Zoning Review in Commercial Real Estate Financing Transactions (FL)

A Practical Guidance® Practice Note by Steven J. Wernick, Wernick & Co, PLLC

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This practice note discusses zoning review for commercial real estate lenders in Florida. This note provides an overview of zoning laws in Florida, details the scope and key components of the lender's zoning due diligence, and offers guidance for the lender and its attorney on conducting zoning review in Florida.

For a general discussion of zoning for real estate attorneys, see Planning and Zoning. For more on commercial real estate financing transactions in Florida, see Commercial Real Estate Acquisition Loan Resource Kit (FL), Commercial Real Estate Financing Transactions (FL), and Commercial Real Estate Financing (FL).

Introduction

The Sunshine State has long been associated with real estate investment and development. Starting with the extension of the railroad by Henry Flagler around the turn of the 20th century and picking up significantly following World War II, Florida has experienced tremendous growth in its population over the years from international and domestic migration seeking to take advantage of the warm climate, waterfront property, and favorable tax structure.

Florida's significant population growth has led to a continued increase in the number, size, and complexity of commercial real estate transactions in the state. With the proliferation of municipal governments and sprawling growth into uncharted territory throughout the 20th century, there is now a myriad of local, regional, and state controls in Florida on the use and development of land. As a result, zoning review for commercial real estate lenders has become an increasingly important and complex component of commercial real estate transactions in Florida.

The term "zoning" is generally synonymous with the term "land development regulations," meaning ordinances that governing bodies enact to establish controls over the use and improvement of real property. This note uses the term zoning broadly in many cases to refer to land use controls and regulations beyond just those classifying land into different zones, including growth management tools, aesthetic controls, and subdivision regulations, which may vary from one local government jurisdiction to another within the state of Florida.

Context of Lender Diligence

Generally, there are four primary contexts in which commercial real estate lenders conduct zoning review of properties and improvements:

- Acquisition financing
- Construction financing
- Refinancing
- Workout and foreclosure

Certain considerations may be more important than others depending on the context of the loan.

In an acquisition loan, a lender finances a borrower's purchase price and potentially other costs involved in the acquisition, and underwrites the loan based on the current

value of the land and existing site improvements. In these transactions, to minimize any potential risks associated with the asset, the lender should look for a zoning review that provides adequate diligence to confirm that existing uses and structures of the asset are legally conforming and are in compliance with applicable land use and zoning regulations.

With a construction loan, a lender finances improvements contemplated on real property. This may amount to a refinancing of an existing acquisition loan, possibly by a different lender. Zoning review is important as it allows the lender to understand the borrower's ability to deliver on the improvements and the timing, costs, and potential risks associated with obtaining a building permit or a certificate of occupancy.

A lender may mitigate its risk by conditioning construction loan advances on the borrower's receipt of a building permit for the proposed improvements. In other cases, where the borrower intends to draw down on the loan proceeds prior to obtaining a building permit, entitlement risk will be a major focus of the lender. It is critical that the lender understands not only the substantive entitlements required for the improvements, but also the process by which the developer must secure land use and zoning approvals as a prerequisite to obtaining building permits and certificates of occupancy and use. Further, the lender must have an understanding of the realistic time frame in the jurisdiction and associated entitlement risk.

Finally, zoning review is important for lenders considering pre-foreclosure workouts or looking to pursue a foreclosure or deed in lieu of foreclosure.

For more information on a commercial real estate lender's due diligence in a Florida, see Commercial Real Estate Financing Transactions (FL). For more information on due diligence generally, see Acquisition Loan Due Diligence Checklist.

Scope of Diligence in Zoning Review

The scope of diligence in a zoning review often depends on the type of property involved and the overarching land use and zoning issues affecting the property. It may also depend on the particular lender's risk profile.

The lender might narrowly focus its zoning review on existing approvals to determine if the proposed commercial use is permitted in the zoning district for the property. Conversely, the lender might undertake a comprehensive analysis of whether the existing improvements and any proposed improvements comply with the current zoning and other land development regulation standards. Documents that the lender may review include recorded deeds, easements, declarations, restrictive covenants, surveys, and subdivision maps, as well as municipal ordinances and resolutions, which may or may not be recorded in the public records. Collectively, these documents tell the story of a particular property, including its past and present uses and limitations on future use.

In some cases, the lender asks the borrower or the borrower's land use counsel to provide the documents and legal analysis to satisfy the lender's zoning review. In other cases, it is the lender conducting independent due diligence. Either way, it is important for the lender to articulate the goals of the due diligence and the type of deliverable work product that it needs to move forward with the financing.

