LAND USE DUE DILIGENCE IN COMMERCIAL PROPERTY TRANSACTIONS

By

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LAND USE DUE DILIGENCE IN COMMERCIAL PROPERTY TRANSACTIONS

By: ***Wallace W. Lien***[1]

The following materials are intended to provide a guideline for performing due diligence investigations as to the acquisition of commercial property in the State of Oregon. It is recognized that the level of actual investigation may be limited by available resource information; the project budget; or the time allotted for the investigation. These materials, though exhaustive, may not cover every issue that may come up in every case, so the practitioner is warned to use these materials only as a guideline in the performance of due diligence investigations.

The author is assuming that the reader has some basic understanding of Oregon's very unique land use systems and laws. Where absolutely necessary some rudimentary explanations are provided herein, however the novice practitioner should consult the CLE publication *Land Use*, for a more detailed understanding of land use terms.

There are a series of common "factors" that seem to be important in the land use evaluation of every commercial transaction. This outline follows that general grouping in the presentation of this topic. The first factor is "Locational", that is matters relating to the location of the subject property. The second factor is "Historical", or how the property got to be zoned or designated as it is, and what past activities affect the site. The third factor, and generally most important to the buyer, are the "Developmental" restrictions covering the land. Almost as important to buyers, are the "Future" and "Environmental" factors, both of which deal with what might happen to the site tomorrow or into the next millennium. The "Financial" factor deals with the very controversial area of systems development charges. The "Representational" factor discusses the inter-relationships of all the various players in a commercial transaction. Finally there are some miscellaneous factors that are important, but fall outside the general groupings.

This outline concludes with a "Practitioner's Toolbox", which is a listing and explanation of the types of material that will be necessary to have available to you and your client to perform a due diligence investigation of a commercial tract.

I. LOCATIONAL FACTORS

The very first thing a practitioner must do in the due diligence investigation of any commercial property is to assess that site's land use locational factors. These locational factors are generally jurisdictional boundaries that are (for the most part) easily identifiable, and provide the starting point for your investigation.

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Whether the due diligence investigation is conducted for a prospective buyer; or a seller; or a financial institution in foreclosure; the basic investigation remains the same. Because the most common due diligence is performed for prospective buyers of commercial property, this outline will focus on that type of transaction.

A. Controlling Jurisdiction.

Generally, the Oregon Revised Statutes, Oregon Administrative Rules and their local implementation rules, found in city and county zone codes, provide the source of land use law. The local zone code applicable to a property depends on where the property is located; however, the attorney should consider how an urban growth boundary, special districts and split zoning affects the uses of the subject property.

1. Inside City Limits. Inside city limits, the city and its code govern the development of land. The city promulgated the code to implement an acknowledged area comprehensive plan. This code should be consistent with the city's comprehensive plan. The land use regulations of a city will include the comprehensive plan, a zone code, a subdivision and partitioning ordinance, and a set of background and inventory reports and master plans.

2. Outside City Limits, Inside UGB. This area has special significance as the land is considered urbanizable; that is, future urban development has already been contemplated. Generally, the county urban zone code governs those properties outside the city limits, however the city's comprehensive plan provides the appropriate land use designation. A county may promulgate two zone codes; one for uses on rural lands, and another for uses on urbanizable lands, which are those lands within the urban growth boundary, but outside the city limits. Additionally, Statewide Planning Goal 2 requires that counties and cities coordinate their land use planning activities in areas outside city limits but within the urban growth boundary through urban planning area agreements. These Intergovernmental Agreements provide the process for coordination of land use activities in this area. These agreements are usually of three types: notice only, review and comment, and concurrence. An attorney should look to these agreements to determine the various responsibilities and obligations of the various governmental entities.

3. In County, Outside UGB. Outside the urban growth boundary, the property is exclusively subject to the county's rural zone code, comprehensive plan and associated inventories and master plans.

4. Special Districts. Special districts are those departments or agencies that govern specific uses for a property, such as fire, water or sanitary districts. Failing to involve or consider the operation of these special districts could cause delay and increase the cost of future developments. Moreover, the district may not be required to provide the property with its service, or else may exact a cost not previously anticipated. The practitioner should work closely with the Special District staff.

B. Split Zoning/Designation.

The practitioner should be on alert for situations where a tract of land is split zoned. A split zone is one where a parcel, or portion of a parcel, is zoned for one use, while another portion of the

same tract is zoned for a different and possibly inconsistent use. Additionally, an overlay zone[2] may affect only a portion of a particular tract.

Although most jurisdictions have policies against split zoning, every jurisdiction has tracts covered by more than one zone. Usually this occurs where the zone line follows a physical feature on the land or a previously identified tax lot configuration. From a land use standpoint, tax lots should not be considered as *per se* legally separate lots. A tax lot may be created by simply going to the Assessor's Office and doing a segregation. This does not involve city/county review, and therefore is not considered valid for land use permitting.

Split zoning also refers to the land use anomaly where the comprehensive plan designation is different from the zone designation on the tract. In these circumstances a jurisdiction will often require the property owner to bring the two designations into conformance at the time a land use permit is applied for.

II. HISTORICAL FACTORS

A wise man once said that the future is guided by the past. In land use, that axiom is of tremendous importance. Any due diligence search must begin with a look back in time at the property and what has happened with it, on it, and to it. From the development of zoning, to adverse possession to grandfather rights, the historical perspective is incredibly important.

A. Is the Parcel a Legally Created Lot of Record?

Lawfully created lots are those that are considered separate, legal parcels by the applicable planning department. The practitioner must determine whether the local government recognizes the lot as a lawfully created and existing lot of record. ORS 92.017 provides that once a parcel is lawfully established, it remains a legal lot of record unless the lot lines are adjusted or vacated.

