

Top 5 Invisible Location Issues For Purchasing Property

Andrew Lieb

Location, Location, Location. Have you ever driven by a property and questioned why THEY don't just put XYZ (i.e., Coffee Shop, Apartments, Offices, Gym) in over there? Then, you thought to yourself: "I can do it, I'm going to be rich!!!" The problem with your get rich plan is that what you see is not what you get when you solely focus on the visual of a given property (i.e., Location, Location, Location). Before becoming a first-time developer of residential or commercial real estate you need to understand these five invisible location issues.

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- 1. Availability of Permits:** The first question when thinking to oneself that a location looks perfect to develop isn't its proximity to where you want to be or the dimensions of the parcel and/or structures or even the existence of certain optimal structures on the land, but more importantly, the only operative first inquiry is what are the as-of-right uses permitted for this property (i.e., is it legal to do what I envision on this property?). To illustrate, a client recently asked me if I thought a certain sum was a good price for him to pay to his landlord to buy the land where he stores his landscaping business' trucks and equipment. After a 5 minute look at the Municipal Code we determined that he shouldn't even be renting at that property any longer, much less buying it, as it was located within a residential district and he was utilizing the property illegally for commercial purposes. In fact, the quickest way to go out of business is for the municipality to shut your business down as a result of your illegal use of property. Therefore you need to ascertain your as-of-right uses (i.e., physical, dimensional and intended purpose) for a given parcel of property before even considering a prospective purchase of the property. To do this, first determine which town (i.e., hamlets are considered located in the town), village or city the parcel is located within. This is done by checking the tax bills for a property because all municipalities tax their inhabitants. Then, it's incumbent upon you to determine the parcel's zoning district designation within that municipality, which can be determined by contacting the municipal Assessor's office in which the property is located. Only then can you check the local Code to ascertain the physical, dimensional and purpose rules for the property, which can be found at the website generalcode.com, or by going to your local municipality (or their online website). If the Code doesn't expressly permit your proposed use, you may still be able to use the property for your goals, but the cost of such use will then be significantly more expensive. If you want to move forward, look-up the availability of Special Use Permits for your proposed plan before throwing in the towel.
- 2. Special Use Permits:** While certain uses of land are as-of-right, others are permissible only with special permission (a/k/a Special Use Permit) from the municipality. Special Use Permits offer additional uses for property beyond the designated as-of-right uses, but such additional uses require proof that certain enumerated codified conditions are satisfied, which are designed to mitigate the negative secondary impact of such additional use on adjacent properties. The need for a Special Use Permit is rarely a terminal diagnosis for your intended project, but it will create another layer of cost. Still further, if you worry about the permit being arbitrarily denied by your municipality, it's incumbent upon you to hire an attorney to submit the paperwork to the municipality because a judicial appeal of the Town's or Village's denial (i.e., Article 78 Proceeding) is restricted to a review of the record before the municipality. Also, be mindful that there is a 30-day statutory limitations period in which such an Article 78 Proceeding must be filed or its deemed abandoned.

