easements present?
 - 5. Are licenses, profits or other interests present?
 - 6. Crop issues?
 - 7. Any Ag. Leases- verbal or written?
- C. Tax Information
 - 1. Parcel numbers
 - 2. Taxing Authorities
 - 3. Any need for notice to purchasers for MUDs, etc.?
 - 4. Any tax exemptions?
 - 5. Any rollback issues?
 - 6. Will tax protests be necessary as to values before closing?

D. Title Company

1. Check to confirm all property rights included in the insured interest-off-site easements particularly.
2. Any special title insurance endorsements appropriate?
3. If ALTA state – review available coverages.
4. Competent closer assigned?
5. Request legible copies and, if appropriate, full sized copies of plats.
6. UCC searches appropriate?

V. **FEASIBILITY ANALYSIS**

See, *Feasibility Issues/Can I Do the Deal?* By J. Cary Barton, 2004 Advanced Real Estate Law Course, available at www.texasbarcle.com and www.reptl.org, which is the source material for this section of the checklist. This paper reviews the issues in analyzing a prospective real estate development project from the perspective of a real estate developer. Highly Recommended

LIST ALL ISSUES WHICH ARE RELEVANT TO THE PHYSICAL AND ECONOMIC FEASIBILITY OF THE PROJECT

A. Demand for Proposed Project

1. Market Area to be Served
2. Population of Market to be Served
3. Demographics of Population to be Served
4. Existing and Announced Projects in Market Area
5. Current Rental Conditions of Competing Projects
6. Prospects for Ultimate Realization of Project Value

B. Availability of Financing

1. Availability of Debt Financing
2. Term of Debt Financing
3. Cost of Debt Financing
4. Guaranties Required for Debt Financing
5. Required Debt to Equity Ratio
6. Availability of Equity Financing
7. Loan Commitments

RESOURCE:

Loan Commitments by Reid C. Wilson, 2003 Mortgage Lending Institute, available at www.reptl.org.

Top Ten Issues in Borrower/Lender Negotiations by J. Cary Barton, 2001 Mortgage Lending Institute, available at www.reptl.org.

PRACTICE POINTER: Loan “commitments” aren’t always strong on *committing*. Developers must be reminded of the “fine print”, since the developer’s “commitment” to buy the land might be firm, even if the lender’s commitment isn’t.

C. Terms of Acquiring Proposed Site

1. Price of Site
2. Due Diligence Period
3. Period for Obtaining Entitlements
4. Closing Period
5. Seller’s Obligation to Cure Title and Survey Issues
6. Seller’s Representations and Warranties
7. Remedies for Default of Parties
8. Potential Investment in Pre-development Costs
9. Potential Investment in Transaction Costs
10. How open will Seller be to “reasonable” extension requests?
11. Letter of Intent- do you start spending money?
12. Contract provisions- do you use a TAR or BAR form to “keep it simple” and what issues are really critical to the deal in tying up the land?

RESOURCE:

Letters of Intent by Reid C. Wilson, 2005 Commercial Real Estate Course, available at www.reptl.org.

Commercial Purchase and Sale Agreements by J. Cary Barton, 2000 Advanced Real Estate Drafting, available at www.texasbarcle.com.

Representations, Warranties, Covenants and Conditions in Acquisition Contracts by J. Cary Barton, 2000 Advanced Real Estate Law, available at www.texasbarcle.com.

PRACTICE POINTER: Use letters of intent to expedite the negotiation and documentation process, not to bind any parties to the underlying deal. Developers may overestimate the legal value of a letter of intent and a course of negotiation. All necessary land *and easements* should be under binding contract.

