

Real Estate Development Law

Rick Daley

REAL ESTATE DEVELOPMENT LAW

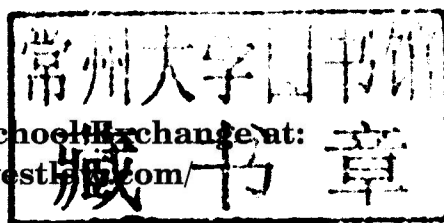
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DEDICATION

This book is dedicated to the memory of James P. Mulroy. Jim taught me what practicing business law is all about. His unexpected death in February 2006 gave me both pause for reflection and the impetus to get on with a new stage of my life by agreeing to join the Moritz College of Law faculty and write this book. Jim, I salute you for being a good Marine and a great lawyer and friend.

PREFACE

The fact that I am writing a book on real estate development law comes as a huge surprise to me. When I graduated from law school in June of 1978, I said a hearty goodbye and good riddance to academia and the Socratic method and jumped headlong into the practice of law. For the next 12 years, I immersed myself in the private practice of business law, working 80 hour weeks and, for the most part, successfully convincing myself that I was having a good time. I spent most of those 80 hour weeks representing real estate developers and watching them make a great deal of money doing something they all seemed to love.

In 1990, I finally had an epiphany and realized that life might be more lucrative and, certainly more fun, if I were to exit the private practice of law and go to work for a developer. I had the good fortune of being offered the opportunity to become Executive Vice President and General Counsel for The Pizzuti Companies, a real estate development company headquartered in Columbus, Ohio.

From 1990 through 2003, I had the time of my professional life, wearing the hats of both lawyer and businessman for a rapidly growing and wildly successful real estate development company. During my stint with Pizzuti, the company grew its revenue base more than tenfold and opened regional offices in Orlando, Chicago and Indianapolis. The people I worked with were smart, passionate and a helluva lot of fun to be around. Best of all, I made a goodly sum of money without having to fill out a time sheet accounting for my life down to the 1/10th of an hour.

In 2003, I decided to take a respite from the workaday world to become, in the words of my then 12 year old son, a “housewife.” The previous 25 years had been a wild and very rewarding ride, but I felt like I needed a break from the demands of real estate development business. For the next two and one half years, I devoted most of my time to being a chauffeur for my son and daughter, while still dangling my feet in the real estate development pool by serving as a consultant on a number of new real estate ventures. As the time passed, I became more and more convinced that my time as a full-time practicing lawyer was in the rear view mirror and that I needed to move on to something new and different to keep my mind from turning to mush (which some have said actually happened years ago).

While I was trying to figure out what I wanted to do when and if I ever grew up, I received a totally unexpected telephone call from Dean Nancy Rogers at The Moritz College of Law at The Ohio State University. Although I am a graduate of Ohio State’s law school, the last time I had stepped into the law school building was when I graduated in 1978. I had made the occasional

donation to the law school during my years of practice and assumed that Dean Rogers was calling to ask me to up the ante on the amount of my donations.

I was shocked to hear Nancy ask if I would be interested in teaching a course in real estate development law at the Moritz College of Law. According to Nancy, a distinguished College of Law alum named Ken Zeisler had made a sizable contribution to the school to fund the teaching of a class in real estate development law. Ken graduated from the OSU law school in 1961 and had gone on to achieve great success as a shopping center developer in Cleveland, Ohio. Ken's contribution proposal to Nancy noted that the 35 years he had spent working as a real estate lawyer and developer had left him "very disappointed with the competence of the attorneys on the other side of the transaction (as it pertained to their knowledge of a real estate transaction and what it takes to make a successful deal)." Ken told Nancy that he wanted to do his part to rectify this sad state of affairs by providing the funding necessary for the Moritz to hire someone to teach a "practical, hands-on" course in real estate development law during the 2006 and 2007 school years. Nancy had been unable to find anyone to teach the course among the usual suspects in the academic world, so she decided to take a flyer and ask an old, washed-up vet like me if I would be willing to sign on to help Ken Zeisler achieve his vision.

