

Understanding certificates of occupancy in New York residential real estate practice

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Consider the following case:

Mr. and Mrs. Smith are selling their home in Brooklyn, N.Y., which they have owned for 10 years, and so they retain a local attorney who prepares a standard contract. After the contract is signed, the purchasers' counsel orders a title report, municipal searches and a new survey. Upon review of these items, the purchasers' counsel determines that alterations were made to the house without the necessary building permits. None of these alterations were done by the Smiths, who were unaware of the unauthorized improvements when they purchased the home.

Since the contract contains the standard provision requiring that all property improvements have the necessary building permits and Certificates of Occupancy, their purchasers can walk away from the deal unless the Smiths obtain those permits. There is no guarantee that the Smiths will be able to get all the necessary certificates. If any of the improvements without a permit and certificate were not built according to current building or zoning codes, then the owners have to bring it into compliance or remove it. The cost could potentially involve tens of thousands of dollars!

Why should the Smiths endure all of this hardship? The answer is simple: The Smiths are responsible because when they purchased the property, they failed to determine that these improvements lacked the required permits and/or certificates. What was previously the obligation

of the prior owner becomes the Smiths' obligation by default.

The Smiths' case is not at all uncommon. Certificates of Occupancy, a/k/a C/Os, are potential time bombs for homeowners and practitioners who represent homebuyers. Often, problems are not discovered right away; sometimes it takes years. But when property owners discover this situation, anger and anxiety are not far behind. They promptly call the attorney who represented them in the purchase and demand to know why this problem wasn't discovered at the time of purchase. One of the critical concerns and functions of an attorney representing a purchaser is therefore to establish the legal use of the property and confirm that all improvements incorporated the necessary permits and resulting C/O.

Unauthorized Past Improvements Can Be a Deal Breaker

C/Os, which are municipally-issued documents, specify the nature and legal use of a building or improvement located on real property. They are required for all new buildings and accessory structures such as detached garages, swimming pools, and raised wood decks. Some municipalities require a C/O for items such as fences, sheds, patios, carports, or air conditioning compressors. Certificates also are required by most municipalities for alterations, additions and reconfigurations to the originally-approved structures.

While it is illegal to construct, alter or modify structures and other kinds of improvements on real property without the consent of the local building department, it happens all the time. Thus, what separates the good real estate attorney from the great one is not only the ability to identify unauthorized improvements, but also the ability to guide the client as to how to proceed with the transaction. Ultimately, it is the

attorney's role to identify the risks, advise the client of the potential consequences and give their advice.

In some cases, the improvement is of such a significant nature that the attorney must advise the buyer to insist that the seller obtain a C/O because the potential consequences of bringing the property into compliance are extremely expensive. While this has the potential of killing the deal, sometimes the best advice an attorney can give the client is to "walk away."

However, there are other less significant improvements where the purchaser may want to proceed with the deal and is prepared to bear the risk. Often, the skilled practitioner can extract some monetary consideration from the seller to proceed with the deal. But when an unauthorized improvement is identified and the client elects to proceed with the transaction anyway, the prudent practitioner will insist that the client sign an exculpatory letter for the file.

For an in-depth discussion of C/Os in New York residential real estate practice, including understanding the Building Department's permitting and certification process, the steps involved in doing a C/O analysis and how to legalize past improvements, please go to www.madisontitle.com/COwhitepaper.

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