D. Suitability of Proposed Site for Proposed Project

1. Nature of Area Surrounding Site
2. Availability of Utilities to Site
3. Traffic Counts on Adjacent Streets and Roads
4. Accessibility to Site
5. Visibility of Site
6. Topography of Site
7. Soil Conditions on Site
8. Environmental History and Condition of Site

9. Existence of Title or Survey Problems
10. Existence of Endangered Species
11. Existence of Caves or other Recharge Features
12. Availability of Contractors to Build Project
13. Availability of Materials to Build Project

RESOURCE:

See Resources under Section IV.B.

PRACTICE POINTER: A knowledgeable, locally experienced engineer/architect/land planner is critical to the review process. They must be engaged early in the due diligence process. The attorney/professional should be mindful to clearly allocate due diligence responsibility and help the process by documenting responsibility and assisting in the distribution of materials, checklists and timelines. Keep these professionals in the loop.

Avoid the “I thought you were checking this out” problem after the due diligence period.

E. Pre-Leasing/Pre-Sales

1. Letters of Intent
2. Negotiation with Big Boxes / National Retailers
3. Ground Leases
4. How sure is sure enough?
5. What are the requirements in the debt financing commitment?

RESOURCE:

Discussion of Typical Model Contracts utilized by National Buyers by Rhonda Jolley and Peter M. Oxman, 2000 Advanced Real Estate Drafting, available at www.texasbarcle.com and www.reptl.org.

Monolithic Buyer Meets County Lawyer by Ted Wm. Hiji, 2003 Advanced Real Estate Law, available at www.texasbarcle.com.

Ground Leasing Issues in Mixed Use Developments By Philip Weller, 2004 Advanced Real Estate Law, available at www.texasbarcle.com.

Unique Issues Relating to Ground Leases by J. Cary Barton, 2003 Advanced Real Estate Law, available at www.texasbarcle.com.

PRACTICE POINTER: Identify the pre-sales and pre-leasing which is critical to the deal. Remember the limitations of letters of intent. Consider appropriate strategies to negotiate with Big Boxes/National Retailers. Watch the timeline, as these parties have their own (slower) schedules. Be prepared for extension of due diligence periods and closings to accommodate the process.

F. Entitlement and Cost Issues

1. Attitude of Local Governmental Authorities
2. Attitude of Neighborhood Groups

3. Zoning Considerations
4. Subdivision Issues
5. Signage Issues
6. Access Issues- TxDOT particularly
7. Drainage Issues
8. Tree Preservation Requirements
9. Historic Conservation Requirements
10. Liquor issues
11. Consistency with Comprehensive Plan- Beware if not
12. Impervious Coverage and Height Limitations
13. Endangered Species Limitations
14. Obtaining Necessary Utilities Capacities
15. Preparation of Plan and Specifications
16. Cost Issues
17. Building Permit Issues
18. Impact Fees
19. Exactions
20. Economic Development Incentives

RESOURCE:

See Resources in Sections VII and VIII.

Economic Development Incentives By Peter Smith, 2005 Advanced Real Estate Law, available at www.texasbarcle.com.

Impact Fees and Exactions by Arthur Anderson, 2003 Advanced Real Estate Law, available at www.texasbarcle.com.

PRACTICE POINTER: Preliminary determination of land use status early in the process is critical to allow time to react. Governments do not work on any “expedited” schedules. Timeline management is critical.

G. Agreement Between Developer and Equity Investor

1. Initial Equity Contributions
2. Obligations for Cost Overruns
3. Allocations of Profits and Losses
4. Distributions
5. Preferred Return on Equity Contributions
6. Development Fees
7. General Contractor’s Fee
8. Property Management and Leasing Fees
9. Residual Profit-Sharing Percentages

RESOURCE:

Choice of Entity by J. Cary Barton, 2003 Mortgage Lending Institute, available at www.reptl.org.

Entity Documents by J. Cary Barton, 2001 Advanced Real Estate Drafting, available at www.texasbarcle.com and www.reptl.org.

Organizational Structure for Real Estate Development and Investment by J. Cary Barton, 1999 SMU Transactions in Depth, available at www.reptl.org.

