

Law: Real estate due diligence – Non-conforming uses by Dickson - NYREJ

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Every real estate attorney knows to check local building department files to ensure that the building was constructed properly and that all improvements have been built in accordance with local codes, receiving the municipality's blessing. One thing that many do not focus on, however, is the issue of the use of the property and whether it is compliant with the current zoning code. If it's not, but was compliant in the past, it's possible that it is a "non-conforming use" – legally able to be continued, but with restrictions on changes to the use or building.

It's helpful if a Certificate of Existing Use exists, but be sure that your client's proposed use is the same as that listed in the certificate. Many municipalities strictly construe these uses. Is "auto repair" the same as "auto body repair?" A retail furniture store the same as a retail bakery? Possibly not. If there is no certificate in the file, there's no record that the non-conforming use was established legally. But, if it can be proven that the use was established before the code was adopted, or before the code disallowed it, it may be permitted.

Beware also of the possibility that the use has lapsed. Most codes provide that such uses will lapse if they have been discontinued for a period of time – usually anywhere from six months to two years. The burden to prove a non-conforming use, and the fact that it has not lapsed, should be put on your seller or landlord, and there should always be a zoning contingency in your contract or lease. It is essential that experienced local zoning counsel be consulted on all real estate matters to navigate the regulations and practices of a locality to ensure your client can use the property for their intended purpose.

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