During our first telephone conversation, Nancy also noted in passing that one of Ken's hopes was that whoever was hired to teach the course might also end up writing a book on the topic of real estate development law. It was this comment by Nancy that really piqued my interest in the job. I have long dreamed of being the next Robert Parker and waking up each morning to sit down at the computer to crank out one great mystery novel after another. [For those of you who are unfamiliar with Parker's Spenser character, you should stop reading this drivel right now and head to your favorite bookstore to pick up one of Parker's more than 30 books featuring the tough Boston private eye with a soft, intellectual side]. Unfortunately, I have absolutely no creative talent whatsoever—which is probably why I ended up becoming a lawyer in the first place.

When Nancy first mentioned the possibility of writing a book on real estate development law, the proverbial light bulb went off in my head. Here was the perfect opportunity for me to live my dream of being a writer, without having to summon up even one lick of creativity. After all, what could be less creative than regurgitating in written form all the things about the practice of law that it had taken me 25 years to learn?

Long story short, I told Nancy Rogers that I would take the job and promptly started writing a book on real estate development law. The first thing I needed to do was to figure out what is "real estate development law." The first chapter of this book is devoted to my somewhat feeble attempt to explain (or maybe justify) what it is I did for the first 25 years of my professional life.

As I started to think about what I wanted to convey in this book, I became increasingly more appreciative of how prescient Ken Zeisler was in his

perception that law schools don't teach students how to be business lawyers. Students who think they might be interested in pursuing a business law practice after graduation have little, if any, opportunity during their law school years to gain an appreciation of what it is truly like to be a business lawyer. Aspiring litigators have moot court and litigation practicum to expose them in some limited fashion to what the litigation practice is all about (to say nothing of the seemingly endless array of *Law & Order* shows on TV). The aspiring business lawyer has virtually nothing of a comparable nature to give him a taste of what it means to be a business lawyer.

It is my hope that this book can help in some small measure to fill this void in the curriculum of this country's law schools. As an area of the practice where the "deal is king" and a practicing lawyer must bring to bear a solid working knowledge of several legal disciplines, real estate development law is an ideal platform to provide students with a practical understanding of how the legal concepts that they mastered in law school can be used by them to help their clients achieve their business objectives—and that, after all, is what being a business lawyer is all about.

Lest there be any doubt in your minds, let me now make it clear that this book is being written from a practical and not a scholarly perspective. Over the years, I have been called by a lot of different names—most of them couched in mildly profane terms to take due note of my natural wit and mental acuity. However, rest assured that the word "scholar" has never before been uttered in the same sentence as "Rick Daley." Although I now have the privilege of being a member of the faculty of a wonderful law school like Moritz, the fact of the matter is that my knowledge of the topic of this book has been wholly formed by my 25 years representing real estate developers, first as a lawyer in private practice and then as in-house counsel. The voice in which this book is written is, therefore, undeniably and without choice that of a practicing lawyer.

While this book will not be filled with scholarly analysis or insightful legal queries, neither is it intended to be a primer on the technical aspects of real estate development law. Rather, the focus will be on examining why the real estate development lawyer takes certain positions and how a real estate development lawyer's actions and judgments can serve to enhance (or detract from) the ultimate success of a real estate deal.

Let me make several, final comments about the style, approach, and organization of this book.

- For the most part, the topics addressed in this book will be examined from the viewpoint of the lawyer representing a real estate developer. The competing perspectives of the other players in the real estate development process will, however, be highlighted when and where appropriate.
- Real estate development law is not a discrete, substantive area of the law, but rather it is an amalgamation of a multitude of legal disciplines that a real estate development lawyer must master if he is to successfully represent his client. This book will, therefore, explore not just

traditional real estate topics, such as the leasing, acquisition and conveyance of real property, but also issues related to tax, partnership, bankruptcy, environmental, finance, zoning, construction and public law.