Sources of Broad Local Zoning Authority in Florida

Zoning as a regulatory concept in the United States goes back to the early 1920s. As the public health movement and modernization of cities took hold, communities increasingly wished to regulate property and the mix of land uses to address various perceived urban ills. In 1926, the U.S. Supreme Court expressly authorized zoning under the 14th Amendment police powers bestowed upon the states. Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

Florida's original zoning-enabling legislation, adopted in 1939, delegated authority to local governments to regulate the use and development of land through local zoning ordinances. See 1939 Fla. Laws ch. 19539; Gulf & Eastern Development Corp. v. City of Fort Lauderdale, 354 So. 2d 57 (Fla. 1978). Zoning codes imposing sets of standards and restrictions on uses and structures are legislative in nature. State v. City of Jacksonville, 101 Fla. 1241, 133 So. 114 (1931).

As the state's population grew during the late 20th century era of the interstate highway system and sprawl development patterns, there was a proliferation of municipalities in metropolitan areas. In Miami-Dade County alone, there are today 35 different municipalities, each with its own comprehensive plan, zoning code, planning determinations, and zoning interpretations, making zoning review a complicated but critical piece of due diligence within commercial real estate financing transactions.

Starting in the 1970s, as its population expanded outward through suburban tract development, Florida developed a formal system of growth management (see Growth Management Act (1985), codified at Fla. Stat. Ann. §

163.2514 et seq. and Fla. Stat. Ann. § 380.05). To establish relatively uniform mandates across the state, the Growth Management Act required that all local governments adopt a comprehensive plan and standardized the elements that each comprehensive plan must include. It also created a system for regulating large regional development schemes—called Developments of Regional Impact (DRIs)—involving a coordinated review by regional planning councils, the state land planning agency, and the applicable local government to monitor compliance with performance standards and phased development matrixes.

After the financial crisis of 2008 and the collapse of the housing market that followed, Florida dramatically scaled back state-mandated land use planning and growth management tools. In 2011, the Florida legislature adopted the Community Planning Act (Fla. Stat. Ann. § 163.3164 et seq.), returning more control over land use planning and zoning to local governments. In part, the Community Planning Act eliminated the requirement for DRIs in Dense Urban Land Areas (DULAs)—larger cities and metropolitan statistical areas, such as Miami-Dade County, Broward County, Palm Beach County, Hillsborough County, and Jacksonville-Duval County. It also eliminated certain concurrency reviews that would otherwise require public services and facilities keep up with the population's needs as it grows.

In DULAs, zoning review for commercial real estate is now largely dependent on local regulations; there are few state and regional policies with teeth covering future redevelopment of properties within these jurisdictions. While DRIs are no longer required within DULAs, however, lenders should be aware of those that already exist as they may have significant implications on development capacity and impact fees for redevelopment or phased development on a property.

In greenfield sites located in more rural areas of the state of Florida, there may still be state-driven regulations affecting total development capacity and land use controls governing a particular site.

Given the variation in both local government frameworks and methods of calculating and assessing the intensity and density of uses permitted on private properties, lenders should conduct zoning review with care and apply the best practices set forth below.

Additional Legal Principles

Courts in Florida afford wide deference to the local government in making zoning decisions, applying a fairly debatable or rational basis standard to local legislative actions setting or amending policies to protect health, safety, and welfare. Martin County v. Yusem, 690 So. 2d 1288 (1997).

Although zoning map changes applied to particular properties are quasi-judicial in nature, courts still give general deference to the decision-making body as long as it can show that there was substantial competent evidence to uphold its decision. See Bd. of Cty. Comm'rs v. Snyder, 627 So. 2d 469 (Fla. 1993).

Zoning decisions by way of development orders (including site plan decisions or rezoning decisions) must be consistent with the adopted comprehensive plan of the jurisdiction. See Fla. Stat. Ann. § 163.3201 et seq.; Pinecrest Lakes, Inc. v. Shidel, 795 So. 2d 191 (Fla. 1st DCA 2001), rev denied, 821 So. 2d 300 (Fla. 2002) (prohibiting approval of a development order that is found inconsistent with an adopted comprehensive plan).

It is widely established under common law throughout the United States and in Florida that a property owner acquires no vested rights in the continued enjoyment of an existing zoning classification. See The Law of Zoning and Planning § 50.03(3); American Law of Zoning § 606. In other words, there is no protected right to be free from future land use regulations. New Port Largo, Inc. v. Monroe County, 95 F.3d 1084 (11th Circ. Ct. 1996), cert. denied, 521 U.S. 1121 (1997).

