

Land Use Questions To Ask When Buying Or Financing Real Estate

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In this article, the author reviews significant land use issues that purchasers of real estate, or lenders that finance such purchases, should consider.

Anyone purchasing or financing the purchase of undeveloped land or a building must make certain that the planned use of the property and size of a new building is consistent with local land use regulations. One might simply ask whether the proposed use and size are permitted by the zoning rules and leave it at that, but there are a number of land use issues that should be looked at as part of the due diligence process. Here are a number of areas that should be investigated.

Does the zoning currently permit the proposed use of the property?

This is obviously the starting point for any land use inquiries. For example, if it is a commercial property, does the zoning permit the specific use planned? What if the property contained business offices, but was to be converted to a large retail store? Would the planned use be permitted, and would it trigger any other requirements, such as more parking spaces? A related issue: Are the commercial uses limited to a particular location in the building? Zoning provisions may limit the location of a commercial use to one or two floors or may require that the commercial use be located below the level of any residential use.

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Does the municipality contemplate any changes to the zoning designation for the property that would render the proposed use unlawful or the planned new building too large?

This will require an inquiry to the local planning department for information regarding proposed rezonings.

Is the certificate of occupancy ("C of O") current, and does it permit the proposed use? Is the building currently occupied by a use that is permitted by the zoning?

The issuance of a C of O constitutes a determination that the building complies with all laws. A building must be occupied in accordance with the C of O. On occasion, however, an owner may change the use but neglect to amend the C of O to reflect the new use. For this reason, it is inadvisable to look to the existing use as evidence of what is permitted.

If the C of O is not current or does not permit the proposed use, may it be updated or amended as a matter of right because the underlying zoning permits the proposed use?

A common misconception is that because a proposed use is not consistent with the C of O it is not permitted

by the zoning. If the proposed use is permitted by zoning, then it is simply a matter of amending the C of O, a ministerial act accomplished by filing an application with the municipality's Department of Buildings.

If the existing and proposed uses of the property are the same, but not permitted by the zoning, is the existing use lawfully "grandfathered" under the zoning?

Zoning laws contain provisions allowing the continuation of lawfully-established uses after the zoning has changed to no longer permit those uses, provided they have not been discontinued for more than a set period of time. This is a fact-specific question, which may require the seller to provide evidence that the existing use has been "grandfathered."

If the proposed use of a building property is different from its existing use, does the change of use trigger new zoning limitations that are more restrictive than those for the existing use?

For example, if a commercial building were to be converted to apartments, would the same amount of floor area be permitted, or less, or more? Also, are the setback and yard requirements different from the requirements for the existing use?

Does the zoning require accessory parking for the proposed use, and has it been provided?

If the existing parking does not meet the zoning requirement, is there room on the property to accommodate it? If the use is to change, is there a different parking requirement and is there sufficient space to accommodate the parking?

Is the property the subject of a variance or special use permit?

Public records need to be reviewed to determine if the current use or building configuration has been the subject of a special use permit or a variance, and, if so, under what circumstances and by what process it may be changed.

Is the property the subject of a restrictive covenant required in connection with a public approval?

Some jurisdictions may now or may have in the past

required property owners to agree to a restrictive covenant binding the owner and future owners to a particular use or building configuration in connection with a land use approval. If such a restriction exists and is inconsistent with the prospective owner's plans for the property, what is the process for amending or removing it?

What is the applicable zoning lot?

In some jurisdictions, a document must be recorded with the local county or city register identifying the zoning lot. If the zoning lot is larger than the property to be sold, then the purchaser needs to know what other buildings are on the lot and whether there is a recorded agreement spelling out the rights and obligations of the multiple owners of the zoning lot. The purchaser should also check to make sure that some of the property's development rights have not been transferred to another owner.

Is the property in a local historic district?

If there is a building on the property, is it a designated landmark? In either case, historic preservation laws may require approvals by the local preservation agency for new buildings or changes to existing buildings. Landmarks laws may also limit the circumstances under which a building may be demolished.

Does the property have unused development rights that could be sold or, conversely, is there the possibility of acquiring development rights from adjoining properties?

Development rights are the right, established by zoning, to develop a property with a building of a particular size. In some jurisdictions, development rights may be acquired from an adjacent property or unused development rights may be conveyed to an adjacent property. Special zoning districts or area-wide laws may also permit the transfer of development rights from a property to remote sites. In urban jurisdictions the transfer may be limited to sites within a special zoning district, while in rural settings development rights transfers over a wider area may be permitted as part of a program to preserve farmland.

If a proposed use or building configuration is not permitted, is there a process for getting it approved and what is the nature of the process?

Many jurisdictions have zoning provisions allowing for a proposed use or building configuration that does not comply with the zoning, provided that certain

conditions are met. The process is usually called a “special permit” or “special use permit.” Conceptually, a special permit is different from a variance, because the premise of a special permit is that the use or bulk is permitted, provided that certain conditions are met. By contrast, a variance would allow a use or building configuration that is *not* permitted. Variances are essentially a zoning “safety valve” to provide relief when a physical condition of the property makes it difficult to comply with the zoning requirements. For example, if the property lies on a steep slope that increases construction costs, or has subsurface water that requires dewatering or an expensive waterproof foundation, those conditions may be grounds for a variance. The processes for obtaining special permits and variances can be lengthy, expensive and uncertain. In New York State, such discretionary approvals are

subject to the environmental review process (not to be confused with the “environmental review” conducted to identify on-site contaminants), which can add to the timing and expense of the processes. A land use attorney can provide advise on the approvals available and the likelihood of success.

Conclusion

Land use issues can trip the unwary. The earlier in the process that a prospective purchaser and lender seek answers to the foregoing questions, the better. Better to know the land use complications, if any, at an early stage, if any, than to purchase a property and find out that using it as intended is not permitted or will require a lengthy, expensive approval process.