

Commercial Real Estate Development (FL)

A Practical Guidance® Practice Note by David K. Blattner, Becker & Poliakoff, P.A.



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This practice note discusses key considerations for a developer of commercial real estate (CRE) in Florida. For purposes of this note, CRE development refers to retail, office, medical, industrial, hospitality, multifamily residential, and other types of commercial properties. Development means new construction or renovation of existing structures. This note is written from the perspective of the developer.

The development concepts discussed throughout this note also apply to residential development such as multi-lot single-family homes and condominium developments because they are large-scale developments involving the same types of approvals.

Real estate development is a lengthy process that begins long before a particular site is selected. CRE developers spend significant time identifying the ideal property for each project they develop. When a developer decides that it wants to be in a particular area, it will obtain market studies to determine the best city and the best area of the city to be in. Once the site is selected, the hard work begins.

For further information on commercial real estate purchases and sales, see [Purchasing and Selling Commercial Real Estate Resource Kit \(FL\)](#).

Planning

Site Selection and Preliminary Due Diligence

There are many questions a developer must ask and investigate during site selection and during due diligence. Once the developer determines the type of project it is developing, these tasks must be completed for any properties that are under consideration:

- **Check the zoning to determine whether the current zoning supports the project.** Will the property have to be rezoned and what variances will be required (if any)? See [Zoning Review in Commercial Real Estate Financing Transactions \(FL\)](#) for a detailed discussion of zoning in Florida.
- **Check the current and future land use of the property.** If an amendment to the land use is required, the size of the property will determine timing and process of the amendment in many counties. A small-scale amendment, usually less than 10 acres, can be handled at the local level at any time. A large-scale amendment must be transmitted to the state and may only be done at certain times during the year.
- **Will the property have to be platted?** This is a county requirement.
- **What are the site planning requirements?**
- **Has the developer had preliminary conversations with local governmental officials about the plans for the project?** The developer should attempt to get a feeling for how the project will be received by the city. Will there be opposition because the project is high density or some other unpleasant use? Consider what the developer can do to assure the city of the positive attributes of the project.

- **Determine what other approvals are necessary.** These may include utilities, drainage and retention, environmental (protection of native species including plants, wildlife, and wetlands), and impact fees for roads, schools, parks, water, and sewer.
- **Begin to create a timeline for obtaining permits and approvals.** This timeline will be instrumental in two ways. First, it will be the basis for creating the approval contingency in the purchase and sale agreement. The time to obtain the approvals will be easy for the developer and its attorneys to articulate and negotiate. Second, the timeline will keep the developer and the development team focused on both the contract deadlines and the completion goal of the project. Hard submittal dates can be inserted into the timeline so that contract contingency dates can be achieved.

Price for Land

The number and scope of the approvals required to develop the property will be a key factor in determining the price for the land. These are some of the many “soft costs” that a developer includes in the project budget. Soft costs alone will not necessarily alter the acquisition price. They will, however, be a factor in rentals or sale prices to the end user.

Contract

A purchase contract for a development property should address all of the points discussed above. The developer/buyer should ensure that the contract due diligence period allows time to definitively confirm zoning, land use, and all other necessary governmental approvals. All contingencies (see below) should be clearly spelled out. Provisions for title and survey review must be included. Provisions should be added regarding any additional easements, reciprocal easement agreements, or development agreements that will be necessary if the property will be part of a larger development. Each of these agreements should be agreed to by a firm date prior to closing.

For further information on commercial real estate purchases and sales, see [Purchasing and Selling Commercial Real Estate Resource Kit \(FL\)](#).

Contingencies

The approvals contingency is the most important contingency to be included in a purchase agreement for a development deal. The developer should not close unless all approvals have been obtained. The date for obtaining the approvals will be subject to intense negotiation. If the developer has done its preliminary due diligence well, it will have a strong argument as to what approvals are necessary

and how long it will take to obtain such approvals. The seller will have difficulty arguing otherwise. Additionally, the developer would not agree to seller's purchase price but for having a fully entitled parcel of land. The seller must be convinced that a faster closing can only mean a lower purchase price as the property has no use to the developer, or any buyer, for that matter, if it is improperly zoned and not entitled.