3. **Area Variance:** Should the only impediment to your intended use be that your project calls for non-conformance with the dimensional or physical requirements for your property pursuant to the local Code, and should no Special Use Permit be available, then you will need to apply for an Area Variance (i.e., exception from Code prohibition) in order to effectuate your vision for the property. Generally, one must first undertake the charade of applying for and being denied a permit for an as-of-right use prior to seeking relief from the Zoning Board of Appeals (ZBA), which issues variances within municipalities. Pursuant to both Town Law and Village Law, the 5-factors considered by the ZBA in an area variance application are: "(1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance." More so, one needs to learn how to play politics in order to be approved for an area variance. Beyond appeasing the powers that be on the ZBA, going to speak with neighbors, civic associations, chambers of commerce and the like prior to making an application creates the best chance for success in obtaining the area variance. By going through the political game, you will know and understand your neighbors' specific objections to your proposed project and have an opportunity to modify your project in order to accommodate those neighbors' objections (i.e., make concessions) prior to making your application for the variance to the ZBA. Accordingly, your application will then be able to demonstrate your neighborhood's support for your project (i.e., the project then creates a desirable change with reference to factors 1 and 4). Nonetheless, should this application fail, an Article 78 judicial appeal is available, but again as with the Special Use Permit, the evidence within such a judicial intervention is restricted to the record and the proceeding must be commenced within the 30-day limitations period from the filing of the decision on the variance application in the office of the municipal clerk.
4. **Use Variance:** Even where your existing structure or proposed construction meets the dimensional or physical limitations imposed by your local Code and the structure is consequently deemed as-of-right, your municipality's Code may restrict your proposed business from operating at the situs of your parcel. When your intended purpose for the property is non-conforming with the Code a Use Variance is required for you to effectuate your vision for the property. To be granted a use variance, you, as the applicant, will need to demonstrate to the local municipality's ZBA that the zoning restrictions have caused you an "unnecessary hardship." Pursuant to both Town Law and Village Law, an "unnecessary hardship" is proven by going through "each and every permitted use" for the property within the district and, for each, demonstrating that "(1) the applicant cannot realize a reasonable return, provided that lack of return is substantial as demonstrated by competent financial evidence; (2) that the alleged hardship relating to the property in question is unique, and does not apply to a substantial portion of the district or neighborhood; (3) that the requested use variance, if granted, will not alter the essential character of the neighborhood; and (4) that the alleged hardship has not been self-created". Best practice in seeking a Use Variance is to make the granting of the variance a condition of purchase where both the seller(s) and buyer(s) cooperate in jointly making the application before the subject municipality. Therefore, you can more easily demonstrate that the as-of-right uses do not realize a reasonable return by arguing that the same is the basis of the current owner's sale of the property. Still further, experts are required to determine how your proposal will affect traffic, water, noise and the like. Whatever you do, don't skimp on experts (e.g., real estate and business appraisers, accountants, and industry experts as well) because their reports form your application record, which, again, is the only evidence before a Court in a subsequent Article 78 Proceeding arguing that the ZBA's decision was arbitrary and capricious.

5. **Up-zoning / Rezoning / Change of Zone:** Where a sought-out use is not as-of-right and should the use be for an entire corridor (i.e., a strip of buildings) rather than an individual parcel, perhaps the best practice to see your vision realized is to seek a change the zoning for your property (a/k/a Up-zoning, Rezoning, Change of Zone) rather than receiving an exception from the Code (i.e., variance). To accomplish a Change of Zone, start by lobbying the local powers that be (i.e., Town / Village Board and/or Planning Board) and arguing through a Change of Zone Petition (i.e., local Codes have different names and processes for the application) that your vision is in accordance with the living comprehensive plan for the municipality. Such a plan identifies the community's short and long-term goals and objectives to protect, enhance, and grow the municipality. While municipalities are generally divided into different districts with strict regulation of required building specifications and permitted uses, rezoning involves the reclassification of property into a new or different district that permits the purposed utilization for the property location. New York's highest court has blessed the concept of rezoning by explaining that "changing conditions call for changed plans, and persons who own property in a particular zone or use district enjoy no eternally vested right to that classification if the public interest demands otherwise" in the perennial case of *Rodgers v. Village of Tarrytown*. Yet, such actions, which are usually carried out by the municipal planning board, are subject to legal charges of Spot Zoning, which seek a judicial determination that the Up-zoning was invalid and the activity apparently permitted for the property under its new zone is enjoined (i.e., stopped). Spot Zoning is "the process of singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners" according to the *Rodgers* Court. Instructively, those seeking Rezoning are required to articulate to the municipality that the proposed Up-zoning is in line with "a comprehensive plan for the general welfare of the community" as opposed to being "for the benefit of individual owners."

Adapted from this [Behind The Hedges](#) Article.