Negotiating the Limited Partnership Agreement by J. Cary Barton, Richard K. Martin and Steven A. Waters, 1998 Mortgage Lending Institute, available at www.reptl.org.

PRACTICE POINTER: Help the developer stay “ahead of the game” in negotiating with investors. Once an investor, or its attorney, senses urgency for commitment, the negotiating balance shifts in favor of the investor. Try to keep the appearance of “competition” or “options” when dealing with investors. Avoid negotiating the limited partnership agreement at the last minute...many developers have signed whatever draft was available at the closing table and lived to regret it. For your own protection, properly document to your client any critical deficiencies, particularly those you advise against accepting. Developer memories may be flawed when the deal hits the rocks.

H. Agreements with Contractors and Professionals

1. General Contractor
2. Architect
3. Consultants

RESOURCES:

Overview and Use of AIA Abbreviated Forms By Bruce Merwin, 2003 Advanced Real Estate Law, available at www.texasbarcle.com and www.reptl.org.

Overview of AIA Documents by Bruce Merwin, 2001 Advanced Real Estate Law, available at www.texasbarcle.com and www.reptl.org.

Annotated Due Diligence Checklist with Sample Consultant Forms and Glossary of Terms, by Jerry C. Saegert – 2001 Advanced Real Estate Law, available at www.texasbarcle.com.

PRACTICE POINTER: The maximum price contract with the contractor is one of the most important documents in a development. The right to use architect developed designs and drawings for further developments must be carefully negotiated as the architect’s position is that those are their property. NOTE: Bruce Merwin's (Haynes and Boone, Houston, Texas) articles on construction documents are detailed, authoritative and highly recommended. If you have Bruce's most recent article on a particular AIA form, then you have the "final word" on the issues to consider.

VI. SITE OBSERVATIONS

A. Physical Information

1. Describe the existing site conditions
2. Is site near a church, school, hospital or airport?

3. Door to door distance?
4. Where is site with respect to street grade?
5. How does site drain?
6. What vegetation is on site?
7. Is demolition or relocation of a structure required that would trigger historical landmark review?
8. Items identified for demolition (preliminary)
9. Is relocation of underground or overhead utilities necessary?
Explanation: _____
10. Is relocation of signs necessary?
11. Is access by private driveway, easement or dedicated roadway?
12. Other: _____

B. Environmental Information - Are there any known environmental issues, on site or adjacent to the site, that will impact this project?

1. Dump sites?
2. Underground storage tanks?
3. Prior usage?
4. Endangered or threatened species?
5. Caves or karst?
6. Critical environmental features?
7. Ponds, lakes, tanks, springs, streams, creeks, waterways?
8. Floodplain, "Wetlands" or "Jurisdiction Waters"?
9. Water wells?
10. Recharge features?
11. Aquifers?
12. Oil or gas wells?
13. Oil or gas pipelines?
14. Historical or archeological features?

C. Professional Reports

1. Addressee / Reliance Letters
2. Liability limits
3. Insurance

RESOURCES:

Annotated Due Diligence Checklist – Environmental Matters, By Brian Rider, 2001 Advanced Real Estate Law, available at www.texasbarcle.com;
Environmental Due Diligence and Redevelopment Strategies, by Michael J. Nasi, 2004 Changing Face of Water Rights in Texas, available at www.texasbarcle.com.
 See generally, *Doing the Real Estate Deal: The Ultimate Environmental Toolkit*, a 2000 State Bar seminar available at www.texasbarcle.com.

PRACTICE POINTER: Experience has shown that even good consultants make mistakes and miss important issues. Relying on prior (even current) inspections can be

risky. If relying on prior inspections, be sure to obtain a reliance letter to establish privity of contract for liability purposes. Review and negotiate the liability limitation provisions in consultant's agreements. Many limit damages to the cost of the services, an unacceptable result.