The give and take on the time for approvals can be mitigated somewhat by allowing for extension options. These usually come at some price to the developer. An extension fee is frequently nonrefundable but often fully applicable against the purchase price at closing. This puts some risk on the developer if the option is exercised. But generally, these options are not exercised unless the developer is well into the process and knows that the approvals will ultimately be obtained.

The other important contingency to be included in most purchase agreements is the financing contingency. Many developers will not proceed with an acquisition unless they know that they have the financing to acquire the property. The financing contingency can be debt or equity financing, or a combination of both. Sellers usually want to know that the developer has the financing in place at a time earlier than the expiration of the approval contingency.

Once the Contract Is Signed

Continue to Conduct Property Diligence during the Contract Due Diligence Period

Although investigations on the property began before signing the contract, there is much work to be done during the period after the execution of the contract but before the expiration of the due diligence period. For a complete discussion of contract due diligence items, see [Commercial Purchase and Sale Process Checklist \(FL\)](#) and [Commercial Purchase and Sale Closing Checklist \(FL\)](#). Important steps to take during the due diligence period relevant to development considerations are discussed below:

- **Conduct physical due diligence of the property, including environmental and geotechnical, immediately.** Environmental testing consists of a phase 1 report which will identify any potential environmental concerns and recommend further, specific testing. If additional testing is necessary, a phase 2 report should be ordered which will summarize the results of the additional testing. The additional tests could include the installation of monitoring wells and the collection and testing of potentially contaminated soil. Geotechnical testing

determines the condition of the ground to identify whether the ground can support the building. Soil borings are taken, and compaction studies are made and detect the stability of the ground, whether fill is required and whether de-mucking and compaction is necessary.

- o Additional studies that may be required include wetlands determination analyses, tree reports, and wildlife investigations. If there are wetlands on the property, the developer may be required to mitigate for the loss or adverse impact on the wetlands. If trees interfere with the proposed development, the developer might have to relocate or replace trees. If protected species are identified on the property, the entire project might be at risk. See [Wetlands Regulations: Considerations for Project Developers](#) and [Conservation Easements](#) for further discussion of these issues.
- **Obtain a title commitment for the property and carefully review all exceptions to title.** In particular, look for restrictions, easements, and encumbrances which could adversely affect the development. Do any exceptions limit the size or scope of the project or prohibit the intended use? If there are exceptions which would be restrictive to the development, the attorney will have to determine whether the exceptions can be released and if so how, or if the title company can delete the exception from the title commitment. Otherwise, the developer will have to determine if there is some other work-around. See [Title Insurance and Survey Review Checklist \(FL\)](#) for guidance on reviewing title and survey for commercial real estate projects in Florida.
- **Obtain an ALTA survey of the property.** Make sure that the surveyor has a copy of the title commitment and the exceptions so that all exceptions can be overlaid on the survey. This will allow a complete review to determine whether the exceptions, including the easements showing on the title commitment, do affect the development. The survey should include the topography of the property. See [Title Insurance and Survey Review Checklist \(FL\)](#) for guidance on reviewing title and survey for commercial real estate projects in Florida.

Obtain Approvals

The timeline for obtaining approvals should be updated to reflect the contingency period agreed to and set forth in the contract (if different from the precontract timeline). The design and engineering teams should be diligently working to prepare plans and applications. Meetings with governmental authorities for all permitting authorities

should be proceeding on a regular basis to assure that all requirements for the permits are properly addressed. There will inevitably be issues that arise during this process. The earlier the issues are identified, the sooner and cheaper the developer can resolve them.

As the approval process continues, it is important to begin to meet with neighborhood groups, homeowner's associations, and surrounding property owners to generate support for the project—or at least to make sure that there won't be strong opposition to the project. Zoning boards and elected commissions don't like to approve projects that have vocal opposition. Therefore, if it is apparent that the neighbors aren't initially enamored with the proposed project, the developer should work to "sell" the idea. This might mean offering beautification improvements to the community or adding additional landscaping to the project to limit visibility.