However, determination of the "lawfully established" standard can be difficult. Review of the title report and any changes or modifications in the legal description through previous conveyances are the best ways to review this. Currently, DLCD takes the position that a perimeter legal description in a deed acts to "vacate" any lot lines inside the perimeter, thereby consolidating parcels that would otherwise be entitled to lot of record status.[3]

Lot of record status is important as most jurisdictions will not issue any new land use permits for a parcel that they do not recognize as being legally created. Therefore, correction of this status becomes the first step in obtaining developmental approvals. In resource zones, if a parcel qualifies as a "lot of record" as of a certain date, it may be entitled to development rights to which other parcels are not allowed. *See, e.g.* ORS 215.705.

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[2]The importance and operation of Overlay zones is discussed later in these materials.

[3]This issue is currently on appeal to LUBA, and a decision is expected in April or May, 1997. *See* DLCD v. Polk County (Hanneman), LUBA Case No. 96-192.

The practitioner should not assume that because the property is under more than one deed or contract, that each deed or contract represents a separate, legal lot. Simply creating different deeds for different portions of the same parcel does not necessarily create separate, *legal* lots. An independent analysis, together with a discussion of the local policies with the applicable planning department is the only true way to determine lot of record status, and even then could be subject to various interpretations.

B. **Was the zone created using a Resolution of Intent?**

A city or county zone code may provide for a method of approving a zone change on a particular site by "Resolution and Intent" or, as otherwise termed "Zone Code Changes with Conditions." Such a mechanism allows the city or county to approve a zone change provided the applicant meets certain conditions. For example, the city or county may require the applicant submit a site plan that meets conditions relating to the size, height, location, or hours of operation. The practitioner should ascertain how the current zone was placed on the subject property, and if it is subject to a Resolution of Intent. Conditional zones such as that discussed here are final appealable decisions at the time they are entered, and failure to meet the conditions could result in the zone reverting back to its former designation. *See, e.g., Headley v. Jackson County*, 19 Or LUBA 109 (1990).

C. **Is the property subject to an Overlay Zone?**

An overlay zone consists of a specific set of regulations deemed needed to address one specific issue, and designed to address specific locational concerns. The overlay zone criteria are applied in addition to the underlying zone criteria and, sometimes, may displace portions of the underlying zone criteria. Examples of the types of overlay zones frequently seen are:

1. Archeological Sites (see ORS 358.920 (1), (4));
2. Limited Use Zones;
3. Geologic Hazard Zones;
4. Limited Groundwater Zones;
5. Floodplain/Wetland Zones;
6. Airport Zones; or
7. Historical District Zones.

When a practitioner encounters an overlay zone, that should be a trigger to dig deeper. These overlay zones are only placed in areas where there is some identified governmental interest that is sought to be protected. Generally, there are developmental limitations and restrictions associated

with overlay zones, the identification of which play an important part in the due diligence investigation.

D. **Are There Conditions of Approval for the Use or Structures?**

The subject property, if developed may have been built pursuant to a land use permit (site plan, conditional use etc.). If so, there may be conditions of approval attached to the permit that place conditions on, or limit the continuing use of the property. Examples include requiring the applicant or property owner to make infrastructure improvements, obtain other agency or departmental approval before building, obtain occupancy permits, or pay system development charges. The practitioner must ascertain what these are, and whether they are satisfied or not.

E. **Grandfather Rights/Nonconforming uses/Vested Interests.**

1. Pre-existing Rights. Uses that predate zoning (generally from the early 1960's to the early 1970's depending upon the area of the state) have the right to remain in existence under certain circumstance. These rights are variously referred to as Grandfather rights, or Nonconforming uses.

a. Limitations on replacement/rebuild. If a use is grandfathered, there may be restrictions on whether the structure can be replaced or rebuilt. If replacement or rebuilding is limited, there may be limits on the extent to which changes may be made without losing the grandfather status. Where a structure is destroyed by natural causes (fire, flood, earthquake, etc.) it may be replaced, but replacement is governed by the local jurisdiction, and generally must be done within a certain time frame (6 months to 1 year). *See, generally,* ORS 215.130(5 and 6).

b. Limitations on expansion. Grandfathered uses can rarely be expanded beyond the existing use. Thus, a practitioner must disclaim, as a part of the due diligence investigation, any such limitations the grandfather rights have as to the subject property. *See also,* ORS 215.130(8 and 9), and be sure and check the local city/county code which will undoubtedly have a governing provision.

c. Cessation of Use/Abandonment. Grandfather rights are lost if abandoned, or if the use has ceased for a prolonged period of time, even if only temporarily. *See*, ORS 215.130(7).

2. Vested rights. Vested rights are those uses that have not been established, but where substantial good-faith commitments or investments toward a particular use result in a lawful nonconforming use. These rights normally arise when a development permit has been issued but not yet fully constructed or acted upon, and in the interim some change in the law (state or local) has been enacted which would either prohibit the prior approved use, or add conditions to the approval.

Oregon courts will consider the good faith of the landowner in proceeding with a development, including a consideration of those expenditures incurred in good faith in relation to

the total cost of a project. The practitioner should review *Clackamas County v. Holmes,* 265 Or 193, 508 P2d 190 (1973) and its progeny, which explain the vested rights doctrine as applied in Oregon.

F. **Are there encroachments?**

Identify, through physical inspection or review of surveys, whether there are any encroachments at issue. Also determine from the title report whether the property is subject to any licenses or easements and, if so, whether these encumbrances adversely affect the future use of the property.

