

Act fast

How buyers can avoid common zoning and land use pitfalls in real estate transactions

INTERVIEWED BY ADAM BURROUGHS

There are common pitfalls related to zoning and land use that can occur in real estate transactions. When acquiring a property with the intent to develop, redevelop, or continue an existing use, there are simple, inexpensive steps buyers can take to get ahead of and navigate these issues during the due diligence process.

“Local regulation and municipal cooperation can be a big hurdle,” says Alyssa E. Golfieri, a shareholder at Babst Calland. “But the zoning due diligence process doesn’t have to be complicated and can be started before buyers execute a letter of intent.”

Smart Business spoke with Golfieri about zoning and land use due diligence in real estate transactions.

WHAT DOCUMENTS NEED TO BE ACQUIRED, REVIEWED AND ANALYZED?

Before a buyer’s due diligence period expires, the buyer should confirm what, if any, zoning, land use and condemnation-related matters are or were pending, initiated, or approved that affect the subject property. Relying on the seller to provide relevant zoning and land use records is a major pitfall buyers fall into. It is rare that a seller can produce such records, especially when the seller isn’t the original developer. Buyers should take advantage of their state’s public disclosure laws because it is an easy, inexpensive process that can yield significant results. Submit the records request early in the process because municipalities have a generous range of time for response.

WHAT SHOULD BUYERS KNOW ABOUT EXISTING PERMITS AND APPROVALS?

Failure to confirm conditions or obligations

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that are imposed through existing permits and approvals is a common pitfall for buyers. Buyers need to understand what permits and approvals exist for the property and use as early as possible because they often contain conditions or ongoing obligations that become the buyer’s responsibility upon closing. Such permits and approvals could include conditional use approvals, special exception approvals, variances, special permits, land development/site plan approval, certificates of occupancy, and business licenses.

Inspections are a very common condition or obligation that trips up deals. Some municipalities tie inspection requirements to business license registrations or renewals, some tie it to the transfer of a certificate of occupancy, some impose it as a condition to approval, and other stricter municipalities require it upon a mere change in ownership.

Once buyers confirm the universe of conditions and obligations, including inspection obligations, they can proactively develop a plan with their sellers for addressing any identified issues.

WHAT SHOULD BUYERS KNOW ABOUT NEW APPROVALS?

The biggest pitfall for buyers purchasing property for a new use or development is failure to confirm that local zoning regulations allow the property to be used

and developed in the manner that the buyer intends. If acquiring property for purposes of a new development, prior to the expiration of its due diligence period, a buyer needs to confirm that the buyer’s proposed use is permitted in the underlying zoning district; the buyer’s proposed site development fits on the property within the confines of current bulk and area zoning regulations; and what, if any, supplemental zoning regulations are applicable. Most zoning regulations are available online, so buyers can do this analysis before executing a letter of intent.

In a similar vein, if acquiring an already-developed property or business, a buyer needs to confirm that the use is permitted in the underlying zoning district, and all existing structures and improvements comply with current bulk and area zoning regulations. If the answer is no to either of the foregoing questions, the use, structure, or improvement is nonconforming, and it is the property owner’s burden to prove such nonconformity is legal and permitted to continue. The easiest way to do this is producing municipal permits, approvals, and authorized site plans. Hence, collecting and becoming knowledgeable of existing zoning and land use documents related to the property, from the seller and the municipality, is a critical step in real estate transactions. ●