

BRANDED MIXED-USE DEVELOPMENT

Part 3

Miscellaneous (but Important) Matters

Branded Residences

There are myriad complexities to the inclusion of branded residential product in a mixed-use development. Foremost among them are how they become branded and whether they will be included in resort rental inventory (which is brand operated and controlled).

Brands charge a license fee for the sale of residential real estate under the brand; that fee ranges from about 2.5% of gross sale revenues (there may be some offsets) to as much as 5% of gross sale revenues. Custom and practice have suggested some variations, but this is where the brands will start.

Of greater concern to an Owner, however, is the degree of approval brands require for any residential sale process that includes their branding and marks. Included in the requirements for brand approval are, typically, most or all the following:

- ☑ Name and use of the brand
- ☑ Sales website contents (must include certain brand-mandated disclaimers)
- ☑ Sales team (or sales agency) and sales team “pitch”
- ☑ Makeup of sales agency and sales team, individually
- ☑ Homeowner or Condominium Governance Documents (which must vest control over the Association in the Owner, and enable the brand to act as Owner’s delegee)
- ☑ Management terms (including compensation to the brand) for Association Management
- ☑ Amenity packages
- ☑ Benefits for buyers, particularly if affecting the hotel or the brand’s system of residential offers
- ☑ Design, including all public areas and back-of-house
- ☑ Services to residents and costs to be charged to residents
- ☑ Substantive aspects of the rental program, including sharing arrangements between Owner and the residential owner (of which the brand gets its fees on revenues and profits due to flow-through in the hotel income statement)
- ☑ Manner by which the Owner presents the rental program to potential buyers

It is critical to note that the brands, especially those that are US-based companies, but even the non-US domiciled brands, rely heavily on US Securities Laws to avoid “rental pools” and obtain indemnifications – if not require guaranties – against Securities Laws and Consumer Protection Laws violations in the sale process. As US law has jurisdiction over sales of securities to Americans wherever they are, and websites and collateral materials promoting sales typically are accessible or received by Americans in the US, the US government asserts jurisdiction. No brand wants to face the US Attorney in New York or DC or Miami for a Securities Law violation. Fortunately, procedures that have been approved in individual instances have arisen and inform the process of sales and the manner of marketing participation in the rental program.

A ‘rental pool’ connotes a sharing (pooling) of revenues and distributions net of shared (pooled) expenses; a ‘rental program’ is simply a means of renting out the residences according to a sharing of revenue formula between the unit owner and the Owner (and, by contract, the Manager) to be determined. One unit’s rental has no effect on another unit’s rental. Brands dislike the restrictions that US Securities Law might place upon brand control of rentals, while benefitting from the imposition of the restrictions that enables them to demand appropriate and complete indemnification from owners/developers. The Owner must also conform to (and seek expert assistance in connection with) the condominium documents and marketing and sales materials under the laws of the jurisdiction (whether in the US or elsewhere) where the Project is located as well as the states where the Project will be directly marketed. Many states have filing requirements, including approval by the Office of the Attorney General of the state. This adds a layer of complexity, time and cost to the entire process.

It would be unusual for all aspects of the residential transaction to be completed concurrently with the negotiations and execution and delivery of the HMA documents; however, it is incumbent upon the Owner/Developer to understand the issues that will arise when the HMA document negotiations are completed. At the very least, all parties should pursue completion of detailed outlines addressing the rental program terms (including sharing of revenues and payment of expenses), the homeowner/condo association management terms, unit owner use and access to common areas and amenities, rules and regulations on third-party rental capabilities and more. The Branded Residences program takes on its own life.

Project Management Services

There exists in the hospitality arena an entire population of entities that provide fee development or Project Management services to owners who may not have in-house expertise in development *per se* or in developing Branded Mixed-Use Projects.

The Project Manager would be the Owner’s right hand in working through the development processes, acting as a third-party extension of the Owner as developer, utilizing its skill set and experience to, among other things –

- 🔍 Oversee architectural planning
- 🔍 Maintain and adhere to scheduling, budgeting and other aspects of the development
- 🔍 Coordinate the design and construction process from start to completion
- 🔍 Interact with all other design consultants
- 🔍 Coordinate with the general contractor in all construction aspects
- 🔍 Coordinate the efforts (though not necessarily the selection) of the purchasing agent and the purchasing logistics (*e.g.*, freight, customs, receipt, storage and, ultimately, installation)
- 🔍 Assure the voice of the brand is heard and accommodated where possible and appropriate
- 🔍 Include the brand Technical Services/Design Development in the ongoing design process (including the selection of designers) and the brand operations team as appropriate during the construction and, ultimately, the installation and pre-opening process
- 🔍 Place and oversee the onsite project manager
- 🔍 Coordinate turnover to Manager’s operations

The Project Manager likely should be identified early in the process, probably just before the completion of **Phase 2** (described in **Part 2**), and retained on a preliminary basis to provide cost estimates of all aspects of the development based on its experience, with a specific purpose of identifying all non-construction hard costs and typical soft costs involved in a Branded Mixed-Use Project. The Project Manager and the Hotel Transactions Consultant (which also stays involved during the tenure of the Project Manager) would be components of the Owner's team.

The Hotel Transactions Consultant can assist in selection of the Project Manager and negotiation of the Project Manager's agreement. The development budget should anticipate early-stage costs that might be paid to a Project Manager; the full panoply of services by the Project Manager are likely to be about 2% - 4% of the entire Project development budget (excluding land) once the Project Manager is engaged full-time and construction is set to get underway.

Legal Fees

Legal fees for this kind of effort – reviewing the LOI/Term Sheet, negotiating the full set of HMA documents and interacting with local counsel – are expensive. We typically recommend from among four to six major US law firms which have groups specializing in this kind of Owner representation; they are all professional and quite good. One distinguishing factor among the highly qualified firms may be their experience with the selected brand or the jurisdiction involved.

Taking a soup-to-nuts approach on attorneys' fees, a US firm's bill for full-scale services (excluding rental program or other residences matters) in negotiating an LOI/Term Sheet, then the documents, might run \$250,000 - \$300,000, and the cost will be heavily dependent upon a wide range of factors, including the tone and approach of the legal team representing the Manager. Attorneys have flexibility in negotiating caps, hourly rates and, perhaps, even, fixed fees. Nevertheless, the branded operators have a template for their HMA documents, they know their documents and the nuances contained therein, and, I believe, it is critical to retain counsel of the highest caliber and experience in this space who, with many of the brands, have done this before, even several times.