G. Adverse possession and location of property corners.

Examine surveys for possible discrepancies of property lines and corners. Are there any boundary dispute lawsuits pending? Identification of property corners, either by survey or location of existing pins. Ascertain if the legal description of the subject property closes. If not, there is an issue with the total size of the parcel, and boundary locations.

H. Leases.

Are there any leases, either of record or not, which impact the property? Are there options or rights of first refusal to a tenant or some other party? Because this information is often found in an unrecorded instrument, it is not always available in a title search, and may require further investigation and inquiry from the owner or persons in possession of the property.

Once it is determined that any of these encumbrances exist, the due diligence investigation must disclaim the particulars of the instrument, as well as discussing its validity.

I. **Buried conditions.**

A due diligence investigation should include an inquiry into any other agreements, or previous land use actions affecting the subject property. Agreements might take the form of contracts with the local government for annexation, redevelopment or may include permits with continuing conditions of approval. In most instances these agreements will not be recorded, and therefore will not be set out in the title report.

III. DEVELOPMENTAL FACTORS

Most due diligence investigations in today's world involve inquiries as to what can be done on a particular tract, and how can it be developed. Developmental factors are also the most difficult to ascertain without actually filing for the development permit and running it through the process.

A. **Land Conservation and Development Commission Acknowledgment Status.**

Virtually every city and county comprehensive plan in the State of Oregon has been acknowledged by LCDC. However, the practitioner should be aware of city or county requests for acknowledgment of amendments to the comprehensive plan or the status of a periodic review.

1. Status of periodic review. Has LCDC conducted its periodic review of the plan and land use regulations? By statute and administrative rule, LCDC must conduct a "periodic review of each local government's comprehensive plan and land use regulations [] to assure that the comprehensive plans and land use regulations are achieving the statewide planning goals adopted pursuant to ORS 197.230 * * * * Periodic review provides the opportunity for local government to update its comprehensive plan and land use regulations to carry out local goals and objectives." OAR 660-25-010.

Periodic review can result in changes to the uses, zone or even comprehensive plan designation for the subject parcel. The practitioner should know if the periodic review is underway or has just been completed. Recent changes to the land use regulations and comprehensive plan may not be apparent in the local government's pre-review documents, and sometimes obtaining the most current set of rules and regulations can be difficult.

Making assumptions about property during periodic review can be dangerous, as some Vested Rights status may be affected if an owner knew or should have known about impending changes in the law affecting the property and did not move forward to complete a prior approved project.

B. Zone Code Requirements.

The zone code determines what uses are allowed - outright or conditionally - on a particular parcel of land, as well as where, how and to what extent any structures may be constructed and located on the tract. The code also describes the minimum lot size for any given zone.

If the subject property has an existing structure, the practitioner should determine if the building complies with outright, conditional or non-conforming use requirements. Non-conforming use status and the implications thereof were discussed above.

To meet due diligence standards, the practitioner should determine whether the lot or use is non-conforming, whether the purchaser plans to continue the existing use or to repair, remodel or rebuild the non-conforming structure. Any of these actions could jeopardize the non-conforming status and leave the client with a piece of property which is unsuitable for his or her commercial needs.

1. What are the use restrictions? All city and county zone ordinances list uses permitted outright and conditionally in each zone. Many also set forth prohibited uses within the same zone.

For example, the City of Sherwood has three commercial zones, Neighborhood Commercial, Retail Commercial and General Commercial. Commercial storage and mini-warehousing facilities

are listed among the prohibited uses in the Retail Commercial zone (Sherwood Code Section 2.108.04.D.), but are specifically listed as outright permitted uses in the General Commercial zone (Code Section 2.109.02.N.).

It is absolutely imperative for the practitioner to check the zone designation of the subject parcel, and determine from that what uses are allowed on the property.

An outright permitted use is one that is allowed in the zone without any land use actions. A conditional use is a use that is allowed in the zone, but only if certain conditions are met. Again, city and county codes specify conditional uses in each zone. If a use is conditionally permitted, a land use application must be filed with the local planning department, notification sent to neighboring property owners and a hearing held before either a hearings officer or the planning commission. *See, e.g.,* Marion County Zoning Ordinance 119.010[4].

In the event any type of land use action is necessary in order to site a desired use on a tract (as would be the case if the due diligence investigation were being conducted for a prospective purchaser) the due diligence report should identify the interested parties; the forms, timeliness, costs and avenues of appeal that are available not only to the property owner, but to the neighbors or other interested parties (1000 Friends of Oregon, Oregonians in Action, DLCD, etc.).

2. Setbacks. Determine the front, rear and side yard setbacks. Also be sure to ascertain any special setback requirements that may apply to the property. These define the building envelope and determine where a structure can be located on the lot. Setbacks are generally found in the zone that is applicable to the tract, however be aware of special requirements surrounding the boundaries of the property (i.e., from farm land); from natural features (such as floodplain or wetlands); and from certain major street and highways. These special setbacks can be as high as 200 feet in some cases. Also be mindful of how the set back is measured. Some setbacks are measured from the property line; others are measured from structure foundations; and street setbacks may be measured from centerline.

> **Example.** A client recently called asking me to look into a parcel he was considering buying in the City of Woodburn to determine if it could be used for a new store. The lot was a large rectangularly-shaped commercial parcel, with an existing, non-conforming residence on the front half of the rectangle. The lot fronted streets on both the front and rear. The client was interested in purchasing the land, partitioning it into a second lot and building a store on the second, newly-created lot, which had been the back half of the lot. The lot was large enough to be partitioned into two legal lots. The commercial zone required a 5-foot front yard setback from the street. No problem. However, the special setback requirements in the General Standards chapter of the Woodburn Zone Code specified an additional 40-foot setback from the edge of the street right of way fronting the intended new lot. With the combined 45-foot setback requirement, the resulting building envelope was too small to accommodate the proposed building.