As a result, a proposed use of the property must follow on the actual issuance of a certificate of occupancy, certificate of use, building permit, or development order (i.e., a site plan approval or conditional use permit). An exception to this rule may arise when a property owner and the local government enter into a valid recorded development agreement under Fla. Stat. Ann. § 163.3164 et seq., or if a DRI in existence covering the subject property contains a phased development order explicitly providing for permitted uses or intensities of uses that would otherwise no longer be permitted.

Florida law does not protect a building permit or development order issued in error. This is important to remember when conducting zoning due diligence. Lenders may be inclined to rely solely on evidence of written authorization from the municipality's building or zoning officials. However, if a permit was issued in error because of a mistake or false information submitted to induce its issuance, the permit cannot be relied upon, and may be revoked at any time upon discovery of the error. See Florida Building Code Section 104.2; Pinecrest Lakes, Inc. v. Shidel, 795 So. 2d 191 (Fla. 1st DCA 2001). Lenders would therefore be wise to conduct independent zoning due diligence to confirm that the proposed use and existing or proposed improvements are in fact consistent with the applicable land use and zoning regulations.

Key Checklist Items in Lender Due Diligence

Introduction to Due Diligence

Prior to closing on a commercial loan transaction for real estate in Florida, most institutional lenders will have a standard checklist of items that must be addressed. While using a standard checklist for all transactions may seem efficient, given the variation in terminology among local governments and the lack of consistency in public recordkeeping and staff reports, lenders should consult with an attorney specializing in this practice area to develop a checklist that is tailored to the particular loan and jurisdiction.

Generally, the lender's zoning review should assess the following:

- What is the current zoning classification of the property? What is the future land use map (FLUM) designation assigned to the property? What are the corresponding permitted uses, density, and intensity and other development standards affecting the property?
- Is the zoning classification appropriate for the existing and/or intended use of the property?
- Is a special use permit or conditional use permit necessary? If so, what are the stated criteria for review of an application? Is the special permit subject to administrative approval or a public hearing approval process?
- Will existing uses and structures remain for the foreseeable future and are they legally conforming or nonconforming? Are there any local laws affecting the time period for abating nonconforming uses or structures or bringing them into compliance with current codes?
- What are the relevant conditions of approval applicable to existing uses and improvements on the property? Have any conditions of approval not yet been satisfied and how might that impact the continued viability of the property?
- If a zoning change is needed for the proposed use and development plans for the property, what is the procedure for securing the necessary use and/or development approvals in the applicable jurisdiction? In Florida, a zoning map change (or rezoning) involves a quasi-judicial hearing and requires adoption by ordinance by the elected city commission after consideration at no fewer than two public meetings. See Board of County Comm'rs v. Snyder, 627 So. 2d 469 (Fla. 1993). Some municipalities and counties in Florida have threshold criteria setting a maximum size of a property to be rezoned. See City of Miami, Miami 21 Zoning Code, Art 7.1.2.8.
- Does the local government have to consider a FLUM? Is the FLUM amendment a small-scale amendment involving fewer than 10 acres of property, and will it proceed through Florida's expedited review process? See Fla. Stat. Ann. § 163.3184.

In order to more fully understand the zoning regulations and entitlements authorized for a property, a lender must consider additional detailed questions as part of its zoning review. The sections below provide a substantive overview of many of the relevant areas to examine when conducting a zoning review on property that is the subject of a commercial loan transaction.

Applicable Zoning Jurisdiction

Zoning review should first identify the local government with jurisdiction over the property. Under state law, if the property is located within a municipality incorporated in the state of Florida, that municipality has zoning jurisdiction over the property. If the property is located within an unincorporated area of a county in the state of Florida, then the county has zoning jurisdiction.

The Community Planning Act provides, as a general rule, that a municipality has jurisdiction and a responsibility for land use planning over all areas within its municipal boundaries. In certain cases, however, where the municipality and county enter into a formal agreement, municipal jurisdiction may cover unincorporated areas for planning purposes and county jurisdiction may cover municipal lands. See Fla. Stat. Ann. § 163.3171.

Note that a lender should not rely on the county's property appraiser website for zoning information; third parties or borrowers may identify land use information that is relevant for property appraisal and ad valorem taxation purposes, but not for permitted uses or other land development regulations.

Permissible Uses

Whether the loan is intended for acquisition or refinancing of an existing asset, or for construction of a new improvement, it is always important to have a firm grasp on the legality of the current use of the property. This use might be a single commercial use, office use, industrial use, or a mix of uses on-site.

The question for the lender's due diligence to answer is whether the current zoning regulations of the municipal or county jurisdiction permit the exact use, as disclosed by the borrower, and, if they do, what are the restrictions or caveats.