Similarly, there may be negotiations with the city to get the project approved. Traffic impact studies will be required. As a result, the city might require certain road improvements. If a tree survey shows the loss of trees and tree canopy, tree mitigation on and about the project might be required. Cities have certain regulations about architecture and color palates that may run contrary to the developer's taste. These are only a few areas the developer must consider and don't include required impact fees for roads, schools, parks, and water and sewer which are calculated based on the expected impact the project will have on the existing infrastructure.

Plan for Operation of the Project

Plan for the operation of the project once built. Consideration must be given to what type of easements or reciprocal easement agreements or other development agreements will be necessary for the project. If there are existing documents in place, will they need to be amended? If the seller is retaining adjacent or contiguous property, it is critical that any reciprocal easement agreements (REAs) be completed and signed by closing.

Other master development documents include homeowner association and condominium documents. These take time to prepare. Condominium documents must be approved by the Florida Division of Condominiums. No units can be sold until the prospectus is approved. When the condominium is designed, a condominium survey must be prepared.

See [Condominium Basics](#), [Condominium Offering Plans](#), and [Declaration of Grants, Covenants, Conditions and Restrictions Establishing a Plan for Condominium Ownership](#) for a discussion of condominium development.

Prepare Leasing and Sale Documents

The project is being designed to generate income. Therefore, the documents that will produce the income must be prepared. Form leases for shopping centers, office buildings, industrial complexes, or apartment developments should be drafted. Similarly, condominium documents, whether for residential or commercial, should be started early in the process. If individual units or lots are to be sold, the sales office and sales program should be established. And, if the developer plans to market outside of Florida, compliance with the Interstate Land Sales Act (ILSA) (USCS Popular Name I-510) is paramount.

For a discussion of commercial real estate leasing in Florida, see [Commercial Real Estate Leasing \(FL\)](#).

Obtain Financing

Whether financing is a contract contingency or not, the developer has to arrange for financing of the project early in the process. The cost of the acquisition of the property is important, but it is only a small part of the development cost. Development costs include design, engineering, construction, lobbying, legal, permitting, testing, closing costs, commissions, and developer fees to name a few. They also include operating costs after the project is built. Operating costs can include sales, leasing, marketing, maintenance, legal, commissions, taxes, insurance, depreciation, and management fees. All of these costs must be budgeted for and funds need to be raised through equity and loans. The capital needs can be broken down and raised in phases. For instance, the acquisition and construction capital can be addressed first, and the operating capital raised second. But a comprehensive financing plan is usually addressed with the initial investors, so they know their overall risks. This practice note does not address the possible capital stack structures or possible partnership or corporate structures. For further information on forming joint ventures for real estate development, see [Choice of Ownership Structure of Real Property \(FL\)](#).

However, it must be noted that when raising equity, SEC and State Blue-Sky laws must be considered. Proper disclosures must be included in all offering memoranda.

There are several types of loans that a developer might obtain for a commercial development:

- **Acquisition loan.** This loan is used to finance the acquisition of property.
- **Construction loan.** This loan is used to finance the construction of the improvements on the property. Often, a commercial lender will combine an acquisition loan with a construction loan.

- **Development loan.** This loan is used to finance the development of the infrastructure on the property, including roads, water, sewer, and excavation and soil compaction. Again, commercial lenders will often combine an acquisition loan with a development loan.
- **Revolving line of credit.** Typically, this is a form of construction loan used to finance construction of improvements on multiple lots, such as single-family homes. The loan will allow for a maximum amount of principal outstanding at one time. As homes are sold and principal repaid, the borrower may re-borrow the principal to construct improvements on other lots. Revolving lines of credit may also be used as working capital for completed projects.
- **Permanent loan.** The final loan in a real estate project. This is used to satisfy the earlier loans. A long term, amortizing loan. It allows the developer to utilize its equity and let the property service the debt. At this point, the property has increased in value so the investors can be repaid. Rents and other income from the property above debt service and operating costs is the profit to the investors.

For further information on Florida commercial real estate loans, see [Commercial Real Estate Acquisition Loan Resource Kit \(FL\)](#).