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[4]A conditional use is defined by Marion County as "an activity which is basically similar to other uses permitted in the zone, but due to some of the characteristics of the conditional use, which are not entirely compatible with the zone, such use could not otherwise be permitted in the zone." Marion County Zoning Ordinance 119.010.

3. Height limitations. In almost every zone there is some type of height limitation that must be disclosed as part of the due diligence investigation. This height limitation is generally set out in a specific number of feet. However, it is never as simple as that. Be sure to ascertain how this limitation is measured. Is it from finished grade or beginning ground level? Are antennae, chimneys or other appurtenances excluded from the measurement? If the limitation is set out in the number of floors, instead of in feet, are there definitions or provisions in the code that identify how tall a story is?

4. Parking requirements. Most codes have some limitations and restrictions on uses surrounding the availability or provision for parking. Determine what parking requirements are in effect, i.e., minimum number of spaces for the use, how many must be off-street, parking lot construction standards, whether some parking can be off-premises, etc. If off-premises is allowed, how close must the lot be, and if a formal agreement necessary between those parties.

5. Loading areas. Commercial zones almost always require certain areas to be set aside for loading and unloading. The practitioner must determine the number and size of loading areas required for the use and parcel, and disclaim that in the due diligence report.

C. Comprehensive Plan Requirements.

The practitioner must determine what the comprehensive plan[5] designation is for the subject property, and whether there are any development requirements contained in the plan that are not found in the zone code.

1. Be careful of definitions in both zone code and comprehensive plan. Definitions in the plan and code may not be as clear as they appear on paper. Also, the definitions contained the zone code may not be the same as those contained in the comprehensive plan.

> **Example.** The Marion County Rural Zoning Ordinance allows lot-of-record dwellings within the Special Agriculture Area. One of the criterion for determining a lot-of-record is found in section 137.030 (D) (1), which requires that the site be lawfully created and acquired by the present owner. Additionally, section 137.030 (D) (2) requires that the tract on which the dwelling will be sited does not include a dwelling. Section 137.130 (E) specifically defines tract as "one or more contiguous lots or parcels under the same ownership." The code also provides a specific definition for "owner" as used in section 137.030 (D), which includes, wife, husband, daughter, son-in-law, etc. However, this broad definition does not apply to the term ownership as used in section 137.130 (E). Thus, a son's ownership of property may qualify for a lot-of-record dwelling even though the contiguous property is also within family ownership. *See Craven v. Jackson County,* 20 Or LUBA 125 (1995) *aff'd* 135 Or App 250 (1995).

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[5]OAR 660-18-010 defines comprehensive plan as a "generalized, coordinated land use map and policy statement of the governing body of a local government that interrelates all functional and natural systems and activities relating to the use of lands, including, but not limited to, sewer and water systems, transportation systems, educational facilities, recreational facilities, and natural resources and air and water quality management programs."

For comprehensive plan provisions to be considered approval standards, the language must be very direct and mandatory in its terms. Words like "shall" are required, rather than "should" which is considered non-mandatory. To complicate matters further, ORS 197.646(1) provides that local governments are to incorporate comprehensive plan language it desires to be mandatory into its zone code. However, very few jurisdictions have done so to date, leaving the practitioner in somewhat of a quandary as to how to disclaim what the approval standards for any particular use might be. Because of the nature of the due diligence assignment, practitioners should err on the side of including plan provisions that appear to meet the approval standard test. *But see, Holland v. City of Cannon Beach*, 142 Or App 5, 960 P2d 562 (1996).

2. Review background and inventory reports. These are the reports and studies that support the comprehensive plan. They often contain good information regarding utility, transportation and development capabilities and plans of the city or county.

3. Review plan elements. The comprehensive plan contains the city's or county's complete development plan. Often a local government will have companion documents to the plan which can be very important. These separate elements, referred to generally as "master plans" may cover specific topics (such as streets, utilities, etc.), or may cover identified geographical areas (West Salem, North Eugene, South Albany, Urban Reserve Area, Downtown Business Area, Waterfront, Old Town, etc.).

These "master plans" contain much of the nuts and bolts of developing a parcel and should be consulted for a thorough understanding of what improvements are in place or expected for the parcel under consideration.

D. Subdivision/Partitioning/Lot Line Adjustment Requirements.

How a parcel was created is a subject that the practitioner must explore. Most commercial parcels have been the subject of some prior land use action. A parcel can be legally created by a subdivision process, or a partitioning process. The exact boundaries of the tract may also have been moved by virtue of a lot line adjustment process. Once it is determined how a tract was created, a review of local government file on the approval is necessary to see if there are continuing conditions of approval, and to make sure that the process was valid and is not currently attackable.

Although most commercial development lies inside the Urban Growth Boundary (UGB), and is therefore controlled by the urban codes, be particularly mindful of the extraordinary limitations contained in ORS Chapter 215 and the applicable county zone code for any development to be sited in a rural setting.

Definitionally, it is important to understand the distinction in terms and process for creating legal lots. A "subdivision" is the division of land into more than three (3) parcels in one year. *See* ORS 92.010(7) and (16). This is the most arduous of land divisions from the standpoint of the land use process and requires an extensive application packet, notification of neighboring property owners and public hearings.

To "partition" land means "to divide land into two or three parcels of land within a calendar year." ORS 92.010(7). In many jurisdictions, this process can be achieved through an administrative

review, i.e., the decision is made by the planning director without a public hearing.