There are three possible answers to the question of whether or not a use is permissible:

- Yes, the use is permissible
- No, the use is not permissible, but it is legally nonconforming

- No, the use is not permissible and there is no evidence of legal establishment of use

For uses falling into the first two categories above, there should be evidence of legal use from when the use commenced in the form of a certificate of occupancy (available from the city clerk or building department custodian of files) or a certificate of use issued for a specific tenant or use. There may also be a county or municipal business tax receipt of occupational license that should match the certificate of occupancy for the commercial space.

A legal nonconforming use means a use that is no longer permitted under the applicable zoning in effect, but that was legally authorized at the time the use commenced and, therefore, may continue to operate under a certificate of use and business tax receipt.

In most jurisdictions, if a nonconforming use is interrupted or ceases to operate for a certain period of time, it loses its legally protected status. Jurisdictions rarely will allow for the nonconforming use status to be moved or transferred to another site without full compliance with the applicable zoning. Some jurisdictions have passed amendments to their zoning codes that call for the abatement or gradual expiration of nonconforming uses after a stated period of time. See City of Miami, Ordinance No. 13114, as amended, Miami 21, Article 7.2 (establishing a 20-year period from date the use became nonconforming).

State Preemption

The Municipal Home Rule Act (Fla. Stat. Ann. § 166.011 et seq.) delegated home rule powers to municipalities and counties in Florida, except where governments are precluded by law or the state legislature has "occupied the field" through state preemption. See generally Tallahassee Mem'l Reg. Med. Ctr. v. Tallahassee Med. Ctr., 681 So. 2d 826 (Fla. 1st DCA 1996).

There are various examples of state preemption in Florida, which may cause significant variation among properties in land use and zoning review for a commercial real estate lender. See Fla. Stat. Ann. § 723.001 et seq. (Mobile Home Parks); Fla. Stat. Ann. § 212.03 (Transient Rentals).

FLUM

In Florida, all local governments must have comprehensive plans to guide future land use, housing, transportation, and other areas of developmental policy. Fla. Stat. Ann. § 163.3167(2). See also Fla. Stat. Ann. § 163.3177 (establishing required elements of a comprehensive plan, including a future land use element and map). All zoning decisions must be made in accordance with the comprehensive plan; more specifically, under Fla. Stat. Ann § 163.3184, all local zoning decisions and actions must be consistent with the adopted comprehensive plan.

To this end, lenders should understand the subject property's FLUM classification or category. Typically, the FLUM classification will establish a maximum density (dwelling units per acre) and/or intensity and permitted uses for a subject property. It may also call for minimum use percentages for mixed use categories.

Zoning Map/Classification

The most common regulatory tools in a zoning code are the municipal zoning map and corresponding land development regulations. While the future land use classification typically sets forth broad policies on future use and density parameters, the zoning classification provides for more detailed and specific standards to guide development of the property.

The zoning classification often identifies uses permitted by right or by conditional approval, accessory uses, minimum/maximum height, lot coverage maximums, floor area ratios (FARs), setback requirements, and other bulk standards. For more information, see Intensity and Bulk.

In recent years, certain municipalities have adopted citywide form-based zoning codes (see, e.g., City of Miami, Ordinance No. 13114, as amended) or form-based approaches within special urban districts (see, e.g., City of Delray Beach, Central Business District (CBD), Ord. No. 19-18, as codified at Section 4.4.13, Land Development Regulations; Miami-Dade County, Traditional Neighborhood Developments (TNDs), Miami - Dade County, Florida Code of Ordinances Sec. 33-284.46 et seq.) (applied in practice to designated urban centers greater than 40 acres in size). Their typology or terminology is often different than those of typical Euclidean zoning codes and it may be necessary for the lender to conduct additional due diligence to understand the applicable standards and potential impacts to the subject property.

Overlay Districts

The lender's review should also identify all ancillary zoning district boundaries applicable to the property (e.g., overlay zoning districts, historic districts, floating districts, performance criteria, architectural guidelines, and parking districts). These districts are typically supplemental to an underlying zoning classification and may have a material impact on permitted uses, density, and intensity on the property.

In many jurisdictions today, municipal GIS maps identify these overlay districts together with the underlying zoning district. There are still municipalities, though, that have not digitized all applicable land development regulations and

corresponding maps, or that may not update maps until several months after they are amended. Lenders must be cautious to make sure that they consider local practice when verifying overlay districts.

Density

Density is an objective measurement of the number of people or residential units allowed per unit of land, such as residents or employees per acre (Fla. Stat. Ann. § 163.3164(12) (defining "Density" within the Community Planning Act)) or dwelling units per acre (see, e.g., CITY OF MIAMI, FLORIDA, Ordinance No. 13114, Section 1.2; ST. AUGUSTINE, FLORIDA, Code of Ordinances, Section 28-144). Most jurisdictions have a limit on the density allowed on a certain piece of property based on the property's zoning classification. The lender should be sure to review the specific regulations of the subject jurisdiction, as many municipalities and counties employ different standards of measurement that may change depending on the use.

