Real Estate Law & Practice

Standing the Test Of **'Time Is of the Essence'**

BY ERIC RUBENSTEIN AND JOHN CHILLEMI

Real estate purchase and sale contracts have included the magic language, "Time is of the Essence" (TOE), seemingly since time immemorial. This term of art has been imbedded in the lexicon of a multitude of commercial contracts to an indelible extent and has earned general acceptance and use in our culture. For example, "Time is of the Essence" is the name of a jazz album (Michael Brecker), and you do not see many records named after real estate contractual provisions.

Practitioners should be mindful, however, of the meaning of TOE and the significance of its absence from a contract. In 1989 and 2001, the lead author of this article co-wrote New York Law Journal articles discussing and interpreting New York law governing TOE provisions in real estate contracts. Recent decisions interpreting TOE indicate a consistency of interpretation, but with certain wrinkles of which attorneys should be aware.

Is the 'T' in TOE Reasonable?

A TOE clause in a purchase/sale contract commonly provides that if the parties do not close on the specified date, or "law date," then the party who is not ready, willing and able to close will be in default of the contract. When the contract does not state that time is of the essence, New York law generally holds that the defaulting party (usually purchaser) is entitled to a reasonable adjournment of the closing date. Once the closing date set forth in the contract passes, either party may unilaterally declare TOE by providing the other party with the following: (1) clear, distinct, and unequivocal notice that time is now of the essence; (2) reasonable time for the other party to act; and (3) notification that failure to appear or perform on the closing date is a default under the terms of the contract. *Nehmadi v. Davis*, 63 A.D.3d 1125, 882 N.Y.S.2d 250 (2d Dept. 2009). That "reasonable" notice period is generally assumed to be 30 days. However, recent case law casts some doubt on that.

When determining a "reasonable time," courts will look at the facts and circumstances of the particular transaction, and will consider: (1) the nature and object of the contract; (2) the conduct of the parties; (3) presence or absence of good faith; (4) the experience of the parties and existence of prejudice; and

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(5) the actual number of days provided in the notice. *184 Joralemon v. Brklyn Hts. Condos*, 117 A.D.3d 699, 985 N.Y.S.2d 588 (2d Dept. 2014).

In *2626 Bway v. Broadway Metro Associates*, 85 A.D.3d 456, 925 N.Y.S.2d 437 (1st Dept. 2011), the First Department held that three weeks' notice was a reasonable time to set a TOE real estate closing. There, seller contracted to sell property with a closing date set to occur within six months following contract execution. As the closing date neared, buyer sent a letter to seller requesting a two-month adjournment of the closing date. Seller responded to the request the same day and instead proposed a three-week adjournment with a "time is of the essence" clause. Buyer objected to the proposed closing date and the TOE designation clause and proposed another closing date without a time is of the essence clause. Seller ignored the objection and when buyer failed to appear at the closing three weeks later, seller declared buyer to be in default and retained the down payment. The court upheld the loss of the deposit, relying on the fact that the original contract contained a six-month period in which to close, and that an additional three weeks on top of the extended contract period was reasonable.

> When the contract does not state that time is of the essence, New York law generally holds that the defaulting party (usually purchaser) is entitled to a reasonable adjournment of the closing date.

Conversely, the Third Department in *Malley v. Malley*, 52 A.D.3d 988, 861 N.Y.S.2d 149 (3d Dept. 2008), held that 21 days' notice in a "time is of the essence" declaration was not reasonable under the circumstances. In *Malley*, as part of their judgment of divorce, the parties entered into an "opting-out agreement" wherein the husband was required to place approximately $75,000 in escrow to be used to pay down the outstanding mortgage on the marital home. The wife had the option of either attempting to refinance the mortgage in her name alone by a certain date or to receive the net proceeds from the sale. The wife obtained a mortgage commitment for the refinancing by the specific date, and the husband in turn notified the wife by letter that closing was set for 21 days following the date of that letter, and that time was of the essence. When the wife failed to appear at the closing, the husband moved to compel the sale of the residence, and the wife cross-moved to compel the husband to attend the closing for the refinancing. Under the circumstances, the court held that the wife had indeed attempted in good faith to obtain the mortgage commitment and that the husband was aware of the wife's difficulties in satisfying the lender's conditions. Furthermore, the court found that since the wife's failure to obtain refinancing would absolve the husband's responsibility of paying increased maintenance to the wife, he had an incentive to frustrate the refinancing. The court found that the law date selected in the husband's letter was unreasonable, and his letter failed to make the closing TOE.

