

Real Estate Journal

COVERING ALL OF LONG ISLAND, NEW YORK CITY AND UPSTATE NEW YORK

Why is zoning due diligence important to a purchaser or developer of real property?

at Andrea Tsoukalas



FCSMC&C

This heightened level of due diligence is necessary because in N.Y. there is no “municipal estoppel.” This means that a municipality may not be prevented from revoking an improperly issued building permit or certificate of occupancy or repudiating the advice of a public official and, therefore, a developer’s reliance on an improperly issued document is not a defense to its revocation.

Contracts for the sale of commercial or vacant residential property often include a zoning “due diligence” provision. Such a provision entitles a prospective purchaser, for a specified time period, to investigate whether the property and its current or proposed use complies with existing land use and zoning regulations. If the investigation reveals that the property is not in compliance with such regulations, the contract is cancelled and the purchaser’s down payment is refunded. A purchaser is usually granted this right so that the seller is relieved of the obligation to make certain representations about present or future zoning compliance. As such, due diligence is not only a purchaser’s right, it is also its obligation. Once the investigation has been completed and the contract is no longer contingent on zoning, any mistakes about the property’s status under land use regulations become the purchaser’s responsibility.

The relevant question then becomes what level of research and analysis is appropriate to insure a property’s legal status. While the nature and extent of

such investigation must necessarily vary from property to property, one thing is constant—the purchaser who relies solely on the advice of a public official or on a certificate of occupancy should tread carefully. The key is looking beyond the obvious legal status to independently verify that the property complies with land use and zoning regulations. This independent investigation must include a site inspection of the property, a comparison of the property and the buildings and structures on it to an updated survey and the latest approved plans on file in the local building department, the review of current zoning regulations and zoning maps, any proposed land use and zoning legislation, and any prior approvals issued by the various municipal boards. Zoning due diligence does not include the typical phase I-phase II environmental review for contamination. There are, however, certain environmental laws, such as wetlands regulations, that do affect the ability to develop property and these would be included within a zoning investigation. These are vital steps in determining a property’s legal status because there are numerous

regulations that can affect the ability to develop property that can not be discovered from an examination of the building department file alone.

This heightened level of due diligence is necessary because in N.Y. there is no “municipal estoppel.” This means that a municipality may not be prevented from revoking an improperly issued building permit or certificate of occupancy or repudiating the advice of a public official and, therefore, a developer’s reliance on an improperly issued document is not a defense to its revocation. In the seminal case, *Parkview Associates v. N.Y.*, the court of appeals held that N.Y.C.’s building commissioner could not be estopped from revoking an improperly issued building permit for the construction of a high-rise building on Park Ave. The permit was issued for a 31 story building when the zoning regulations allowed for only 19 stories. Even though the building commissioner issued the stop work order after construction was substantially completed, no vested rights were conferred upon the owner because the permit was issued based on an incorrect interpretation of N.Y.C.’s zoning

regulations. Parkview confirms the importance of zoning due diligence and that a developer cannot uncritically rely upon an assumption of the correctness of a municipal action.

Property owners are not the only ones who may suffer economically from this type of misplaced reliance. A lending institution’s reliance on an incorrect assumption of the development potential of a property may impair the value of its security interest and its ability to recover the full amount of the loan in the event of a foreclosure. For this reason, lending institutions frequently require a borrower to provide an opinion of counsel to independently verify the property’s zoning and that the various governmental approvals were properly issued and no longer subject to legal challenge.

Andrea Tsoukalas is an associate at Forchelli, Curto, Schwartz, Mineo, Carlino & Cohn, LLP (FCSMC&C), Mineola, N.Y. She was assisted by Jason Isaacson a law student at the University of Miami.