A "lot line adjustment" or property line adjustment is "the relocation of a common property line between two abutting properties." ORS 92.010(11). A lot line adjustment does not result in the creation of a new parcel, only the changing of the boundaries of existing adjoining parcels. This is the easiest adjustment to accomplish and generally requires only an administrative review.

There is a relatively new provision to create parcels. The 1995 legislature enacted a set of rules entitled "expedited land division" that was intended to make land divisions easier. This is a fourth means of dividing land, but it applies exclusively to residential property and thus, is has limited application to this topic. However, it may apply to allow commercial residential units such as apartments, duplexes, and for residential housing developers - it would be a consideration. *See* ORS 197.360 et seq.

E. Street Access Standards.

Accessing the property involves a number of different issues including contacting the appropriate agency or local government, meeting driveway standards and obtaining the correct permits.

> **CAVEAT:** Present and anticipated congestion problems in Oregon have created an atmosphere unfriendly to providing additional access to major streets and state highways. The practitioner should look to the rules and regulations and carefully determine the likelihood of access to the site for both present and anticipated developments.

1. Controlling Jurisdiction. Determine whether the access street is a city, county, state or federal road. This determination will dictate which authority has jurisdiction over the road for issuing access permits. Do not rely upon normal jurisdictional boundaries, as it is common to have a state highway inside a city.

2. Status of Permit. If an access permit has been issued to the property, it must be reviewed to determine whether it is transferrable with the property; whether any conditions must be met for the continuation of the permit; whether it terminates upon transfer of the property; or whether it has an expiration date.

CAVEAT: A right of way to a highway reserved in a deed does not automatically allow for construction and use of the right of access. ORS 374.305 requires a permit from either the Oregon Department of Transportation, with respect to access to state highways, or the county, with respect to access to county roads, prior to construction of a right of access. Issuance of such construction permits are based on rules promulgated pursuant to ORS 374. As such, a right to construct a driveway could feasibly be denied even though there exists a right of access.

3. Scope of permit. The practitioner should determine whether the permit allows only a restricted number of uses. ORS 374.310 (2) provides that permits shall include "provisions, terms, and conditions as in the best judgment of the granting authority * * * *" The practitioner should carefully review these conditions as they present one more set of obligations which must be disclosed in the due diligence investigation.

4. Know where to find review standards. If the road access sought is to a state highway, the Oregon Administrative Rules, promulgated pursuant to ORS Chapter 374, provide the review standards for the grant of a road approach permit. If the access sought is to a county or city road then look to that jurisdiction to determine whether it has promulgated any additional regulations pursuant to ORS Chapter 374.

5. Maintenance of the road. Who maintains the access road? The local government? Property owner? A road district? Road maintenance obligations must be disclosed as a part of the due diligence investigation.

6. Are there special setbacks from the centerline? If so, the effective building envelope is reduced and drive-by visibility may be reduced. See the above discussion on special street setbacks.

7. Street area designation. What is the access road designated as in the street plan? Normally, streets are classified as local, collector or arterials depending upon the traffic load the street is designed to carry. Each designation is designed to handle different volumes and types of traffic. The designations also provide a clue as to where the local government intends to upgrade and expand its road system.

8. Are any bordering streets limited access streets? Limited access streets are those where there is street frontage but no ability to access it. In these circumstances access rights have either been acquired by the local government (either voluntarily, or by eminent domain), or established by policy as a result of the type and volume of traffic. It is important that such limitations be disclaimed as a part of any due diligence investigation.

F. Is a Site Plan Review Necessary to Construct Improvements?

Every local jurisdiction has some type of "site plan review" process that is used to determine compliance with zone code criteria for any new commercial development. If the due diligence

investigation involves inquiry into how a tract can be developed or redeveloped, the site plan review process should be identified and disclaimed.

Some jurisdictions require a site plan, complete with floor plans, elevations, parking lot description, utility locations and specifications, sign plans and traffic impact reports. Others require nothing more than a sketched drawing of the proposed structure. Most processes are administrative in scope, however notice of decision will have to be published within the notification area and may result in an appeal.

1. Site plan required. If a site plan is required, determine what should be included in the plan and application, what the filing fees are for the application, whether the process is an administrative review or entails a public hearing and what is the appeal process. Appeals by opponents can tie up a site plan application for a considerable length of time and such a prospect should be considered and disclaimed.

2. Are adjustments or variances needed? When evaluating the site plan criteria, it may become necessary to consider adjustments or variances. Examples include reducing the minimum lot size, reducing the number of off-street parking spaces, increasing the maximum height limits, etc. Variances or adjustments are often difficult to achieve, so the need for such requests must be carefully weighed.

G. Sign Code.

Nearly every jurisdiction contains sign ordinances regulating the size, location and appearance of commercial signs. The practitioner must be mindful of the applicable sign code, and disclaim it.

1. Size restrictions. Size restrictions on signs include the overall height of the sign, the square footage of the sign, and height of the lettering on the sign itself.

2. Locational restrictions. Placement of signs, whether on the building or near the street is often restricted.

3. Lighting restrictions. How a sign is lighted (front or back lit) and when it is lighted are almost always controlled by sign codes.

4. Permitting and regulations. Many cities and counties prohibit construction and placement of signage until a sign permit application has been submitted and a permit issued. Often, a site plan application requires submission of the application signage information. Of particular interest in the sign code, and its administration by local planning departments, are multi-user signs, i.e., signs for shopping centers, strip malls or other buildings where there are multiple individual, separate users.

