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Due diligence & zoning: Review of use & structure issues

The requirement to investigate how a property is zoned, and related zoning issues, arises in a variety of contexts. The purchase, development, repurposing or leasing of property all generally necessitate an investigation into how the property may be used and if the existing footprint, landscape and context of the property may be continued or modified if necessary in the future. When purchasing real property, it is generally during the due diligence phase, when the contract may still be terminated with minimal to no penalties to the buyer, that the buyer investigates if the future intended use of the property is permitted by the existing zoning code and comprehensive plan(s).

For example, if a buyer would like to operate an industrial use, the buyer must determine if the use is permitted on the property in the current improvements. If the property is being leased as opposed to purchased, a tenant may also perform the same due diligence related to the potential use of the property, as the landlord may or may not be willing to represent in the lease if the intended use is permitted by zoning. A seller would be reluctant to represent in a purchase contract if the intended use will be conforming after closing, given most purchase contracts disclaim such types of intended for a particular purpose type warranty. As a result, the investigation of the property for a specific purpose is up to the buyer or tenant and their team.

During the investigative



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phase, if purchasing the property, it is not only important to investigate if the use is permitted, but also if the structure and issues related to the structure, such as setbacks, height and number of parking spaces are permitted and in compliance with the zoning code. Zoning codes have different requirements and focuses across different jurisdictions, and each jurisdiction may have unique requirements specific to the structure or use of the structure or both that require investigation, such as bicycle parking requirements, trash/recycle/compost receptacles, parking in relation to proximity to transportation, access requirements or open space/transparency requirements.

In addition to confirming the specific use at the property is a permitted use, the buyer and tenant also will want to confirm that the use itself is not merely a grandfathered use or structure, but rather the use or structure could continue even if there were a change or damage to the property. Generally speaking, a use or a structure that is allowed to currently continue but is nonconforming does not permit expansion of the use or structure beyond the original grandfathered use, if at all, or without obtaining an adjustment. As a result, it is important to determine that the existing use is sufficient

for the intended use without an expansion. The ability to continue the use or use of the structure after a partial or total destruction in cases where either the use or the structure is allowed to continue but is nonconforming should also be investigated, as the right to rebuild the same structure with the same use is not guaranteed and may not be permitted. If the industrial use has been rezoned to residential following a partial or complete destruction of the structure, it is unlikely that a new zoning permit will be issued for the industrial use.

Depending on the jurisdiction of the property, the use/structure analysis may be compressed into a single binary question of conforming/nonconforming for both the use and structure in that if either the use or the structure is nonconforming that is the entire analysis. However, in other jurisdictions, the use of the property analysis is a binary question of conforming/nonconforming as to whether or not the use is permitted; and the compliance of the structure is a separate and independent analysis, but still a binary question of conforming/nonconforming and whether the structure, separate and apart from the use, is conforming or not. During the due diligence phase, it is important to recognize the analytical framework to determine the risks associated with the use and the structure in the event of change. In most jurisdictions, there will be two different levels of analysis in the event of

a change to the improvements on the property or to a change to the use. Again, this investigation is important because in the event of destruction of all or a portion of the property, it is possible that the property will not be able to be rebuilt to accommodate the prior existing use or improvements. For example, even if the continued use is permitted but if the structure itself is nonconforming because it is too tall or does not meet the setback requirements, volume of the structure will be lost, which would result in less usable or leasable space. It is also important to confirm that the use itself, in the event of a casualty could be re-permitted in the same location. As areas changes, permitted use changes with updates to zoning codes and updates to comprehensive plans.

Not all jurisdictions have the limited binary analysis. The city and county of Denver offers a different analysis that does not require the binary analysis of conforming versus nonconforming. The Denver Zoning Code adopted on June 25, 2010, republished on July 1, 2021, addresses how both uses of property and structures situated on property that predate the current zoning rules that do not comply with current zoning codes may continue to be modified and exist, and not be stuck in the binary analysis of conforming versus nonconforming. Denver's nonbinary analysis is broader and purposeful to create a vision that promotes sustainability and purposeful reuse of structures.

When Denver adopted the DZC, it included a concept

called "Compliant Structures" to address properties for which the use, the structure or both the use and structure would not comply with the newly adopted DZC. A "compliant structure" is a structure that was lawful prior to the adoption, revision or amendment to the DZC, but which fails by reason of such adoption, revision or amendment, to comply with one or more of the Building Form Standards set forth in the DZC, including, without limitation, for example, the height standards. See DZC Section 13.3. When requesting a zoning compliance letter, Denver's zoning compliance letter usually addresses if the structure and use are conforming and if compliant. This provides greater flexibility in both the expansion and rebuilding/re-permitting context than the traditional analysis of nonconforming.

The recognition by Denver in its revised zoning code of compliant structures allows for creative urban planning and design that is not limited by binary choices that prevent creative solutions for fostering reuse and redevelopment as the demands for different uses of structures change. How and where people work and live continues to evolve from the significant changes resulting from COVID-19. The compliant structure model likely makes the process for obtaining zoning entitlements and permits a less cumbersome process than the traditional binary process.▲

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