For example, in the city of Miami, density is measured per acre. The number of units allowed per acre depends, in turn, on the zoning classification of the property. This is an important area to review in order to properly determine the value of property and its potential developmental capacity.

Intensity and Bulk

Intensity is an objective measurement of the extent to which land may be developed or used. It covers, among other things:

- Consumption or use of the space above, on, or below the ground
- Use of or demand on natural resources
- Use of or demand on facilities and services

See Fla. Stat. Ann. § 163.3164(22).

Intensity is usually regulated by maximum and minimum heights, setback requirements, FAR, and lot coverage ratio.

FAR is the ratio, expressed as a decimal number, of the total floor area of a building to the total area of the parcel on which the building is located. Variations of FAR may include or exclude parking or other non-habitable space.

Lot coverage ratio, on the other hand, represents the portion of the lot covered by a structure. Some jurisdictions limit lot coverage by not allowing the structure to cover more than a certain percentage of the lot. Cities with more traditional urban design will usually provide for higher lot coverage and reduced setback requirements, and may even provide a build-to-line or frontage line, which requires a minimum percentage of a building façade to be coterminous with a front setback line. This maximizes pedestrian-friendly environments and activated sidewalks.

These factors can have a significant impact on the developmental capacity of a property and should be part of every lender's review to ensure that the property in its current form is compliant and properly appraised.

Parking

In addition to other regulations that local governments place on a property and its development, parking requirements are typically regulated by unit or by using a minimum ratio per square feet of habitable use space.

Some jurisdictions also allow payment into parking trust funds in lieu of providing parking on-site. Reviewing a jurisdiction's parking requirement is important when identifying potential costs associated with a building and ensuring that the property is in compliance. Parking requirements can cause more costs than expected and may require a developer to provide spaces on-site, lowering the development potential of the property.

Entitlements

Entitlements are legal rights granted through approvals from government agencies that implement—and should be consistent with—underlying land use and zoning regulations. Entitlements can change the use and value of the property. A lender must ensure that an entitlement has been properly vested and identify what conditions apply to that entitlement.

Development approvals granted at public hearings, typically by resolution, or administrative development approvals granted by administrative order or determination, will often incorporate conditions that must be satisfied. Certain conditions—such as a requirement that the developer pay impact fees, or record a unity of title to attach two adjacent platted lots comprising the overall development site—might be general to all projects in the jurisdiction and serve as prerequisites to obtaining a building permit. Other conditions may impose deal-specific obligations that the developer must satisfy either before obtaining a building permit or at a future stage of the project. The lender should evaluate all such conditions closely for compliance.

Conditional Use Permit / Special Exceptions

Conditional use permits or special exceptions are common in zoning districts where there is some sensitivity to mixing of uses. This could range from bars, lounges, and nightclubs to preschools or religious facilities. There are usually both objective and subjective criteria involved in evaluating an application for a conditional use permit or a special exception. Usually the standard of review will come from a municipal code, and it often requires that the applicant demonstrate compatibility with the surrounding neighborhood. Other times the use might be permitted upon meeting certain

objective standards or distance restrictions. If there is a proposed use that requires a conditional use permit and/or special exception, most jurisdictions will require a public hearing. This may create entitlement risk if the nature of the request is one that is sensitive to neighboring property owners or other interest groups.

Variances

A variance is relief from the enforcement of a zoning code when such enforcement would create undue hardship on the property owner. A variance seeker must demonstrate a "unique hardship" in order to qualify for a variance. See Nance v. Town of Indialantic, 419 So. 2d 1041 (Fla. 1982). When unique hardship is created by the owner's own conduct, a variance will not be permitted. See Clarke v. Morgan, 327 So. 2d 769 (Fla. 1975). Local governments have the ability to shape more specific variance criteria or limit the types of permitted variances, such as prohibiting use variances or height variances, but the basic standard under the law remains an undue hardship.

Development Agreements

The state legislature adopted enabling legislation giving local governments the ability to enter into development agreements. See Fla. Stat. Ann. §§ 163.3220–163.3243. The purpose and policy interest behind development agreements is to create more certainty in infrastructure planning and efficiencies that benefit local governments. A development agreement may accompany a large planned development or phased development program. Florida law provides for a period of 30 years for vested rights and requires the development agreement to address the following:

- A legal description of the land subject to the agreement and the names of its legal and equitable owners
- The duration of the agreement
- The development uses permitted on the land, including population densities, and building intensities and height
- A description of public facilities that will service the development, including who will provide such facilities; the date any new facilities, if needed, will be constructed; and a schedule to assure public facilities are available concurrent with the impacts of the development
- A description of any reservation or dedication of land for public purposes
- A description of all local development permits approved or needed to be approved for the development of the land

See Fla. Stat. Ann. § 163.3227.

