



Certificate of Occupancy and Open Permit Issues: Hidden Problems That Can Derail a Closing

One of the most common issues uncovered during real estate due diligence is an invalid Certificate of Occupancy (“CO”) or open building permits. These problems often surface late in a transaction, often after contracts have been signed, creating delays, unexpected costs, and disputes between buyers and sellers.

Certificates of Occupancy and their Legal Significance

A Certificate of Occupancy is issued by a local building department certifying that a building or structure complies with applicable building codes, zoning ordinances, and other municipal requirements, and is legally fit for its designated use. The CO identifies the approved use (such as single-family residential, commercial, retail, industrial, or mixed-use) and serves as the municipality’s confirmation that the structure may be lawfully occupied. In most jurisdictions, a building may not be legally occupied without a CO, and its absence may constitute a code violation or expose the owner to enforcement action.

It is important to distinguish between temporary and final certificates of occupancy. A temporary CO (or “TCO”) is issued when a building is substantially complete and safe for occupancy but certain non-critical items remain outstanding, such as landscaping, exterior finishes, or minor punch-list corrections. A TCO typically carries an expiration date and must be renewed or replaced with a final CO upon completion of the outstanding work. A final CO is issued only when all construction is complete, all inspections have passed, and the building fully complies with applicable codes. A final CO does not expire unless the property’s use changes or new work triggers additional permitting requirements.

Understanding Open Permits

An “open permit” is any building, electrical, plumbing, mechanical, or other construction-related permit that was issued but never finalized or “closed out” through a satisfactory final inspection. When a permit is pulled, the municipality expects that upon completion the owner will request a final inspection, the inspector will verify compliance, and the permit will be closed. An open permit means work was authorized but never confirmed as properly completed.

Open permits can linger for various reasons: the work was completed but the owner never scheduled a final inspection; the project was started but never finished; an inspector identified deficiencies that were never corrected; or administrative errors occurred at the municipal level. Whatever the cause, open permits remain on record indefinitely and typically surface only when a buyer, lender, or title company orders a permit search during the transaction.

How These Issues Affect Transactions

Open permits and CO deficiencies create significant obstacles to closing. For purchasers, an open permit may indicate unresolved code issues, incomplete construction, or unauthorized alterations. Most institutional lenders require a valid final CO as a condition to funding, and missing or non-conforming COs or outstanding permits may prevent a loan from closing. For sellers, resolution can be expensive and time-consuming as municipalities may require inspections, engineering certifications, updated surveys, permit renewals, or remedial work before permits can be closed.

Due Diligence Recommendations for Buyers

Prospective purchasers should not rely solely on seller representations regarding permits and occupancy compliance. Before waiving due diligence contingencies, buyers should:

- Obtain municipal searches and building department records.
- Confirm that the existing use complies with the current certificate of occupancy.
- Review permit histories for unresolved permits or violations.
- Determine whether any additions or alterations require certificates of completion.
- Evaluate whether zoning approvals, special permits, or variances remain valid and transferable.

In commercial transactions, purchasers should also determine whether tenant improvement work was properly permitted and closed out, as open permits created by former tenants often become the owner's responsibility.

Practical Advice for Sellers

Property owners contemplating a sale should investigate CO and permit issues before marketing. Conducting a municipal review early can identify problems while there is time to address them. Proactive resolution is almost always less costly than the concessions, escrows, and delays that result from leaving issues for the buyer to discover. Sellers should also be mindful of disclosure obligations. New York imposes on residential sellers a duty to disclose known material defects, and open permits, unpermitted work, and CO discrepancies likely fall within that obligation. Failure to disclose may give rise to claims for fraud, misrepresentation, or rescission that far exceed the cost of the underlying cure.

Takeaway

CO deficiencies and open permits are among the most common issues in real estate due diligence. What appears to be a minor administrative oversight can delay a closing, impact financing, increase costs, or jeopardize a transaction entirely. Whether buying, selling, leasing, or financing real property, early investigation of municipal records can help resolve these issues before they become a dealbreaker.

If you have questions regarding Certificates of Occupancy, open permits, municipal compliance, or real estate due diligence, you should consult our experienced real estate counsel for guidance.

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