VII. SURVEY REQUIREMENTS

1. Type of survey required - land title or boundary, ALTA or TSPS
2. Additional surveys needed: topographical, tree survey, "as-built" survey, others: _____
3. Sellers or buyers responsibility?
4. Payment/reimbursement terms: _____
5. Form of Certification – Lender, Buyer/Owner, other: _____
6. Survey (due/received): _____
7. Prior surveys available? Updatable?
8. Parking counts
9. Offsite easements
10. Special items to be located?

RESOURCE:

Land Surveying for Development by James Noble Johnson, 2001 Advanced Real Estate Law, available at www.texasbarcle.com and www.reptl.org.

Title and Survey Objection Letter by Niles W. Holmes, 2002 Advanced Real Estate Drafting, available at www.texasbarcle.com.

Title Examination Checklist by James L. Gosdin and James Noble Johnson, 2000 Mortgage Lending Institute, available at www.reptl.org.

PRACTICE POINTER: Experience shows that the cheapest survey is not always comparable to the others. Surveyors are busy and the number of young surveyors is not matching demand. Remind developers that a good survey is valuable.

VIII. ZONING REQUIREMENTS

1. Is the property subject to zoning regulation?
2. What is the current zoning classification?
3. Are changes in zoning pending or contemplated?
4. Does this zoning classification allow the desired use?
5. What is the current use of the property?
6. Is the current use legal, non-conforming, accessory, or illegal?
7. If non-conforming, what rights are granted to the property?
8. How is the site listed in the city's comprehensive plan?
9. Is the site located within an "overlay" district?
10. Are there any restrictions specific to zoning?
11. What are the adjacent zoning and uses of the property?
12. Are there any special requirements due to adjacent zoning?
13. Is re-zoning required for the desired use?

14. Is the applicant required to obtain adjacent property owners' list for notification?
15. Who are the "interested parties/stakeholders"?
16. Which Neighborhood Association has jurisdiction?
17. Will re-zoning be by a consent procedure or opposed by the neighbors?
18. Will a specific use permit or special exception from the Board of Adjustment allow the use?
19. Is a variance required or desirable?
20. If there are any unusual land use issues, debrief Seller's land use counsel.
21. Should special counsel be retained?

RESOURCES:

Practical Tips for Dealing with Local Governments by Reid C. Wilson, 2005 Advanced Real Estate Law, available at www.texasbarcle.com and www.reptl.org.

Zoning: A Real Estate Attorney's Guide by Reid C. Wilson, 2002 Advanced Real Estate, available at www.texasbarcle.com and www.reptl.org.

Hot Topic: Checklist for Local Development Approvals by Reid C. Wilson, 2001 Advanced Real Estate Drafting, available at www.texasbarccle.com and www.reptl.org.

See generally, *Suing and Defending Governmental Entities*, a series of State Bar seminars beginning in 1998, available at www.texasbarcle.com.

PRACTICE POINTER: Don't be reluctant to associate specialized, locally knowledgeable land use experts. Land use law relates to real property, but is not based on real property law. Mistakes in this area can cripple a project.

IX. SUBDIVISION PLATTING REQUIREMENTS

1. Is the property legally platted?
2. Request for Municipal certification under Tex. Loc. Gov't Code §212.0115 – determination due within 20 days of request, certificate due 10 days after determination.
3. Will the property need to be subdivided to affect the sale?
4. Does the property fall within any exception to the platting requirements?
5. If already platted, does the plat on the property need to be vacated, replatted or amended?
6. Jurisdictions and time limits for approval?
7. Preliminary and final subdivision plan required?
8. Is the City Council involved in plat approval?
9. What plat notes, restrictions, or reservations are required on the plat?
10. What type of exactions are expected?
11. When does the preliminary plat expire?
12. Groundwater certification needed?
13. Tax certificates for filing?