There may be a good deal of room for negotiation in jurisdictions that want to use the mechanism to create public-private partnerships. As part of its zoning review, the lender should determine whether or not a development agreement exists for a project. Some local jurisdictions provide for a mechanism to request verification for development agreements. If an agreement does exist, the lender may want to request an estoppel letter confirming compliance with all terms and conditions of the agreement as part of its zoning review and diligence.

Certificate of Appropriateness (COA)

It is important to conduct due diligence to confirm whether a subject property is or may qualify as a historic resource or structure under local, state, or federal programs, and/or if the subject property is located within an established historic district. Historic preservation regulations typically will require a COA for any demolition, new construction, or even renovations/additions. This can pose significant challenges in the approval process and in some cases may make it very difficult to demolish a structure or build a new structure without adhering to detailed and subjective criteria. A COA amounts to a site plan approval, or prerequisite to a building permit, for structures within a historic district. There are instances where the COA can be approved administratively; other times, municipal staff has discretion to send an application to present and receive approval from a historic preservation board. Most cities and counties have some level of historic resources. Larger cities typically will regulate and manage historic resources internally through a historic preservation officer; oftentimes, small municipalities and villages will use a county's resources.

Platting/Subdivision

Almost all jurisdictions in Florida require platting of a property prior to issuance of a building permit. Subdividing a property through a new plat or an amended plat may involve multiple agency reviews and dedication of road rights of way or land for utility expansion or service areas.

Lenders should keep this in mind when identifying risks associated with development of rural properties or redevelopment of urban infill properties that may have been platted anticipating a different use.

If an alley was created by plat, local regulations may require that it be vacated by plat. In some jurisdictions, there are exemptions for properties that were developed without being platted or properties with portions of platted lots conveyed prior to a certain date.

Unity of Title or Covenant in Lieu of Unity of Title

When reviewing title to a property, lenders may come across a declaration of unity of title or a declaration of restrictive covenant in lieu of unity of title:

- **Declaration of unity of title.** Municipalities and counties commonly use a unity of title to treat multiple properties as one, often where the properties are already platted, for zoning and permitting purposes. By tying the properties together, the municipality treats the properties as one tract of land for setbacks, density, and more.
- **Declaration of restrictive covenant in lieu of unity of title.** A restrictive covenant in lieu of unity of title is used where the properties are owned by more than one owner, but are regulated as one tract of land for zoning and permitting purposes. This is common in commercial retail shopping centers, or where a residential developer creates multiple condominiums tied to a master condominium with shared amenities, but with each building under separate ownership.

These may appear of record for several reasons. In some cases, the current or prior owner may have recorded the document over multiple buildings prior to redevelopment or to provide common utility service to existing buildings under common ownership.

During zoning review, lenders may also uncover a zoning memorandum or a development order requiring that the owner record a unity of title or a declaration of restrictive covenant in lieu of unity of title as a condition to obtaining a building permit or a certificate of occupancy.

Unity of title typically runs with the land. Unless the unity of title says otherwise, a successor in interest takes title to the property subject to the unity of title. As a result, the unity of title must remain on title to be in compliance with local zoning regulations, unless released in a manner consistent with the unity of title's approval and signature requirements.

If there is a unity of title of record, the lender should make sure that the borrower is not acquiring only a portion of the unity of title without explicit authorization from the local government or other beneficiaries of the unity of title. If there is a partial conveyance of the property, the unity of title must be either (1) rescinded because it is no longer necessary for zoning compliance or (2) released and replaced with a covenant in lieu of unity of title in which the local jurisdiction authorizes multiple separate ownership.

Impact Fees

Impact fees are now a common source of revenue for local governments, intended to help pay for the cost of funding infrastructure necessary to accommodate and service new development on an ongoing basis. Common impact fees include transportation or road impact fees, water and sewer fees, park impact fees, and school impact fees. These fees are based on rates per unit of development or consumption and are generally applicable to all development within a specified benefit district.