H. Private Restrictions on Use and Development.

Private restrictions on the use of land take many forms, including covenants, conditions and restrictions, deed restrictions, easements, leases and contracts. These instruments can restrict the use of the property or the type or extent of structures to be built on the land.

Historically, courts have favored the free use and enjoyment of real property, and any restrictions on use must be clear and unambiguous. *Crawford v. Senosky*, 128 Or 229, 232, 274 P 306 (1929). Private restrictions on the use of land will be upheld, but only if such restrictions are unambiguous and were clearly intended to bind the property at issue. *See, e.g., Bruni v. Thacker*, 120 Or App 560, 853 P2d 307 (1993).

A practitioner performing a due diligence investigation must review any such private encumbrance and disclaim its validity and existence.

IV. FUTURE FACTORS

A complete due diligence investigation must include some assessment of what the future might hold for the subject property. This will be an extremely important aspect of the investigation if it is being performed for a prospective purchaser or developer, or for a lender that is considering its options once the property is reacquired through foreclosure. The following are issues that should be explored in order to ascertain the future development options available to the subject property. It must be noted that the land use crystal ball is notoriously clouded, and any prediction for the future must be fully disclaimed, as the laws change very rapidly.

A. Is the Property Capable of Being Subdivided or Partitioned?

The practitioner must review the local codes for subdivision and partitioning, as well as for expedited land divisions to determine if the property can be divided. For example, a 10,000 square foot parcel could not be divided into two 5,000 square foot parcels if the minimum lot size in the zone is 6,000 square feet.

In addition, the practitioner should inquire with the local planning division if there are changes to the plan, zone code, or other ordinances either in the works or contemplated that would have a material affect on the subject property. Any and all communication with local government staff should be documented in writing by letter, progress note or memo which is confirmed to the local government.

B. Will a Zone Change And/Or Comprehensive Plan Amendment Be Necessary to Accommodate Expansion on the Site?

This consideration applies primarily if the current use is allowed only because of its grandfather status, rather than through compliance with existing rules. However, there may be other circumstances that would require land use changes prior to expansion on-site, and certainly if additional land must be acquired to allow for expansion, the possibility of land use changes becomes much more important.

C. What Development, Plan or Code Changes in and Around the Property Are Currently in Progress? Are They Legislative or Quasi-Judicial?

Local governments sometimes act legislatively to change areas from one type of use to another. This is particularly true in urban renewal projects, and in areas held in transition zones, such as lands between the UGB and the city limits. The practitioner must be cognizant of such changes if proposed, but not yet through the land use process at the time of the due diligence investigation. These changes are often jurisdiction wide, and notice of action is done by publication rather than by individual mailed notice. Because of this, it is important not to rely only on statements by the property owner, but in addition to inquire of the local government.

Quasi-judicial changes may be under way by another property owner, and may affect the way in which the subject property is treated in the future. It is not unusual for a troubled parcel, especially non-conforming use tracts, to engage in creative ordinance revisions to allow their use, or correct a perceived problem with the code. While these changes may satisfy that property, its affects throughout the jurisdiction could be much different, and the practitioner must be wary of such prospects and disclaim them.

D. Do the Long-Range Planning Documents Contemplate Changes in the Area Around the Property?

To avoid problems such as that outlined above, the practitioner should review area comprehensive plans and intergovernmental agreements to determine the potential for future inconsistent zone changes on adjacent properties.

This is especially true in transition areas - most of which lie between the UGB and the city limits, and in urban renewal areas.

E. Are There Proposed Street Vacations in the Vicinity That Will Impact the Property?

Street vacations are a commonly used tool by land owners and local governments to control the flow of traffic and potential redevelopment of an area. The practitioner should do both a map and visual inspection of the subject property and surrounding areas to see if there is a need for a street vacation, or whether one is in progress. Street vacations, parking changes, speed limit changes, directional changes and signalization changes are all generally required to be posted in the affected area. A practitioner who visits the site and surroundings will easily identify the traffic pattern in the area and will see the governmental notice signs indicating the proposed change.[6]

V. ENVIRONMENTAL FACTORS

A very important aspect to any land use due diligence investigation is a review of the potential environmental hazards that may be present on the site. This issue is so important as to warrant an entire separate outline. See the materials presented by Mr. Thomas Lindley for that in-

[6]Almost all types of land use actions will require a similar type of posting. A site visit will reveal not only access and street changes, but may also identify other proposed land use changes that might otherwise affect the subject property.

depth analysis.

VI. FINANCIAL FACTORS

Increasingly, local governments are requiring property owners and developers to bear the burden of infrastructure growth. This takes many forms, but usually appears as surcharges to development permits. The most common, System Development Charges (SDCs) and Traffic Impact Fees (TIFs) will be addressed here. Be aware that specific jurisdictions might have a number of different fees and charges that should be reviewed and disclaimed during the due diligence investigation.

A. System Development Charges.

Have services, utilities and/or roads been extended to the property in the last ten years? Have there been any land use permits approved for the tract in the last five to seven years? If the answer to either of these questions is yes, there is a possibility that an SDC or TIF has been imposed on the land.

The importance of this element lies in the methodology of payment. If the fee is paid up front as a part of the permitting process, no liens attach to the land and no encumbrance follows it from one owner to the next. Therefore, if the preliminary investigation indicates payment in full, the inquiry stops.

However, if the fee has not been paid in full the other issues immediately arise. In most cases, payment agreements will be recorded, so that the terms and conditions can be readily determined from a title report. That is not always the case though, so a practitioner must again approach the local government to receive a copy of the agreement and to determine the status of payments.