- A mantra that will be repeated often in this book is that “if you want to succeed as a real estate development lawyer, you first need to understand the real estate development business.” As such, the first three chapters of this book are devoted to an exploration of the real estate development business, including a full chapter on what the real estate development lawyer needs to know about the economics of a real estate development project.
- The role played by the real estate development lawyer will be examined during each of the ten stages of a real estate project, beginning with the acquisition of the land on which the project will be developed and ending with the ultimate sale of the project.
- The best way to appreciate the lawyer’s role in the real estate development process is to look at that process against the backdrop of a “real world” case study. I have chosen as the primary case study a 350 acre mixed use project located in Orlando, Florida, having over two million square feet of developed office space, two apartment complexes, two hotels, and a neighborhood retail and dining center. I worked on this deal (the “Heathrow International Business Center”) from its inception in 1992 when Pizzuti first acquired an ownership position in Heathrow through 2002 when the project was sold in its entirety.
- The heart and soul of real estate development law is represented by the documents prepared, reviewed and negotiated by the real estate development lawyer. A significant part of this book will be dedicated to (a) looking at the key provisions of those legal documents that evidence the real estate development deal and (b) discussing how those provisions can be structured and manipulated to serve the legitimate business needs of the real estate development lawyer’s client. The Document Appendix to this book includes a number of standard transactional documents that the real estate development lawyer will encounter during the course of his representation of a developer.
- I have made a conscious attempt to sprinkle throughout the book some “*Practice Tips*” that I have learned during my career. The tips are not intended to be intellectually inspiring or particularly insightful—just useful.
- The 12 chapters of this book are liberally footnoted with citations not to appellate cases, but rather to practitioner-authored articles on topics that are of interest to practicing lawyers (and not just law school professors).
- Terms of art commonly used by developers and their lawyers are highlighted in ***boldface print and italics*** when they first appear in the text.

- The practice of transactional business law does not lend itself to absolutes or legal imperatives. As a result, the text is liberally sprinkled with terms like “typically,” “normally,” and “customarily.”
- Finally, when I started writing this book in the spring of 2006, life was really good for real estate developers and their lawyers. Cap rates were low, rents were high and debt and equity capital was flowing like champagne at a well-attended wedding reception. The good times came to a sudden halt when the subprime meltdown began taking its toll on the commercial real estate markets in the later part of 2007. Life today is very difficult for my friends and former colleagues in the real estate development business and will likely remain challenging for at least the next couple of years. However, as I finish writing this text, I do so with a profound confidence that the practice of real estate development law will soon become as rewarding and profitable for today’s practitioners as it was for me during my 25 years in the practice. I say that both because I believe it to be true and because I need to somehow justify having spent the last five years of my life writing about a practice area that is currently in the toilet.

You will note that I refer throughout this book to the real estate development lawyer as a “he.” This is done solely for the sake of convenience and is not in any way intended to derogate or minimize the participation of women in the real estate development business. I had a choice of either using the annoying “he or she” reference or just settling on one gender reference. The fact that I have been a “he” throughout my professional life seemed to make the gender choice both easy and natural

I would like to thank a number of people for their roles in the writing of this book. First there is Ken Zeisler, a prince of a fellow and someone I have grown extremely fond of during the course of my writing of this book. But for Ken’s initial idea to sponsor a course at Moritz on real estate development law, I would never have had the opportunity to live my dream of waking up every morning to work on a book (albeit one with few plot twists and zero creativity). Then there is Nancy Rogers, who, for some inexplicable reason, had the crazy idea of asking a semi-retired, real estate development lawyer to join the Moritz faculty. Thank you, Nancy, for giving me my second career.

I would be remiss if I didn’t take the time to list some of the people who have directed and inspired me during my professional career. Thanks to all of my early mentors (particularly Dave Sidor, Jim King, Jim Mulroy and Kim Swanson), my friends and colleagues at Pizzuti (including Cliff Aiken, Jim Cramer, Dean Kissos, Jim Miller and Scott West) and to all those lawyers who showed me the right way to practice law (Jim Seay, Dick Murphey and Fred Smith among a long list of exemplary professionals). A special thank you goes to Ron Pizzuti, who, by rescuing me from private practice, provided me with the platform to expand my talents and make some money along the way.

Finally, I must thank my wife Sandy and my wonderful kids, Jill and Michael, for the patience, understanding and love they have shown me as I sat

staring at my laptop these last few years. I couldn't have done it without you (nor would I have wanted to).

Oh by the way, I wrote this Preface on a flight to Kauai, Hawaii. Life in academia really is pretty cool.

RICK DALEY
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October 1, 2010 (my son's 19th birthday)

REAL ESTATE DEVELOPMENT LAW

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