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Coates' Canons Blog: Preoccupied with Occupancy Certificates: Part I

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My current preoccupation (a temporary one, I hope) is certificates of occupancy. I don’t mean those permissions necessary to occupy public property in the Raleigh, New York, or Washington demonstrations that have been in the news. No, I mean those ordinary certificates of occupancy that local governments issue to allow new buildings to be occupied for the first time or the use of existing properties to be changed. The certificate of occupancy (CO) is a widely recognized certificate issued by code officials that represents a determination that work done on a building or development project has been completed in compliance with the law and may be occupied safely.

To qualify for one in North Carolina, the owner and contractor may be required not only to show that the project complies with the North Carolina State Building Code (SBC), but also with other laws and regulations that are unrelated to the SBC but that apply to the development project. In addition, the CO has significance not only for the local government; it is important to the variety of private parties such as contractors, subcontractors, design professionals, lenders, realtors, utility service providers, and others who have an interest in knowing exactly when a building project has been properly completed and can be occupied and when various obligations provided for in private construction contracts have been discharged.

Most government officials and members of the development community believe they understand the way the certificate of occupancy works. Yet despite the apparent widespread use of the certificate of occupancy process, there are various ambiguities in the law that have resisted resolution. The result is that there is more variation in the administration of certificates of occupancy among North Carolina local governments than might be expected.

Certificates of compliance as certificates of occupancy

The North Carolina building, inspection, and development statutes do not refer to a certificate of occupancy at all. Instead the statutes refer to “certificates of compliance.” G.S. 160A-423 and G.S. 153A-363 (Certificates of compliance) provide as follows:

At the conclusion of all work done under a permit, the appropriate inspector shall make a final inspection, and if he finds that the completed work complies with all applicable State and local laws and with the terms of the permits, he shall issue a certificate of compliance. No new building or part thereof may be occupied, and no addition or enlargement of an existing building may be occupied, until the inspection department has issued a certificate of compliance. A temporary certificate of compliance may be issued permitting occupancy for a stated period of specified portions of the building that the inspector finds may safely be occupied prior to final completion of the entire building. Violations of this section shall constitute a misdemeanor.

If the word “occupancy” were substituted in the statute set forth above in each instance that the term “compliance” is used, then G.S. 160A-423 and G.S. 153A-363 might clearly serve as authority for the use of certificates of occupancy. Furthermore, requiring that “completed work complies with all applicable State and local laws” suggests that the authorizing certificate take into account conformity with not only the State Building Code (SBC) but other applicable state laws and regulations as well.

The idea that a certificate of compliance and a certificate of occupancy are essentially the same thing was reinforced 26 years ago in the case of First American Federal Savings and Loan Association v. Royall, 77 N.C. App. 131, 334 S.E.2d 792 (1985). The court referred to the certificate of compliance statute (G.S. 160A-423) in upholding the right of the City of Raleigh to withhold issuance of a certificate of occupancy for a building on a subdivision lot because the subdivider had not complied in all respects with the terms of its subdivision plat approval. The developer had failed to complete a required water line extension to several other lots within the subdivision. The court ruled that the city could withhold the certificate

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of occupancy for the building even though the water line was not necessary to provide service to the lot upon which the building was located. The decision appeared to allow an expansive reading of the certificate of compliance statutes.

Certificates of compliance distinguished from certificates of occupancy

In early 1990s, however, the SBC was amended in such a way as to recognize the certificate of compliance as being something different from the certificate of occupancy. Since then the SBC has viewed the certificate of compliance as evidence of compliance with a particular volume of the Code or the regulations that apply to a particular trade. The inspection department may issue multiple certificates of compliance indicating conformity of the work with the various technical codes that make up the SBC. These certificates could be called "building system certificates of compliance," because they signal compliance of a particular building system (e.g, HVAC) with a particular technical code (i.e., the mechanical code) that is part of the SBC. This approach is consistent with the fact that the certificate of compliance statute refers to compliance with regulations applicable to "work done under a permit." One may expect that a complex development project will require various individual permits. Finally, to distinguish a certificate of compliance from a certificate of occupancy, section 204.8.2 of the 2009 North Carolina Administrative Code and Policies (part of the North Carolina State Building Code) provides in part that "(t)he certificate of compliance shall not be construed to grant authority to occupy a building."

To complicate matters still further, some local governments issue a blanket, overall certificate of compliance indicating conformity with all of the technical codes and related regulations of the SBC. In these circumstances a building may not be occupied prior to the issuance of this overall certificate of compliance. That use of a certificate of compliance is also authorized by the administrative code (sec. 204.8.1).

Where does all of this leave the certificate of occupancy? Without referring to any general statute, section 204.8.4.1 of the 2009 Administrative Code provides:

Upon satisfactory completion of a building and after the final inspection, the inspection department may issue a certificate of occupancy. The certificate of occupancy shall state the occupancy may be safely occupied.

This code provision does suggest that those who adopted and drafted the SBC were aware of something known as a certificate of occupancy, even if they were not prepared to define it or establish its scope.

This is not to say that there are not North Carolina statutes that expressly mention the use of certificates of occupancy. There are. They must be based on the assumption that authority for the use of COs exists. For example, G.S. 115C-521(c1) prevents a local board of education from applying for a CO for any new middle or high school building until the plans for the science laboratory and related areas are reviewed and approved by the State Board of Education. Likewise, G.S. 160A-374 prohibits a city from requiring the dedication of water system facilities as a condition of land subdivision plat approval unless a public entity that operates water systems agrees to begin operation and maintenance of the dedicated water system facilities within one year of the time of the issuance of a CO for the first unit of housing in the subdivision. Similarly, G.S. 105-277.1D(a) allows a residential builder to qualify for a property tax break on a property that is part of the builder's residential inventory only if the residence is unoccupied but "a certificate of occupancy authorized by law" for it has been issued.

An eminently practical question, then, is: What is the authority for, scope of, and reach of a local government certificate of occupancy program? What development-related permissions and approvals does it (or may it) apply to? In some local governments the certificate of occupancy indicates compliance with the SBC and, very likely, zoning. In other jurisdictions the CO might not be issued until compliance with community water system requirements is demonstrated or until deceleration lanes are built to serve a major traffic generator. What about compliance with septic tank regulations, the land subdivision ordinance, the Coastal Area Management Act, applicable state or local driveway regulations, or soil erosion and sedimentation control requirements?

It remains unclear whether a local government is compelled or even authorized to withhold a certificate of occupancy pending a demonstration of compliance with non-SBC laws and regulations or whether a local government must administer a CO program at all. The *Royall* case cited above and the long tradition of certificates of occupancy still provides comfort for those who rely on them today. A local development ordinance can certainly provide guidance and elaboration. However, until improvements are made to the statutes and building code provisions affecting certificates of

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occupancy, local governments are left to resolve some of the questions above on their own and to risk exceeding their authority or to risk failing to make use of a very effective permit coordination technique.

Until then, the circumstances under which certificates of occupancy allow building occupation will continue to be a subject worthy of preoccupation.

Next time, part II of this blog will take up the use of temporary certificates of occupancy and the relationship of certificates of occupancy to the connection of permanent electrical power to a building.

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