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Real Estate & Title Insurance

Know What Your Client Is Buying

Top ten reasons why purchasers of real property should perform a zoning investigation

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Suppose you represent a contract purchaser of real property, and the contract contains title, mortgage and inspection contingencies. Any competent attorney would perform a thorough title review, closely examine the terms of the mortgage and ensure the client performs a physical inspection, Phase I investigation or such other examination of the premises as the circumstances warrant. But would you perform, or urge your client to perform, a due diligence investigation with respect to the zoning requirements and any existing permits or approvals for the property? Although performing this investigation will increase the client's cost, the long-term benefits usually exceed the up-front expense.

Aldrich v. Schwartz

Consider the following facts, which illustrate the importance of such an investigation. In 1969, an owner of residential oceanfront property applied for and received minor subdivision

approval from the municipal planning board to divide the property into three lots. The zoning ordinance required a 20-foot wide easement across the three new lots, thereby providing access from the public street to the ocean. Due to the location of an existing home on the proposed lot along the public street and furthest from the ocean (Lot 1), the required easement was limited to only 15-feet across that lot. The Board of Adjustment granted a variance authorizing this deviation, conditioned upon a specific portion of the oceanfront lot (Lot 3) remaining undeveloped for use as open space.

All of the lots were sold, and the vacant lots were developed with homes. The home constructed on Lot 3 conformed with the development restriction.

Some twenty years later, after Lot 3 was conveyed several times, a new owner purchased it with the expectation of demolishing the existing home and building a new home. The new owner, having no knowledge of the development restriction, was denied a construction permit.

In the ensuing litigation, *Aldrich v. Schwartz*, 258 N.J. Super. 300 (App. Div. 1992), it was undisputed that the development restriction did not appear anywhere in the chain of title, which contained merely a reference to the

prior subdivision but did not describe the restriction. Instead, it was set forth in the planning board's unrecorded resolution of approval and appeared on the subdivision plat, which was not recorded (apparently the subdivision was perfected by deed rather than by plat).

The Appellate Division framed the issue as "whether the variance itself, embodied in the resolution of the Board of Adjustment, was binding on subsequent owners, in all of its terms, even if they had no notice or knowledge of it, and even if the subdivision was not perfected." *Id.* at 307. The Court ruled that it was binding, despite the purchaser's ignorance of it and irrespective of whether a diligent search would have identified it. This holding was based on the reasoning that "[i]f subsequent owners are entitled to the benefits of the variance and the value it adds to the property, even though they are unaware of its existence, they should enjoy those benefits limited by any restrictions which were lawfully attached as conditions, subject to current zoning agency relief." *Id.* at 308-09. Although following this ruling the owner could seek discretionary relief from the Board of Adjustment to remove the condition, clearly this was not his expectation at the time the purchase price was negotiated and the property was conveyed.

In a subsequent action by the same plaintiff for damages occasioned by the restriction, the Appellate Division stated that "[t]he police power exclusion in the [title] policy squarely places on the prospective purchaser and his attorney the burden of investigation and compliance with local ordi-

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nances and land use resolutions as they may affect a particular property.” *Aldrich v. Hawrylo*, 281 N.J. Super. 201, 211 (App. Div. 1995).

Aldrich has since been narrowed slightly by *Island Venture Associates v. New Jersey Department of Environmental Protection*, 179 N.J. 485 (2004), which held that a subsequent purchaser was not bound by a development restriction imposed by NJDEP in connection with its issuance of a permit pursuant to the Coastal Area Facilities Review Act, N.J.S.A. 13:19-1 et seq. Following issuance of the CAFRA permit and the recording of an instrument containing the restriction, the predecessor in title subdivided the property. The NJDEP, by letter, indicated that the subdivision did not require a CAFRA permit but made no mention of the development restriction. The Master Deed, which contained the restriction, did not clearly identify the extent of the property subject to the restriction. Accordingly, despite performing a title review, *Island Venture Associates* took title with no knowledge of the restriction.

The Supreme Court distinguished these circumstances from *Aldrich*, finding that the NJDEP is a single state agency administering a permitting program (CAFRA) of limited geographical reach. By contrast, *Aldrich* involved decisions by individual land use boards throughout the state. In addition, the Court noted that NJDEP was in a “superior position” to know of the restriction and advise the subdivision applicant accordingly, but did not do so.

Benefits To Investigating

Even though a decade has passed since the Appellate Division established the obligations set forth in the *Aldrich* decisions, the importance of performing an adequate zoning investigation precedent to acquiring real property in New Jersey remains just as important today. Aside from the legal obligation, there are many reasons why a purchaser or investor would want to undertake a zoning and permitting due diligence investigation.

Here are ten important questions that a zoning and permitting due diligence investigation can answer:

1) Is the proposed or existing use permitted as-of-right, and can it be expanded? If the existing use is nonconforming, has the municipality acknowledged its legality through the issuance of a certificate of nonconforming use?

2) Do any prior site plan, subdivision or variance approvals exist which impose conditions of approval that could impair the intended use of the property? Have all conditions of approval been satisfied, or do some remain outstanding and unaddressed?

3) Is the subject property within an “area in need of redevelopment” pursuant to the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 et seq., in which case it could be subject to acquisition by eminent domain for redevelopment?

4) Was the property properly subdivided, and was the subdivision properly perfected?

5) Are all municipal development approvals in place? If the approvals authorize improvements that have not yet been built, do the approvals remain valid and in force, or have they expired?

6) Was county planning board subdivision or site plan approval required and, if so, was it properly obtained?

7) Were all required state approvals granted, such as NJDEP, New Jersey Department of Transportation, New Jersey Meadowlands Commission, New Jersey Pinelands Commission,

Delaware & Raritan Canal Commission, Delaware River Basin Commission, etc.?

8) If the existing use has been discontinued, is abandonment a consideration?

9) If multiple tax lots are involved, are any of them undersized? Is there any basis for a claim that lot merger has occurred?

10) Are there any pending health code, building code, fire code or municipal ordinance violations, and have there been any prior prosecutions for such violations?

A zoning and permitting due diligence investigation not only allows the purchaser to better understand the asset being acquired, but it often raises questions concerning the status of required approvals. Such questions can become the basis for discussion with the seller, often resulting in a stronger bargaining position that results in give-backs on other issues or in a price reduction. In addition, the plans and documents obtained during the investigation can be assembled into a permitting binder that will serve as a ready reference following the transfer of title, and which can be presented to a future purchaser when the property is later sold.

In many instances, a zoning and permitting due diligence investigation will pay for itself through an improved bargaining position or a reduction in the purchase price. But even where the investigation turns up nothing amiss, the purchaser will be comforted in knowing that post-closing surprises are much less likely. ■

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