



A cautionary tale in zoning: Historical use of a property does not guarantee continued future use - by Jessica Leis

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Look to any contract for sale of a commercial property and you will find a “due diligence” provision. During this period, it is incumbent upon the prospective purchaser to investigate whether the property and its current or proposed use complies with the existing land use and zoning regulations. If the investigation reveals that the property is not in compliance with the intended use, the purchaser has the right to cancel the contract for sale. Once the investigation has been completed and the contract is no longer contingent on zoning, any mistakes about the property’s status under land use regulations becomes the purchaser’s responsibility.

One might ask what level of research and analysis is appropriate to ensure a property’s legal status? The nature and extent of such investigation varies, however researching the property’s zoning district and permitted uses in said district is typically a good starting point. A purchaser should not make assumptions that a use is permitted in a district simply because the property operated with such a use in the past. Zoning codes are constantly being revised—and municipalities often adopt specific provisions on how to address non-conforming uses. As was the case in a May 6th, 2020 decision handed down by justice Antonio Brandveen. The Supreme Court, Nassau County denied and dismissed an Article 78 proceeding commenced by the property owners of a commercial site on Northern Blvd., which was brought to reverse the Village of Russell Garden Zoning Board of Appeals’ (ZBA) denial of an area variance for parking.

The property owners had initially applied to the Village for a special use permit to operate an approximately 7,000 s/f commercial piece of property along Northern Blvd. in Great Neck as a used car dealership. Before the application for a special use permit could be heard, the property owners were directed to the Village’s ZBA to obtain a variance for a deficiency in off-street parking spaces.

The property owners purchased the site with the knowledge that it had been used historically as a car dealership and assumed that there would be no issue with a new application for such use. While the property had been used on and off as a car dealership since 1972, there was no current approved use for the site. Of most importance, the Village’s Code had changed in 2016 to prohibit any new automotive uses unless a special permit was granted by the Board of Trustees. Any automotive uses which were currently operating were not allowed to continue past 2016 without the special use permit. A due diligence search of the site at the time of purchase would have alerted the property owners that no special use permit had been granted for the site to operate as a car

dealership.

To the detriment of the property owners, their argument for approval of the variance weighed heavily on the historic use of the site. Further, their only expert testimony presented in support was a traffic report written for an entirely different use at the neighboring site from the year prior. Despite the property owners' attempt to set forth testimony that there would be limited use of the site and it would act more as a satellite location, they failed to meaningfully address any of the ZBA's concerns that the use was an over intensification of the site and would result in undue traffic and vehicle congestion in the surrounding residential community.

In a ten-page Findings of Fact, the ZBA thoroughly detailed its reasoning for denying the parking variance. The property owners appealed to the Supreme Court by way of an Article 78 proceeding, however the court affirmed the ZBA's decision and found that it was supported by substantial evidence on the record.

Now, more than two years after the property owners purchased the site, they are left with a commercial piece of property that cannot be developed in the manner for which they intended. The moral of story: There are no guarantees in zoning. Research the zoning code. Always conduct a thorough due diligence before purchasing, or hire an expert to investigate for you.

Jessica Leis, Esq., is a land use & zoning attorney at Forchelli Deegan Terrana LLP in Uniondale, N.Y.

New York Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540