As of July 1, 2019, the Florida legislature amended state law to provide protections for property owners from local governments' misuse of impact fees:

- First, it clarified that a municipality may not collect an impact fee earlier than the date of issuance of the building permit for the property subject to the fee.
- Second, it reiterated the dual rational nexus text that the U.S. Supreme Court established in *Nollan* and *Dolan*:
    - "The impact fee must be proportional and reasonably connected to, or have a rational nexus with, the need for additional capital facilities and the increased impact generated by the new residential or commercial construction." Fla. Stat. Ann. § 163.31801(3)(f).
    - "The impact fee must be proportional and reasonably connected to, or have a rational nexus with, the expenditures of the funds collected and the benefits accruing to the new residential or nonresidential construction." Fla. Stat. Ann. § 163.31801(3)(g).

See also Nollan v. Cal. Coastal Com, 483 U.S. 825 (1987) and Dolan v. City of Tigard, 512 U.S. 374 (1994).

For example, school impact fees are applicable only to residential uses, and senior living communities with minimum age restrictions in place are most often exempt from school impact fees. Park impact fees are also often applicable only to residential uses.

It is important for a lender to understand the different jurisdictional impact fees applicable to new development. The lender should also be aware that a proposed change of use may, in some jurisdictions, result in new impact fee assessments based on intensification or mere change of use. Some jurisdictions offer deferment of impact fees as economic incentives for affordable/workforce housing or for development in specified redevelopment areas, opportunity zones, and the like. Lenders should confirm whether any impact fees remain due for a project, as the obligation would inherently run with the land.

Concurrency

Concurrency is the concept in Florida's growth management toolbox of requiring adequate public facilities and services

in concert with new development. Under the Community Planning Act (see Fla. Stat. Ann. § 163.3164 et seq.), "[s] anitary sewer, solid waste, drainage, and potable water are the only public facilities and services subject to the concurrency requirement on a statewide basis." Fla. Stat. Ann. § 163.3180(1). Additional public facilities and services may be subject to concurrency standards by a local government, and must be supported by "principles, guidelines, standards, and strategies, including adopted levels of service," to guide application to new development. Fla. Stat. Ann. § 163.3180(1)(a).

For example, Miami-Dade County and the majority of municipalities in the county remain within a compact with Miami-Dade County Public Schools to support school concurrency requirements. These requirements mandate that (1) all residential development that adds new units be reviewed at plat or site plan-equivalent stage, and (2) developers obtain a concurrency certificate that verifies sufficient capacity (student stations) in the schools directly serving or in abutting service areas currently or within the five-year capital plan.

Similarly, Palm Beach County maintains a traffic concurrency program applicable to development countywide to ensure adequate public facilities to accommodate future growth patterns.

Expiration Dates / Extensions of Time

Development orders that a borrower obtains as a precondition to building permits for a project will typically require that the borrower secure a building permit or a certificate of use within a specified period of time from the date of the development order (or a non-appealable development order). The lender should verify that an existing entitlement has not expired. Entitlement expiration dates commonly range from 12 months to 24 months following issuance of the development order. Expiration dates might be more complicated where there is a phased project, or where a development agreement approves a planned unit development or large-scale development plan. Some jurisdictions provide for extensions by administrative approval; others require a public hearing if the original approval was by public hearing.

Tolling and Extension of Permits and Development Orders under State of Emergency

Following on the changes to the Community Planning Act (see Sources of Broad Local Zoning Authority in Florida) and in recognition of the disruption that natural disasters cause to the building industry in Florida, the Florida legislature enacted Fla. Stat. Ann. § 252.363, which provides a tolling formula that is automatically available to qualifying development orders or building permits within the area of a declared state of emergency. Under this law, if the governor declares a state of emergency for a natural emergency, all deadlines and expiration dates tied to a building permit or development order issued by a local government or water management district are automatically extended for six months plus the duration of the state of emergency.

Under the statute, the permit holder must simply provide the local government with written notice, within 90 days following the termination of the state of emergency, that it intends to exercise the tolling for a valid permit or development order. Some municipalities, however, have taken a more restrictive approach by requiring applicants to complete specific forms and follow a particular protocol. As a result, it is best practice for land use counsel to submit a formal letter in compliance with state statute and seek written confirmation of compliance, or obtain a stamped-received copy of the application.

The lender should ensure that all pending development orders remain valid and effective without any potential challenges or defects.

Municipal Lien Search / Code Compliance

For all commercial loans, the lender should review the status of municipal liens and code violations—zoning and non-zoning—affecting the property. Be aware that some violations, such as noise and signage violations, may arise under regulations that are separate and apart from the municipal zoning or land development regulations. The lender may need to order separate searches from various municipal departments to cover the full scope of potential liens and violations filed against a property.

Municipal code enforcement liens and tax liens are recorded on title and should appear in the title search. Pending code enforcement violations, however, which can sit for several months, typically do not appear in a title search. Therefore, lenders should pull (or require borrowers to pull) a list of all open permits, code enforcement cases, and the like to best appreciate the deficits that may exist on the property and all potential costs and penalties.

