

CERTIFICATES OF OCCUPANCY, CERTIFICATES OF COMPLIANCE

Many towns issue certificates of occupancy and certificates of compliance as part of the land use permitting process. There seems to be a fair amount of confusion as to when it is appropriate to issue these certificates, and whether it is even necessary to do so. This article seeks to define the two documents and the circumstances in which their use is appropriate.

CERTIFICATES OF OCCUPANCY

A municipal bylaw may require that a certificate of occupancy be obtained prior to occupancy of a structure. The primary reason for issuing a certificate of occupancy is to certify that a structure has been built according to the permit that approved its construction. A certificate of occupancy would be issued by the zoning administrator as a project nears completion, but prior to any occupancy by residents or users of the structure.

The statutory authority for issuing a certificate of occupancy comes from 24 V.S.A. § 4449(a)(2), which states, "If the bylaw so adopted so provides, it shall be unlawful to use or occupy or permit the use or occupancy of any land or structure, or part thereof, created, erected, changed, converted, or wholly or partly altered or enlarged in its use or structure after the effective date of this chapter, within the area affected by those bylaws, until a certificate of occupancy is issued therefore by the administrative officer, stating that the proposed use of the structure or land conforms to the requirements of those bylaws."

Based on this statutory authorization, a local bylaw must then authorize/require the zoning administrator to issue a certificate of occupancy before one can be issued. Practically speaking, a certificate of occupancy would require the zoning administrator to visit a property to ensure that it has been built in accordance with its municipal permits. After comparing notes from the property visit and the permit, the zoning administrator would then issue a certificate of occupancy.

CERTIFICATES OF COMPLIANCE

So-called "certificates of compliance" are an entirely different animal from certificates of occupancy. Increasingly, title examiners are asking municipal zoning administrators to certify that there are no outstanding violations on a property. This simple request is an appropriate one to respond to. However, some zoning administrators may be going further out on a limb than they need to in issuing certificates of compliance.

It is important to know why a title examiner would want a certificate of compliance. When someone purchases a piece of real estate, it is essential to certify that there is clear title to the property. What does this mean? There are a number of components that comprise "marketable title" in Vermont. The most important is that the seller is actually the owner of the property. Beyond that, it is important to ensure that the property you are about to buy is actually what it was advertised to be. It is also important to make sure there are no liens, unknown rights of way, or other encumbrances on a property, as those interests run with the property; they don't disappear once it has been sold. Other components of marketable title include delinquent taxes, and most importantly for our purposes here, land use permits.

When a real estate attorney, paralegal, surveyor, or other title examiner goes to the town clerk's office to search the land records, he or she can be reasonably confident that the recorded and filed documents in the town offices give a sufficient picture of what the state of title is to a certain piece of property. However, it is also important for that title examiner to make sure that there are no unrecorded notices of violation or other unrecorded issues that could adversely impact the property. To make certain of this, the title examiner is going to ask the zoning administrator to certify that there are no outstanding violations or other problems with the particular property. This gives the title examiner an up-to-the-minute snapshot of the title situation for that property.

It appears that some zoning administrators have been going beyond what has been asked of them in the certificate of compliance process, and some have been performing detailed title searches and examinations of zoning records when asked for a certificate of compliance. This serves no purpose for either the municipality or for the real estate attorney.

Instead, a certificate of compliance would be an effective tool for both the municipality and for those involved in the conveyance of the property if the zoning administrator states simply, "I am not aware of any pending violations of the Town of _____ Zoning Regulations on this property. Based upon the information submitted by the property owner, I hereby issue this Certificate of Compliance."

Additionally, it may be appropriate to include language to inform the applicant that this certificate of compliance does not preclude the town from pursuing an enforcement action or taking other appropriate action to ensure compliance with the municipal zoning regulations, if a violation were to present itself. It may also be wise to include language stating that this certificate does not relieve the prospective buyer from performing a thorough title examination.

STATUTORY AUTHORITY

Incidentally, there is only one reference in all of Vermont statutory law to certificates of compliance, at 24 V.S.A. § 4403(11)(D). The statute states, ““Municipal land use permit”” means any of the following whenever issued: . . . A certificate of occupancy, certificate of compliance, or similar certificate that relates to the permits or approvals described in subdivision (11)(A) or (B) of this section, if the bylaws so require.” All this statute does is cast a wide net over a variety of terms, in the process scooping up these certificates of compliance. There is no explicit, or even implied, statutory authorization for municipalities to issue certificates of compliance. That stated, they may be appropriate reasons to issue certificates of compliance.

PRACTICAL CONSIDERATIONS

A zoning administrator does not have to visit a property to issue a certificate of compliance (in fact, it would probably overburden an already overworked administrator), though some do a drive-by. As a rule of thumb, it is probably better to refrain from visiting the property in the certificate of compliance process. Additionally, the legislative body of the municipality should establish a fee structure for municipal land use permits. Most municipalities issuing certificates of compliance charge a base fee for issuing such certificate and charge an hourly rate for those requiring more than one hour of research.

It may appear that the town is being asked to perform a service which it has no statutory duty or authorization to perform. However, a number of tangible benefits come from issuing certificates of compliance. Since a zoning violation can be a potential barrier to the sale of a property, this creates an excellent opportunity for a market-based solution to the zoning enforcement process. Moreover, the certificate of compliance is regarded by most title examiners as an essential component to their ability to ensure marketable title. This is a clear opportunity for municipalities to provide a necessary governmental service to their citizens.

- Brian Monaghan, Attorney, VLCT Municipal Assistance Center

Contact the Municipal Assistance Center for sample certificates of compliance, certificates of occupancy, or for help in drafting documents for your community.

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