Real Estate/ Municipal Law

Can You Rely On That Certificate Of Occupancy?

In the area of real estate and land use law there is a critical document that property owners, attorneys, banks and title companies all look for when someone intends to buy, sell or improve a property: the certificate of occupancy. The certificate of occupancy is a document maintained by the local municipal and announces to the world that the property and the structures located thereon are fully compliant with all of the applicable codes, rules and regulations. What if I told you that this critical document may not be worth the paper on which it is printed?

John Farrell

Imagine a scenario where a property owner decides that he needs to expand his home to accommodate his growing family. He wants to construct a two-story addition with a master bedroom suite and two new bedrooms so that his children no longer have to share a room. He hires an architect and tells her about his plan and directs her to obtain all of the necessary approvals. He specifically tells her that he wants the construction to be performed according to code and does not want to have to obtain a variance from the local board of appeals. When the plans are complete, the architect files the application with the municipality and the plans examiner issues a building permit for construction of the addition. Construction is completed and a certificate of occupancy is issued for the addition.

Five years later, the homeowner receives a letter in the mail informing him that the municipality reviewed building permits issued during a certain time period and that his permit was being revoked because it did not comply with the restrictions on gross floor area. The homeowner is advised that the prior building inspector interpreted the code in such a way that would allow him to increase his gross floor area as long as the addition complied with all of the restrictions of the code. Unfortunately, the current building inspector reads the code in a manner that mandates that the entire dwelling and the property must comply with code in order to increase the floor area and since his front porch (which was built in 1927 before permits were even required) was only 34.5 feet from the front property line instead of the required 35 feet. Thus, in his opinion, the entire addition was illegal.

Can the certificate of occupancy be revoked simply because a building inspector interprets the code differently than his predecessor? Whether or not this is proper, it actually happens, and several municipalities around Long Island are doing this more frequently.

Under New York State law, a homeowner has no rights under an improperly issued building permit.[1] Therefore, regardless of whether a building permit is obtained from a local municipality, a property owner may not rely on it if it does not comply with the local zoning code.

In the case of *Parkview Associates v. City of New York*,[2] the New York City Department of Buildings erroneously interpreted the city zoning map and issued a permit to a developer to construct a 31-story building, 12 stories higher than permitted in that zone.[3] After substantial construction was completed on the building, the borough superintendent realized the error and issued a stop work order to the developer and the building permit was partially revoked. The plaintiff appealed this decision to the Board of Standards and Appeals (BSA) which upheld the decision to revoke the permit. In affirming the decision of the BSA, the Court of Appeals held that the building department had no discretion to issue a permit in contravention of the zoning code. According to the Court:

> Insofar as estoppel is not available to preclude a municipality from enforcing the provisions of its zoning laws and the mistaken or erroneous issuance of a permit does not estop a municipality from correcting errors, even where there are results are harsh results… the City should not be

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estopped here from revoking that portion of the building permit which violated the long-standing zoning limits imposed by the applicable P.I.D. resolution.[4]

Further illustrative of this point is *Lamar Advertising of Penn LLC. v. Pitman*.[5] There the Third Department upheld a stop work order which was issued after the Building Inspector issued a permit to erect a billboard that exceeded the maximum allowable height under the code. Again, after construction had commenced, a stop work order was issued. Lamar commenced an Article 78 proceeding alleging that it had acquired a vested right based on the partially completed construction. In rejecting the argument, the court held:

> There can be no doubt that a permittee may acquire a vested right to complete a structure where substantial work already has been performed in good faith reliance upon a valid building permit. However, no such right inures upon an improperly issued permit that purports to allow construction of a structure that violates applicable zoning regulations.[6]

The reason a municipality cannot be estopped from enforcing its own code is because it "could easily result in large scale public fraud."[7] A developer may be more inclined to bribe a local official to issue a permit to construct a building in excess of the permitted zoning, if he knew that he would be allowed to complete the construction even if the fraud were discovered based on a claim of estoppel. The increase in the value of the property would make engaging in fraud worth the risk. "As stated long ago by the United States Supreme Court, 'It is better that an individual should now and then suffer by [governmental] mistakes, than to introduce a rule against an abuse, of which, by improper collusions, it would be very difficult for the public to protect itself.'"[8]

This logic is understandable in the *Parkview and Lamar Advertising* cases where there were clear violations of the zoning code. However, those cases are quite different from the situation described in the beginning of this article.

In that situation, the homeowner had his certificate of occupancy revoked because the current building inspector interpreted the code differently than his predecessor. This is a harsh consequence to suffer based on one's subjective opinion, particularly when the homeowner follows the correct procedures, obtains a building permit and makes a significant investment into his home in reliance on the opinion of the public officials charged with reviewing and interpreting the code.

While the homeowner clearly has the right to make an application to the board of appeals to challenge the new interpretation, there are costs and expenses associated with that application that the average person may not be able to absorb. Moreover, there is a risk that the board of appeals will deny the request for relief placing the homeowner in a difficult position of having to spend significant money to put the home back to its pre-construction condition.

Until the courts or legislature address this issue, property owners are seemingly at the mercy of municipal officials' reading of the local zoning codes.

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1. *Vill. of Wappingers Falls v. Tomlins*, 87 A.D.3d 630, 631 (2d Dept. 2011); *Lamar Adver. of Penn, LLC. v. Pitman*, 9 A.D.3d 734, 736 (3d Dept 2004).
2. 71 N.Y.2d 274 (1988).
3. *Id.* at 280.
4. *Id.* at 282 (internal citations omitted).
5. 9 A.D.3d 734 (3d Dept. 2004).
6. *Id.* at 736 (internal citations omitted).
7. *New York State Med. Transporters Ass'n, Inc. v. Perales*, 77 N.Y.2d 126, 130 (1990) (internal quotation marks omitted) (quoting *E.F.S Ventures Corp. v. Foster*, 71 N.Y.2d 359, 370 (1988)).
8. *E.F.S Ventures Corp.*, 71 N.Y.2d at 370 (alteration in original) (quoting *Lee v. Munroe*, 11 U.S. 366 (1813)).