14. Will Buyer close with only preliminary plat approval, or is final plat required.

RESOURCES:

The Real Estate Attorney's Guide to Platting by Reid C. Wilson, 2003 Advanced Real Estate Law, available at www.texasbarcle.com and www.reptl.org.

Practical Tips for Dealing with Local Governments by Reid C. Wilson, 2005 Advanced Real Estate Law, available at www.texasbarcle.com and www.reptl.org.

Hot Topic: Checklist for Local Development Approvals by Reid C. Wilson, 2001 Advanced Real Estate Drafting, available at www.texasbarccl.com and www.reptl.org.

PRACTICE POINTER: Retaining a knowledgeable, locally experienced engineer/surveyor/land planner with expertise in the platting processes applicable in the area is critical. Obtain a municipal certification regarding platting compliance under Tex. Loc. Gov't Code §212.0115.

FOR ITEMS BELOW SEE LOCAL CODE AND DESIGN CRITERIA MANUALS. DESIGN PROFESSIONALS MAY BE RESPONSIBLE FOR THE FOLLOWING ITEMS THAT SHOULD BE COMPREHENSIVELY ADDRESSED EARLY IN THE DEVELOPMENT PROCESS

X. SITE PLAN REQUIREMENTS

1. Is site plan/development plat required?
2. Jurisdiction approving site plan/development plat?
3. Topo survey required?
4. Tree survey required?
5. Soils report required?
6. Other plans or support documents required for approval?
7. Reciprocal Easement Agreements exist or required?

RESOURCE:

See Resources at Section XI.Q.

PRACTICE POINTER: Retaining a knowledgeable, locally experienced engineer/surveyor/land planner with expertise in these processes is critical.

XI. BUILDING PERMIT REQUIREMENTS

1. Is a building permit required prior to closing?
2. What approvals are required prior to building department submissions?

3. What site plans are required to be submitted for a building permit?
4. Is a separate permit required for site work?
5. May a permit for demolition and/or site work only be obtained if necessary to expedite the project?

PRACTICE POINTER: In many areas (including Houston), there are local “permit expeditors” who help manage the permitting process. Their involvement can be a significant time saver.

XII. SITE DESIGN REQUIREMENTS

See, *Development Due Diligence* (Checklist), by David S. Brewer, PE, RPLS, HBA Real Estate Law Section October 18, 2000, available through HBA, which includes a checklist of engineering oriented issues in new development and a detailed explanation of platting law by the author. An updated checklist is available at www.brewer-escalante.com.

A. Roadway And Traffic Requirements

1. What are the existing roadway conditions providing access to the site?
2. What is the jurisdiction of the adjacent road(s)?
3. What is the name and R.O.W. width of the road providing access to the site?
4. Are there any roadway improvements scheduled for this area?
5. Will any roadway improvements be required by this project?
6. Is a traffic impact study required?
7. What standards are used for design?
8. How many driveways are allowed?
9. Can existing curbcuts be retained?
10. Does TxDOT have jurisdiction?
11. What is the required width of the driveway?
12. What is the minimum distance from the side property line to the centerline of the driveway?
13. Is curb and gutter required within the ROW?
14. Are acceleration or deceleration lanes required?
15. Is a new median cut needed?
16. Is a traffic signal needed?
17. Sidewalks required?
18. Sidewalks existing?
19. Sidewalks to be located in the ROW?
Adjacent to roadway?
Adjacent to property/ROW line?
20. What is sidewalk width?

21. Is a separate permit required to work in the ROW?
22. Is a separate permit required for driveway?
23. Are utility construction permits required in ROW?
24. Is there street parking?
25. Additional dedication of right-of-way necessary?
 - For utilities?
 - For roads?

RESOURCE:

Streets and Easements by James Noble Johnson, 1999 SMU Transactions in Depth, available at www.reptl.org.