Prepare and Review Construction and Development Contracts

The construction and development contracts constitute the biggest cost items of a project. All contracts must be carefully reviewed, from preparing bid specifications to reviewing the bids and negotiating contracts. This includes all design, engineer, and build professionals.

Close and Acquire the Property

After completion of satisfactory due diligence and satisfaction of all contingencies (including approvals), closing will occur. For a discussion of commercial real estate closings in Florida, see [Commercial Real Estate Closings \(FL\)](#). If the developer has been working on all the other matters, it will have a good jump on what comes next.

Once the Property Is Acquired

Sign Contracts

If construction and development contracts have not already been executed, now is the time to do so. Work should begin as soon as possible.

Apply for Site Development Permits

The work for these permits includes clearing and de-mucking of the land, excavation, paving, drainage, retention, and utilities. If demolition of an existing structure is necessary, city permits must be obtained. But, if asbestos, lead paint, and other interior environmental issues have not been addressed during the contract due diligence period, abatement and disposal pursuant to applicable law must occur before demolition can. This is also the time to apply for any required environmental permits.

Apply for Building Permits

As site development work is coming to completion, you should then make applications for vertical building permits. These are the permits that allow construction of the actual building. Depending on the project, the city might issue an overall permit for a building with a series of permits for each component, such as foundation, electrical, plumbing, roof, and more. The general contractor is responsible for the building permit and obtaining inspections and approvals during the construction process. The project architect will supervise the project during construction to assure that each component is being properly constructed and no shortcuts are being taken. The architect will certify to the owner and the construction lender that work has been completed so that draws on the construction loan can be made each month to pay for the work. Usually, the construction lender will retain its own inspector to double check everyone's work. Sometimes, the owner hires its own project manager to oversee the contractor and architect.

Ensure That No Construction Liens Are Being Placed on the Property

Next to construction safety, proper payment and avoidance of construction liens is the owner's number one concern during site development and construction. To maintain protection, the owner must follow Florida Statutes Chapter 713, the Construction Lien Statute. Before any work begins on the property, the owner must file a Notice

of Commencement (NOC). The NOC puts those who provide services or materials to the property on notice that they must comply with the requirements of Chapter 713 before entering the property in order to have their right to lien protected. That means, all such subcontractors and suppliers must provide the owner with a Notice to Owner which lets the owner know that someone provided services or supplies under a subcontract. When the work is complete, the subcontractor has 30 days to file its lien if they are not paid. The owner, to assure proper payment, is entitled to receive a waiver of the lien from all such subcontractors and suppliers who have provided a Notice to Owner upon making payment. Additionally, the general contractor must provide an affidavit upon receipt of each draw that all subcontractors and suppliers have been paid to date.

For Florida construction lien resources, see [Construction Lien Resource Kit \(FL\)](#) and [Real Property Liens \(FL\)](#).

Obtain Certificates of Occupancy

When the work is completed, the city will do a final inspection of the work and issue a Certificate of Occupancy (CO). A CO or a Certificate of Completion will be issued for each permit issued. The building can be used and occupied when the final CO for the master permit is issued.

Final Completion

After all the years of hard work, the developer can finally celebrate. Sometimes the project opens in phases and sometimes it opens all at once. But the grand opening and ribbon cutting marks the beginning of the profit taking phase of the development. Profits are made through rent and sale of units, refinancing of the project through a permanent loan, or the sale of the project. If the developer is holding the project for the long term, operating the property requires proper management. Regardless, most experienced developers have already started another project, or two or more, and are well on their way to completing the process again.

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David K. Blattner has over 25 years of experience in complex real estate transactions and concentrates on acquisitions and financing and development of large-scale shopping centers, office buildings and executive parks, marinas, warehouse, flex projects, hotels, single-family and multi-family residential developments, and condominiums.

David represents a wide range of clients throughout Florida, the U.S., Canada, South America, and Asia. His clients include: developers, multinational corporations, domestic corporations, banks and other financial institutions, condominium and homeowner's associations, property management companies, and landlords and tenants.

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