Due Diligence Work Product

As Florida's population and mix of uses and development patterns evolve and become more sophisticated, and as urban centers become more valuable for redevelopment

opportunities, it is even more important that lenders conduct appropriate zoning review in order to make fully informed decisions for purposes of underwriting and risk management.

Particularly in volatile real estate markets or when disruptive factors in the economy call into question the future performance of a loan, lenders should give thought to the due diligence and work product appropriate for the transaction.

Zoning Opinion Letters

A zoning opinion letter is a formal legal document that an attorney licensed in the property jurisdiction prepares and issues to the lender. The opinion usually takes the form of a lender on the letterhead of the attorney's law firm and is addressed to the lender. The lender is entitled to rely on the statements, findings, and conclusions contained in the opinion, subject to the assumptions and exceptions that the opinion contains.

The borrower's land use counsel often prepares the zoning opinion letter, particularly when the borrower is undertaking an entitlement process for development or redevelopment of the subject property.

Institutional lenders commonly request zoning opinions when underwriting an acquisition loan, construction loan, or refinancing where the amount of the loan is substantial, or where potential compliance questions or controversial uses pose added risks to the lender.

For more information on opinion letters generally in commercial real estate transactions in Florida, see Commercial Real Estate Financing Transactions (FL).

Due Diligence Memoranda

Perhaps the most common form of work product addressing zoning review in a commercial loan transaction is a due diligence memorandum from an attorney with expertise in land use and zoning. This document may create some limited basis for reliance by a lender, but more typically is for informational purposes only. The scope of work and type of exhibits in due diligence memoranda may be similar to those in zoning opinion letters.

In some cases, these memoranda may be comprehensive in nature and address all relevant land use regulations along with any entitlements to the property as they apply to current and future uses and improvements. In others, their focus may be narrow. They might address only current or future use of the property; if the purpose of the loan is limited, their scope might similarly be limited to one phase of the property; or if the lender has already conducted significant diligence, they might address specific questions that remain open.

Zoning Verification Letters (ZVLs)

ZVLs are formal letters issued by or under the authority of a city or county zoning administrator. They may also be issued by a designated senior zoning official assigned to receive and provide official written responses to requests from members of the public.

A ZVL typically provides limited property information that can be verified with city zoning GIS maps and generally identifies the zoning district, future land use classification, and any overlay districts applicable to the subject property.

A ZVL may also serve a purpose similar to an estoppel letter confirming compliance with conditions of a development order.

The individual requesting the ZVL often does not need to be the property owner or an authorized representative of the owner. Most cities have a standardized process for requesting and issuing ZVLs and require payment of an application fee. In some cities (including Miami and Lakeland), the applicant can pay an additional fee for verification of nonconforming structures and/or nonconforming use.

Third-Party Zoning Compliance Reports

There are a small number of zoning consulting companies that provide services for real estate transactions on a national level. Land use and zoning regulations are highly local; the terminology, legal effect, and implementation of policies and land development regulations vary greatly by jurisdiction. Local expertise is often necessary to accurately assess zoning compliance. As a result, reports from these national companies may not be as useful to lenders as due diligence reports from attorneys who are licensed in the property jurisdiction and specialize in land use and zoning. Note as well that the companies producing these reports may limit their liability to the cost of the report itself. For these reasons, lenders would be wise to consider the risks associated with relying on third-party vendor reports.

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Steven J. Wernick is an experienced land use attorney. He has significant experience representing real estate developers, property owners, lenders, and other real estate industry clients as an advocate and local land use counsel—skillfully navigating the intricacies of local government regulations and the development approval process to help clients add value, deliver on great projects, and re-imagining urban core neighborhoods.

Steve regularly works on zoning and development approvals for mixed-use projects throughout Miami's urban core neighborhoods. Since 2013, Steve has represented numerous local and national developers on the first wave of approximately 1.5 million+ square feet of new construction projects in the Wynwood Arts District, including the Wynwood Garage, Wynwood 25, and the first Class A office buildings in the district. Additionally, Steve was intimately involved in developing and securing entitlements for the Miami Design District Retail Street Special Area Plan, a 1 million square feet of destination retail and cultural attractions that has catalyzed midtown Miami.

Steve is also a go-to advisor on best practices for zoning and TOD legislation. He helped craft the City of Miami's micro-unit legislation adopted in December 2017 to facilitate innovation in multifamily development around transit stations. Steve has served as special counsel to the Wynwood Business Improvement District on the creation of the Wynwood Neighborhood Revitalization District (NRD-1), which was recognized in 2017 by the American Planning Association with the National Award for Best Economic Development Plan.