PRACTICE POINTER: Tex. Loc. Gov't Code §212.904 limits a city's ability to require street (and other public) improvements not related to the new project. This recent change (HB 1835, effective 6/18/05) essentially codifies the holding in Town of Flower Mound v. Stafford Estates Ltd. Partnership, 135 S.W.3d 620 (Tex. 2004).

The new TxDOT Access Management Guidelines, available at <http://manuals.dot.state.tx.us/dynaweb/coldesig/acm>, significantly limit curbcuts and are bedeviling developers used to the traditionally liberal curb cut policies throughout Texas.

B. Water

1. What is needed?
 - Size of line?
 - Capacity?
 - Location?
2. What is currently available to the site or area?
3. Name of provider?
4. Easement required?
5. Any restrictions on installation?
6. Is water service capacity available?
7. Is offsite extension of the water line required?
8. Is there an existing water service line adjoining the site?
 - Location?
 - Size?
 - Approximate depth?
9. What is the pressure of the water line? What Pressure Plan?
10. Will easements be required?
11. What is the capacity fee formula?
12. What are the meter fees?
13. What is the connection/tap fee?
14. Does municipality or private contractor make the tap?
15. Is a separate irrigation meter required?
16. Is a backflow preventer required for the irrigation?
17. Is a backflow preventer required for the fire line?

18. Does a utility provider have a CCN certificate covering the property?
19. Is the property in a MUD?
20. Is the property adjacent to a MUD with excess capacity and the willingness to annex?

RESOURCE:

Negotiating Water Supply With or For a City, by Russell Johnson, 2001 Changing Face of Water Rights in Texas, available at www.texasbarcle.com and www.reptl.org.

C. Water Quality

1. What is needed?
 - Local requirements:
 - State (TNRCC) requirements:
 - Federal (EPA) requirements:
2. Are regional facilities available?
3. Easement required?
4. Is property located in recharge/water quality zone?
5. Water Pollution Abatement Plan (WPAP) required?
6. NPDES permit prepared and filed?
7. Buffer zones setbacks required?

RESOURCE:

See generally, *The Changing Face of Water Rights in Texas*, a State Bar seminar series beginning in 2002, available at www.texasbarcle.com.

D. Wastewater

1. What is needed?
 - Size of line?
 - Capacity?
 - Location?
2. What is currently available to the site or area?
3. Name of provider?
4. Is an easement required?
5. Any restrictions on installation?
6. Is wastewater service capacity available?
7. Is offsite extension of the wastewater line required?
8. Is there an existing water service line adjoining the site?
 - Location?
 - Size?
 - Approximate depth?
9. Is there an existing wastewater line adjoining the site?
 - Location?

- Size?
- Approximate depth?
- 10. Is there an existing wastewater lateral to the site?
 - Location?
 - Size?
 - Approximate depth?
- 11. Is existing line gravity or force main?
- 12. Will a lift station be required?
- 13. If there is an existing lift station, will it need modifications?
- 14. Will easements be required?
- 15. Does a utility provider have a CCN covering the subject property?
- 16. Is the property located in a MUD?
- 17. Is the property located adjacent to a MUD with excess capacity and the willingness to annex the property?

E. Storm Drainage/Water Quality

- 1. Storm Drainage
 - a. What is needed?
 - Size of line?
 - Capacity?
 - Location?
 - b. What is currently available to the site or area?
 - c. Easement required?
 - d. Is an off site storm sewer outfall available?
 - If not, what is the preferred route to a positive outfall?
 - e. Is the site in the 100-year flood plain?
 - f. What is the FEMA firm panel number?
 - g. What is the flood zone?
 - h. Is FEMA reviewing its maps for the property?
 - i. What is the design criteria for retention/detention?
 - j. Is drainage approval required by any other agencies?
 - k. Are there regional detention facilities serving the property?

RESOURCE:

Water Drainage by Rueben Barrera, 1992 Advanced Real Estate, available at www.reptl.org.

Flood Plains by James Nobel Johnson, 1997 Advanced Real Estate, available at www.reptl.org.

