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## Beware of permitting requirements upon a change in occupancy

**hg** Howard Geneslaw



Gibbons, Del Deo, Dolan, Griffinger & Vecchione, P.C.

Retailers sometimes prefer to locate in existing space partly because they anticipate few if any permitting requirements other than the construction permits needed to fit out their space, and perhaps a sign permit to erect a sign. While in many instances this expectation proves to be the reality, prospective tenants would be well served to investigate before signing a lease.

As tenants come and go, typically in a strip center or shopping center, municipalities and enforcement officials may develop concerns about changes to the site that have taken place over time. For example, perhaps minor modifications were made at one time to the parking area in order to accommodate the larger delivery trucks utilized by a particular tenant. Maybe these modifications resulted in the loss of a parking space or the relocation of the trash collection area. Alternatively, perhaps different tenants are subject to differing parking requirements. For example, retail tenants

may have one standard while service businesses or those involving group activities such as instructional, yoga or dance classes, may be subject to a different standard. Over time, what can result is a series of individual occupancies that deviate from the originally-approved site plan.

Many municipalities address this situation through requiring a zoning permit or site plan approval upon a change in use. This provides the opportunity to review the anticipated occupancy and, if appropriate, the entire site plan in conjunction with a change from one permitted use to another. If different parking standards, loading requirements or other regulations apply, this will provide an opportunity to determine whether they are met. However, when only the occupancy is changing, but the use remains the same, often there is no such opportunity.

Some municipalities have sought to address this situation by adopting ordinances which require a zoning permit, and in some cases site plan approval, whenever a "change in use" occurs. Such changes may alter the parking, traffic circulation, lighting, access, landscaping, or intensity of a use in a way that impacts surrounding properties and area residents. As is often the case, determining applicability of such a requirement depends on the reach of a "change of

use." A typical definition of "change in use" is:

Any use which differs from the previous use of a structure or land by way of function, operation, extent, or products sold, handled, or manufactured and the like, including a change from one permitted use to another kind of permitted use in the same zone, as well as any change in activity which changes, alters, or enlarges the previous use or structure or which will change, alter, enlarge, or affect drainage, traffic, parking, sidewalks, paving, landscaping, fencing, sanitary disposal or other similar consideration."

Issuance of a zoning permit typically requires a showing that the change in use is in full compliance with the applicable zoning regulations, the property has no outstanding violations of codes or ordinances, the property is in compliance with the approved site plan and any conditions of approval, and the change in use does not require site plan approval under the provisions of the applicable zoning requirements.

Undertaking an analysis *prior* to signing a lease to determine whether a change in occupancy requires a zoning permit or site plan approval can prove to be a highly worthwhile investment. For example, in one instance, a retailer of closeout merchandise acquired several leases of Woolworth stores.

Since it was assumed that no municipal approvals other than a construction permit would be required, the lease assignment did not contain a permitting contingency. When the retailer filed for a construction permit, it was denied on the basis that site plan approval was required. The retailer then applied for site plan approval from the planning board, which was denied on the basis that the sale of closeout merchandise involved a wholesale rather than a retail operation. Following litigation, this decision was reversed and site plan approval was granted. Although the right result was reached, the retailer was unable to occupy the space for more than a year while the site plan and then the appeal remained pending. Since the lease assignment contained no permitting contingency, the retailer was forced to pay rent for that entire period even though it could not occupy.

Tenants that assume changes of occupancy can occur without obtaining any approvals other than construction permits do so at their peril. A small investment in analyzing the applicable permitting requirements can yield significant savings.

**Howard Geneslaw is a director at Gibbons, Del Deo, Dolan, Griffinger & Vecchione, P.C., Newark, N.J.**