Once the record of payments has been received from the local government, that should be compared to the record of payments supplied by the property owner to see if they are in agreement. If not, that discrepancy must be disclosed in the due diligence investigation.

If the payment agreement is in default, the extent and nature of the remedies must be explored and disclaimed as well.

If the agreement was paid in full at the time of permitting, or is not in arrears and is otherwise complied with, the practitioner should consider the possibility that such charges may in fact be imposed on the property at some time in the future. Although predicting the future is difficult, a quick conversation with local government staff (planning, public works and general services all should be consulted) will at least identify if any such proposal is now, or recently has been a topic of discussion before the local governing body.

VII. REPRESENTATIONAL FACTORS

In performing any due diligence investigation, a practitioner will encounter a number of different people, each representing a different (and sometimes competing) interest. It is important to sort out each of these players and identify their role and representational status.

A. Governmental Employees.

There are a number of government employees involved in the assessment of the land use characteristics of the subject property. The following listed staff each represent the governmental agency they work for. That may or may not mean they are looking out after the best interests of any one particular tract, therefore it is important to qualify them and to document information received from them.

1. Planning and building departments. These staffers are the mainstay of any land use lawyer. Our first line of information comes from these individuals. Within these departments are kept the historical records of land use planning on the site and in the area. Permit files are kept here, and applied for here. Most planners can provide a historical perspective on an area, and sometimes even a particular piece of property if it has been the subject of a previous land use action. The location of policies, information on neighbors, rumors of changes all can come from well-placed questions to folks at the counter of these departments.

2. Legal counsel. For information about SDCs, annexation agreements and other contracts and legal matters, the best place to go is to the attorney for the local government. Generally it is best to be referred there by another staffer, however if you know that attorney and have dealt with them before it can be cost effective to go directly to the source. Involving legal counsel can also be important in resolving ambiguities in documents (comprehensive plan or zone code), and in educating the front line staff on issues they may not be familiar with.

3. Public Works. As a general rule, the Public Works Department controls the financial participation agreements. Most Public Works Departments will be in charge of water, sanitation and streets, and therefore will have intimate knowledge of system improvement needs and agreements to cover those improvements.

4. Tax Assessor. In most circumstances, the Tax Assessor is the repository of the county's "official" maps. In addition, the Assessor handles property segregations, identification of tax accounts, status of payment of real property taxes, and can provide a printout of the penalties involved if resource land is disqualified from its deferral program.

B. Realtor.

In the event the due diligence investigation is precipitated by a property sale, both the seller and buyer may be represented by realtors. Practitioners should be cautious of the realtor and the information presented by the realtor. It is always best to perform an independent investigation, and to verify any statements made by a realtor, or any documents provided by a realtor.

Realtors, though well intentioned in most cases, do not understand the complexities of the land use legal system. What to them may seem simple and straightforward, may in reality be a trap

for the due diligence practitioner.

Realtors also bear a certain representational loyalty to their clients. If a practitioner is representing a buyer for example, care should be given to what is said to or obtained from a realtor who is working for the seller. There can be no confidences between the practitioner and the opposing party's realtor, as that realtor is obligated to communicate everything back to his client.

C. Planning Consultant.

Planning Consultants are becoming more and more a useful tool to the due diligence investigation. While always a mainstay in development and permitting type activities, especially in larger projects, it is only recently that practitioners have begun using Planning Consultants to assist in sorting out the complexities and nuances of local codes. Where a practitioner is not familiar with the provisions of the applicable jurisdiction's land use documents, bringing in a local Planning Consultant can be of great assistance. The Planning Consultant can address local practice, advise where to find information, can best identify who to talk to in the local government, can inform as to local history, speak to potential future trends and activities, and perhaps might even have some unique knowledge about the subject property.

Like attorneys, Planning Consultants are hired and owe their loyalties to the client. However, unlike attorneys, they are not licensed or governed by any state agency. There are no formal rules of conduct, and confidences do not legally exist. Most Planning Consultants are very honorable, however the practitioner must remain careful to protect the legal rights of the client when dealing with any lay professional.

D. Engineer/Architect.

Most due diligence investigations will involve questions regarding engineering or architecture. Engineering comes to play when dealing with flood plains, wetlands, limited groundwater areas, geologic hazard areas, etc, and architects must be involved in detailed site planning, determination of building envelopes, sufficiency of parking, layout and design type issues.

In most cases, these professionals will already be employed by the client. In the event they are not, and the due diligence investigation reveals questions or issues in these areas, it is imperative that the practitioner include them in the process. In cases where the client has limited resources, and

does not authorize outside expert assistance, the due diligence investigation should carefully note this limitation and the potential affect it might have on the information presented.

VIII. MISCELLANEOUS FACTORS

There are a few general topics that are not easily grouped with the normal factors addressed above. The following miscellaneous subjects will not be involved in every investigation, but if applicable, they will be of the utmost importance.

A. Urban vs. Rural Considerations.

Whether a land use is "rural" or "urban" is a question that has been of importance for the last several years in lands primarily under county jurisdiction. Land under city jurisdiction is by definition already considered "urban".

Where there are lands outside of a UGB - of commercial nature - the question will always arise. It is an important question as well, since the definition will dictate the viability of the land for the use. If a use is determined to be "urban" it belongs inside the UGB, and will generally not be allowed outside of a UGB. Therefore with few exceptions, a "rural" type use will be the only one allowed in the county.

Sorting out whether a use is "urban" or "rural" can be a daunting task. There are a few tools available to help, but truly this is an area where the "beauty is in the eye of the beholder". That is to say that the definitions are so loose that the decision maker is entitled to great latitude in what uses will be allowed. On the one hand it is certain that a shopping mall is "urban" in nature, and that a roadside produce stand is "rural", but on the other hand everything in between is subject to interpretation. By way of example, a farm equipment machine shop has been considered "urban" and allowable only inside the UGB, while an amusement park has been considered "rural" and allowed outside the UGB.