See generally, *The Changing Face of Water Rights in Texas*, a State Bar seminar series beginning in 2002, available at www.texasbarcle.com.

F. Electric Utility

1. What is needed?
Voltage/phase?
Overhead/underground?
Location?
2. What is currently available to the site or area?
3. Name of provider?
4. Is an easement required?
5. Any restrictions on installation (who installs, location of transformer, etc.)?

G. Gas Utility

1. What is needed?
Size of line?
Capacity?
Location?
2. What is currently available to the site or area?
3. Name of gas provider
4. Is an easement required?
5. Are there any restrictions on installation (who installs, location of meter, etc.)?

H. Telephone /Computer /Cable

1. What is needed?
Overhead/underground?
Location?
2. What is currently available to the site or area?
3. Name of provider?
4. Is an easement required?
5. Any restriction on installation?

RESOURCE:

Developments Concerning Building Access and Other Telecommunication Regulations Affecting Real Properties by C. Brian Cassidy, 2001 Advanced Real Estate Law, available at www.texasbarcle.com and www.reptl.org.

I. Handicap Accessibility (add elevators and restrooms)

1. Are there any special requirements for:
 - parking?
 - bus stops?
 - side walks?
 - elevators?
 - restrooms?
2. Other:
3. Who certifies to ADA compliance? Done?

J. Fire Safety

1. Who provides fire protections?
2. Are there any special requirements for:
 - fire lines?
 - sprinklers?
 - fire hydrants?
 - water pressure?
3. Any concerns the fire chief will oppose the Project?

K. Signage

1. General
 - a. Are sign easements needed?
 - b. Is there a sign ordinance?
 - c. Is there a maximum combined sign area for the entire site?
 - d. What is the minimum sign setback from the property line?
 - e. Are there any restrictions?
 - f. Are there existing signs?
 - g. Do existing signs need to meet current ordinance?
2. Pole Signs
 - a. Are pole/pylon signs permitted?
 - b. How many pole/pylon signs are allowed?
 - c. What is the maximum height?
 - d. What is the minimum clearance?
 - e. What is maximum square footage?
 - f. Is the sign area calculation based on one side only?
3. Ground Signs
 - a. How many ground signs are allowed?
 - b. What is the maximum size allowed?

4. Building Signs
 - a. How many building signs are allowed?
 - b. What is the maximum size allowed?
 - c. Are building signs counted towards site signage?

5. Directional Signs:
 - a. How many directional signs are allowed?
 - b. What is the maximum height?
 - c. What is the maximum size allowed?
 - d. Are logos permitted on directional signs?
 - e. Are directional signs counted towards overall site signage?

6. Sign Permits:
 - a. Are separate sign permits required?
 - b. What is the time frame for review?
 - c. Can plans be submitted for review without a contractor?

L. Building Characteristics

1. What is the maximum building height?
2. Is there a building floor area ratio limit?
3. Are there any restrictions for architectural elevations, colors or material use?
4. Setbacks:
 - a. What are the building setbacks? (Facing front of store)
 Front: _____ Side/Interior: _____
 Rear: _____ Street: _____
 - b. Do setbacks apply to canopies?
 Signs?
 Other?
 - c. Is a drive-thru proposed?
 - d. If so, what are the queuing requirements?
 - e. Is a by-pass lane required?
 - f. If so, are these setbacks by:
 Municipal ordinance?
 County ordinance?
 Restrictive covenant?
5. Are there any restrictive covenants?
6. Is there a property or owners association?
7. If so, is there an Architectural Control Committee?
8. Are there additional rules or regulations issued by the POA?

M. Parking/Loading:

1. What is the parking formula?
2. What is the number of spaces required?
3. How many of these spaces must be handicap accessible?
4. Is employee parking identified?
5. Is curbing required?
6. If so, where and what are city and/or county standards?
7. If short of parking, will restriping with compact spaces or reconfiguration of the parking lots help?
8. If short of parking, will the city allow leasing offsite parking?

