

REAL ESTATE Connection

IT'S ALL ABOUT HAVING THE RIGHT CONNECTIONS

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A Lawyer's Perspective

Do diligence on real property

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Yes, my legal and financial colleagues, the correct spelling is “due”, not “do”, diligence, but the convergence of several data blips over the past week causes me to respectfully suggest to my readers that they “do diligence” in anything involving real property, including condition, land use approvals and transactions. It may not be grammatically correct, but it is reality.

The blips all converge on what you must do if you want to effectively use and/or make money on real property. Over the past few weeks, we talked about the importance of a property’s physical condition, a tangible quality to that can be seen, touched, quantified. Starting this week, I would like consider some less tangible aspects of real property, specifically land use approvals. In future columns, I plan to discuss real property transactions and then discuss how all three of these issues must be addressed together to maximize the value and potential of your real property

First, it is important to distinguish between the terms real property and real estate. Real estate is the physical asset and real property includes both the physical real estate and the legal rights attendant to it. You may have a deed or a lease for the real estate, but you must be cognizant of the real property rights that you do, or do not, have. Think of it this way: real estate appraisers do not value dirt - they value the rights that you have to use the dirt. This is true whether you own, or are purchasing, a single family home or a casino-hotel.

Now, let’s get back to our discussion regarding the care and feeding of your real property that we have been having over the past several weeks.

Let’s say that you currently own a property and want to wait out the bad market. You read my previous articles on condition and created your own fix-up list, hired a home inspector or, in the case of a large commercial improvement, a construction analyst and structural engineer. You now have a conditions survey showing how to make your property last longer, more functional, more enjoyable, etc. You obtain a cost estimate from a handyman, builder or international heavy construction company. Then, you go to your local banker, the internet or Wall Street for financing. But, what about the necessary land use approvals?

Land use approvals, you say? All I want to do is (fill in the blank). This is my property! Well, you may own the real estate but the “bundle of rights” that you own in the “real property” are limited by the governmental powers of taxation, eminent domain, “police powers” and escheat. Everybody in New Jersey knows about real property taxation. Eminent domain was the subject of the U.S. Supreme Court case *Kelo v. New London*, decided three years ago this month, and we’ll talk more about that in the future. Escheat is the right of the state to take your property if you die without heirs and without a will. The Police Powers that we will address are related to the use and physical dimensions of real property and are generically described as “land use controls”, a.k.a. planning and zoning approvals.

Whatever you may think about the level of regulation over development in New Jersey, you must deal with it. If you want to put up a fence, add a room for your mother-in-law or expand your thriving business, it is highly likely that you will need plan-

ning and/or zoning approvals.

Fortunately, the people who provide these approvals are some of the most helpful and dedicated people I have ever met, as evidenced by numerous examples in municipal land use offices and before land use boards. Planning and Zoning Board staffers will not only patiently explain why a homeowner needs to come before a board to build an addition. They will also detail the steps one must go through and, if necessary refer the applicant, or their professionals, to the board’s invariably helpful planner or engineer for esoteric technical issues. Planning and zoning board members serve without compensation and put in many hours of often thankless public service. Every member of these boards takes their responsibility as seriously as Barack Obama or John McCain will exercise their responsibility as President of the United States.

Over the ensuing weeks I would like to discuss some of the issues that you should know about land use rights and responsibilities related to your ownership of real property. Whatever land use issues you may face, however, make sure that you respect, and show thanks to, the ladies and gentlemen who serve you in obtaining land use approvals for your real property.

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