In the event such an issue arises during the due diligence investigation the wise practitioner will consult Goal 14 (Urbanization), OAR ch. 660, and *1000 Friends of Oregon v. LCDC (Curry Co.)*, 301 Or 447, 724 P2d 268 (1986) and its progeny.

B. Case Law Interpretations.

Significant features of land use law will not be found in state statutes, the local comprehensive plan or zone code. It is extremely important to any due diligence investigation for the practitioner to check the case law on any topic of concern in the investigation.

1. LUBA. The Oregon Land Use Board of Appeals is the first level of appeal of any land use case in this state, therefore it has a wealth of information on how rules, regulations and policies are being interpreted. Although it can be difficult obtaining current decisions, LUBA is only 17 years old and the entire body of law is contained in 32 volumes. There are a number of on-line and CD Rom services that carry LUBA opinions, and these should be consulted. The practitioner should be aware that the legislature often is called upon to "fix" glitches in the law

found by LUBA, so that older opinions of LUBA should be carefully analyzed for current application.

2. Oregon Court of Appeals. Appeals of LUBA decisions are made directly to the Oregon Court of Appeals. When reviewing any LUBA decision, the careful practitioner must ensure that the Court of Appeals has not modified or overturned that decision.

3. Oregon Supreme Court. Appeals of land use decisions of the Court of Appeals are made directly to the Oregon Supreme Court. As with any other case, the Supreme Court will take only the very few important cases. It is not unusual for there to be only a handful of land use cases decided by this court each year.

4. U.S. Supreme Court. It has been the practice of the U.S. Supreme Court to hand down one land use related case each year. In the past several years these cases have all been "takings" type cases, with the most important being Oregon's own *Dolan v. City of Tigard*, 512 US ___, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).

C. Local Interpretations and Policies.

Because each local jurisdiction has its own land use implementing ordinances, and they are all different from each other, it is imperative to investigate these local laws in the due diligence process.

Once the provisions applicable to your investigation have been identified, the practitioner must ascertain if these provisions are the subject of any local interpretation,[7] or LUBA/court decision, before making the final determination. Even where a practitioner has found no local nuance, the due diligence investigation may still warrant a disclaimer that such might exist, or be created in the future to alter the opinion being rendered.

IX. PRACTITIONER'S TOOLBOX

To thoroughly perform a due diligence investigation on a commercial tract, the practitioner must have on hand, or access to, significantly diverse background information and rules. It is not critical that the practitioner have this information in house, but simply that it is known where to go to find the information.

It is good practice to create a backup file of information used or garnered during the course of the due diligence investigation. Not only does this provide assistance to the practitioner should problems or questions arise later about the quality or scope of the investigation, but it also can be

[7]Local code interpretations are sometimes formalized in a policy book, but more often than not, these interpretations have been done on a case by case basis and verbally passed on by staff and decision makers.

neatly packaged as an appendix to the due diligence report given to the client. Most of the information obtained during this process is extraordinarily useful to the client, and much goodwill can be obtained by giving copies of all the base data to them.

Care must always be used to ensure that the data used, or the code provisions referred to, are up to date and currently valid. It seems that local governments are constantly changing even very small sections of their zone code. The legislature changes the law every two years, and LUBA and the court system are monthly providing new ways to review language. A due diligence investigation that relies on out-dated law is doomed from the start.

In our office, we refer to the resource material we use as the "tools" of our trade, and to perform any due diligence investigation, the wise practitioner's "toolbox" should include, at a minimum, access to the following materials:

1. A copy of the text of the applicable zone code, including the subdivision and partitioning ordinance and sign code and any other specialty codes that are applicable;

2. A copy of the text of the applicable comprehensive plan, including available background and inventory reports, periodic review reports, master plans and any other specialty plans that are applicable;

3. If property is inside the UGB, but outside the city limits, a copy of the intergovernmental agreement between the applicable county and city;

4. An aerial photo of the subject property and sufficient surrounding area to adequately address any due diligence issues[8];

5. Full readable copy of the last deed of record, and if necessary a complete title report with supporting documents for each exception;

6. Applicable assessor's map covering the subject property, and sufficient surrounding lands to properly perform the due diligence investigation[9];

7. Tax account information, including the land type designation and identification of any deferral program the subject property might be on;

8. Zone and comprehensive plan map for the area;

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[8]Many local governments now have aerial bluelines available for under $5. In some jurisdictions, the practitioner may have topographical lines superimposed on the aerial, as well as utility locations and a wealth of other information, generally at no extra cost. If more clarity in the photo is desired, excellent scaled aerial photography, made to order, can be obtained from WAC, 520 Conger St., Eugene, Oregon, 97402-2795, (800) 845-8088.

[9]In resource zones (farm and timber) the local zone code will generally specify an impact area. That area of concern can be from 500 feet to up to one mile. Mapping to determine parcel sizing and relationships within that impact area is critical to the proper evaluation of the case.

9. Copies of any planning department files for previous land use actions on the subject property;

10. Copy of Soil Conservation Survey map if the tract is rural, to identify soil types, classification, timber capability rating and characteristics;

11. Copy of tax assessor's file on the subject property;

12. Applicable state statutes and administrative rules;

13. Camera - to take lots of photos of the subject property at the time you do the site visit.

Armed with these tools, an abundance of patience and a clear mind, the land use due diligence investigation can be properly completed.