N. Dumpsters/Compactors:

1. Is a dumpster/compactor service provided by the city/county or privately contracted?
2. Is screening or fencing around dumpster/compactor required?
3. Design requirements:
4. Are there are requirements? Minimum distance in front for pick up?

O. Landscape Requirements

1. Is a landscape plan required?
2. Is there a landscape ordinance?
3. Are there any xeriscape requirements?
4. Is there a maximum impervious cover limit?
5. What are buffer requirements?
6. Can the car overhang into the planting area count towards the length of the parking space?
7. What are interior landscape requirements?
8. What is the maximum number of parking spaces in a row allowed before an island is required?
9. What is the minimum size of landscaped islands?
10. Is there a list of acceptable plants available?
11. Irrigation system designer?

P. Tree Requirements

1. Is there a tree ordinance?
2. What trees are required?
3. What are the tree preservation requirements?
4. What is the mitigation formula for tree removal?
5. What is the tree removal permit process?
6. Is an arborist involved?
7. Tree survey required?

8. Are any “significant” or “landmark” trees on the property?

Q. Parks and Open Spaces

1. Open space requirements?
2. Park and playground requirements?
3. Screening from adjacent uses?
4. Restrictions on use of open space?
5. Maintenance of open space

R. Reciprocal Easements/Covenants

1. Any existing?
2. Do existing REAs accommodate desired new development?
3. If modification of existing REA required, what is the procedure and are the parties available and cooperative?
4. Is REA necessary for desired new development?
5. If new REA necessary, will it be limited to developer’s site or will it require cooperation of adjacent land owners?
6. If national buyer/tenant involved, is their form REA required to be used?
7. Are certain uses to be prohibited?
8. Does an important buyer/tenant require exclusive use provisions?
9. Will there be common area maintenance obligations?
10. Who will pay for common area maintenance - each parcel owner/tenant or a common landlord?

RESOURCE:

Reciprocal Easements/Operating Agreements by Bernard O. Dow, 1996 Advanced Real Estate, available at www.reptl.org.

Annotated Easement by James Noble Johnson, 2003 Advanced Real Estate Drafting, available at www.texasbarcle.com and www.reptl.org.

Easements and Restrictive Covenants in Commercial and Mixed Use Developments by Brian C. Rider, 1999 Advanced Real Estate Law, available at www.texasbarcle.com and www.reptl.org.

PRACTICE POINTER: The negotiation of reciprocal easement agreements and any restrictions on use is critical to the long term success of a commercial project. The development attorney/professional should carefully consider the breadth and term of use exclusives and prohibitions, incorporating all reasonable and practical restrictions thereon. Developers have a habit of thinking all requirements from national tenants/buyers are non-negotiable, but there is considerable room to “nibble at the edges” on most deals, and where the site is highly desirable, to obtain significant concessions.

Other Checklists/Due Diligence Materials

- ? *Development Due Diligence Manual* (Lender Review), by John M. Nolan and Michael F. Abessio, 2002 Mortgage Lending Institute, available at www.reptl.org.
- ? *Due Diligence Overview for Raw Land Acquisition*, by Brent G. Stahl and David J. Sewell, 2004 Advance Real Estate Law Course, available at www.texasbarcle.com.
- ? *Annotated Due Diligence Checklist with Sample Consultant Forms and Glossary of Terms*, by Jerry C. Saegert – 2001 Advanced Real Estate Law, available at www.texasbarcle.com. (which provides the basis for this checklist).
- ? *Development Due Diligence*, by Brian C. Rider, 2001 Advanced Real Estate Law, available at www.texasbarcle.com.
- ? *Due Diligence for Income Producing Properties*, by William H. Locke Jr., 2000 Advanced Real Estate Law Course, available at www.texasbarcle.com.