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Special due diligence considerations

As purchasers look to take advantage of recent property development trends, such as the growing popularity of development in downtown business districts and transit-oriented developments, they may need to perform due diligence with special, additional considerations in mind that differ from those considerations on a typical project in less developed areas. Because of the high value of each square foot of property and the need to make the most of that expensive property, purchasers may want to consider post-closing construction and development in their preclosing due diligence review. Additionally, because of the close proximity of neighbors, purchasers should consider performing due diligence on the surrounding property because it may affect the proposed construction and development. Therefore, when purchasing property for infill development, purchasers should consider adding the following six issues to their typical due diligence review:

■ **What will be constructed on site? How many stories? How close to each property line?** Most urban infill development aims to maximize every square foot of property, which means developers plan to build as close to the property lines and as high and deep as allowed by local ordinances. In fact, local ordinances in downtown business districts often contain required build-to lines as opposed to setbacks. The result is that there may be little additional property available for temporary construction staging on the parcel being developed. Therefore, purchasers should consider overlaying the building footprint on the parcel to see exactly how much of the parcel will be necessary for the actual building, and, in turn, how much will be left for construction activities.

■ **Who owns the neighboring property? Are these neighbors supportive or open to the idea of the proposed project?** If the project's building footprint covers the



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entire property, the developer may need to obtain a permit to use public right of way or request easements from neighbors for temporary construction staging, overhead crane usage and underground tie-backs, underpinnings and shoring systems. To obtain these rights, one must first determine who has an interest in the neighboring property. Colorado statute provides that the surface owner owns all of the airspace above the surface of its property, subject to aircraft flight. The surface owner also may own everything beneath the surface, but it is possible that all or a portion of the mineral estate has been severed from the surface estate. Unlike requesting a permit for the use of public right of way (where one may expect relatively predictable processes, fees and timing), negotiating with neighbors may prove to be more complicated than anticipated. The sooner one can gauge how reasonable and responsive neighbors will be to these requests, the sooner a developer can understand the possible constraints for the project. It may even be prudent to obtain these easements in connection with closing. Ultimately, a neighbor's support or understanding of the project at issue may facilitate the reasonable negotiation of an easement agreement. Additionally, the neighboring property may be subject to deeds of trust, easements, leases or severed mineral rights that may affect a developer's requested use and require additional consent. A review of the title work on the neighboring property will help identify whether a developer, or the underlying property owner, will also need to



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obtain consent for easements from lenders, easement holders, tenants or mineral rights holders.

■ **Is the parcel at issue subject to agreements with neighbors or others for emergency access, parking, drainage, shared utilities, subjacent and lateral support or mineral rights? Will the beneficiaries of these agreements be willing to modify them?** A review of title work on the property at issue may uncover additional parties with rights to the property. If the project contemplates a building where no structure previously existed, the developer may have to get creative to honor these rights. For example, if a neighbor holds a drainage easement across the property at issue, is the neighbor willing to allow for relocation as long as it retains substantively equivalent rights? Colorado case law now provides that, if a burdened owner and a benefitted owner cannot reach an agreement, the burdened owner may seek a declaratory judgment that allows the burdened owner to make reasonable alterations to the easement that do not damage the benefitted owner. Additionally, depending on the level of below-grade development, a purchaser may want to pay particular attention to whether the seller owns more than the surface estate, and, if not, the purchaser may need to perform additional due diligence regarding the ownership of the subsurface and mineral rights.

■ **What is the state of nearby streets, public infrastructure and publicly owned property? Will any improvements be neces-**

sary soon? Although construction on streets or public infrastructure may be temporary, it can last long enough to take a toll on adjacent property. If ground-level retail is part of the proposed project, it may be important to understand when future public improvements are planned, because they could make it difficult to rent space to retail tenants or could be a hardship on existing tenants. On the other hand, if a public entity is making a major investment in nearby infrastructure, the property can benefit when the project is completed.

■ **Does the proposed project call for the demolition or significant remodel of an existing building? Could it have historical significance or be the subject of historic preservation efforts?** Certain areas have been designated as historic districts and have specific boards to review proposed developments and alterations. Additionally, depending on the local authority in the area, a property could be subject to historic preservation efforts that conflict with the developer's plans.

■ **Is there usable access (as opposed to legal) to the property? Is there construction access? Is there alley access for loading and unloading?** Standard title review on a typical project will consider whether a property has "legal access" (i.e., access to a public road). For an infill development to function well, however, a purchaser will want to ensure that people can easily access the property from multiple points, both on foot and by car, and that traffic will flow smoothly to and from the property. Additionally, local regulators often require certain off-street loading requirements and emergency vehicle access. Before buying a property, a purchaser may want to consider additional access points for large construction vehicles, cranes, fire trucks and end-users' moving needs. All of these considerations may require additional planning outside of ensuring simple legal access.▲