

How Not To Get Zoned Out Of Your Transaction Or Project

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Commercial real estate transactions and projects have become more complex and expensive. So, analyzing zoning and land use restrictions prior to the closing has become more important than ever. The goal is to minimize the risks associated with your transaction or project before the closing so that you are protected to the maximum extent possible.

The objectives of this article are to provide you with a basic understanding of how zoning and land use issues affect risk by discussing:

- The role of zoning and its effect on land uses and structures;
- The risks associated with zoning non-compliance;
- Specific obstacles that can de-rail a transaction or project; and,
- Ways you can minimize your risks of zoning non-compliance.

The Role of Zoning

Zoning is a mechanism used by governmental entities to control growth and development. The goal of zoning is to minimize overcrowding and land use conflicts. Zoning ordinances let property owners know what can be built on their property and surrounding properties and how those properties can be used. The general purpose of most zoning ordinances is to protect the health, safety, and welfare of the public and the expectations of owners and prospective owners.

Zoning ordinances have a direct effect on land uses and structures, and the ordinances are frequently amended. Typically, there are three classes into which land and structures are separated:

- Conforming;
- Legally non-conforming; and,
- Non-conforming.

A conforming parcel or structure meets all current ordinances.

A legally non-conforming parcel or structure complied with the ordinances at one time, but does not meet the current ones. This is commonly described as "grandfathering" the pre-existing uses and structures. The "grandfathered" structure or use is permitted as long as the structure or its use is not substantially changed. However, if a "grandfathered" structure is destroyed or damaged beyond certain limits set forth in the applicable zoning ordinances, the owner likely will have to re-build in compliance with the current ordinances. If the "grandfathered" use is allowed to lapse for a certain period of time (for example, six months), that use will no longer be permitted.

Non-conforming structures did not comply with the ordinances when built or created, and do not comply with the current ordinances. A non-conforming structure will have to be re-built to current standards if it is

destroyed or damaged in any amount and a non-"grandfathered" use will have to be abandoned.

Risks of Zoning Non-Compliance

What are your risks when your property is not compliant with the applicable zoning ordinances? First, your potential uses of the property, its marketability, and, most importantly, its value may be substantially and adversely affected. Second, zoning non-compliance can significantly increase the costs and expenses associated with your transaction or project (i.e., engineering, surveying, environmental, and legal fees). Third, non-compliance can delay the closing and development of your project. At the extreme, non-compliance can result in the termination of the transaction or project for which you purchased the property.

Other Concerns

In addition to zoning ordinances, there is a plethora of related federal, state, and local rules and regulations that govern the use and development of property that can create an obstacle to you having a successful and profitable transaction or project. Some specific examples include buffering/screening regulations, setbacks, parking requirements, height restrictions, sign ordinances, subdivision restrictions, historic or other overlay districts, Americans with Disabilities Act compliance, environmental regulations, and private restrictions or covenants.

Ways to Minimize Your Risk

How can you avoid these risks? By doing some homework prior to closing on the property. At a minimum, you should research the history and prior uses of the property, analyze the applicable zoning ordinances, and obtain a determination of zoning compliance from the local zoning official where the property is located – all of this before you become obligated to purchase the property. After you have signed a binding contract that does not allow you to terminate it if you find the zoning to be unacceptable, you will be stuck with the proverbial "pig in a poke."

In addition to providing for a "due diligence period" in your contract during which you engage attorneys, engineers, and other investigators to inspect the property's compliance with zoning ordinances, how else can you protect yourself? First, you can request that your attorney obtain a title insurance policy that includes zoning endorsements. There are two types of zoning endorsements offered – one for unimproved (vacant) property and one for improved (built upon) property. The unimproved property endorsement would insure you against problems that might arise with the zoning classification for the property and the authorized uses under that classification. The improved property endorsement adds insurance against a final court order which would require the removal or alteration of the present structure because of a violation of the zoning ordinance as to the area, width, and depth of the site; floor space area; setbacks; height; and number of parking spaces.

Some other ways you can protect yourself include, but are not limited to:

- Allocating the risks contractually by requiring problems to be fixed by the seller prior to closing; and,
- Applying for a variance, a special use permit, or a change in the zoning, and providing in your contract that if you don't get the relief you request, you will not be required to close on the purchase of the property.

Conclusion

Zoning and land use restrictions are complicated. Making sure you have thoroughly researched and analyzed them prior to closing on a real estate transaction or project can mean the difference between having a

successful or unsuccessful project. The more you do to minimize the risks associated with a transaction or project before the closing, the more chance you will have of being protected to the maximum extent possible and be successful in your endeavors.

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