Many purchase and sale contracts, commercial leases, and financing documents include a general provision, often in the "miscellaneous" section at the end of the instrument, providing that all obligations of the purchaser, tenant, borrower or guarantor are "of the essence." Direct case law was not found on whether such a general, conclusory clause would be applied to specific contractual obligations in the instrument. However, » Page 12

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Don't Ignore **Liquor License Issues** In Transactions

BY JENNIFER L. TSYN AND SARAH LEWIS BELCHER

When representing a client in core real estate work, such as buying or selling real property or negotiating a lease, alcohol may be the last thing an attorney is likely to take into consideration. Clients are often looking for high-quality work on the specific issue presented to the attorney, with a quick turnaround and acceptable cost.

A client who retains an attorney for representation in the purchase or sale of real property, or in the negotiation of a lease, may not necessarily bring liquor licensing concerns to the attorney's attention.

As with many other business considerations related to the use of real property, liquor licensing issues can significantly impact real estate transactions. These items may delay, or even derail, negotiations and closings of purchase/sale contracts and leases.

In the course of working with a potential buyer or tenant of commercial real estate, it is important to consider the licenses and other approvals the client will need to operate the intended business at the property. Many businesses may require a liquor license to remain sufficiently profitable to operate. However, both the location and physical layout of the property being purchased or leased can cause several issues for a client applying for a liquor license. These factors should be considered in the contract or lease negotiations, as well as in the due diligence phase of any real estate transaction involving a business that will sell alcoholic beverages.

Initial Considerations

At the outset of any purchase or lease of commercial real estate, the client should be asked whether the business it intends to operate at those premises is a food and beverage establishment or a retail business that sells alcohol. If the response is yes, the next step is to determine whether the client will apply for a "retail" liquor license or a "wholesale" liquor license. The "retail" classification allows the licensee to sell or serve alcohol to the public.[1] "Wholesale" liquor licenses are issued to alcohol manufacturers or distributors.[2]

If the client will seek a "retail" license, the attorney should determine if an "on-premises" or "off-premises" license is appropriate. An "on-premises" retail liquor license allows the licensee to serve alcohol to customers to be consumed on the premises.[3] An "off-premises" retail license only allows the licensee to sell alcohol "to-go," with no consumption allowed on the premises.[4]

From a real estate perspective, the "on-premises" retail liquor license (which would generally apply to a bar, restaurant, hotel, club, catering or event hall, arena or entertainment venue) is the classification that is most likely to impact purchase or lease negotiations. If the client will be seeking this type of license and is purchasing or leasing a property to start such a business, the first step in the liquor license application process is to notify either the municipality in which the premises is located or the community board serving the premises, using the New York State Liquor Authority's approved form.[5]

If the property is located outside New York City, the notice is sent to the clerk of the municipality in which the property is located.[6] Once the clerk receives the notice, the client must wait 30 days from delivery of the notice form before submitting a liquor license application to the Liquor Authority.[7] Some municipalities will waive the waiting period, but larger municipalities may be less willing to do so. Clients may wish to send this notice while still negotiating the contract/lease and/or working through the due diligence portion of the transaction, as it is a relatively easy and low-cost part of the application process and does not obligate the client to actually purchase or lease the property or file any liquor license application for that location.

If the property is located in New York City, the notice must be sent to the applicable Community Board. The appropriate Board is determined by searching Community Board maps available on the official website of the City of New York.[8] The client must provide information to the Community Board about the new business.[9] A hearing before the Community Board, or one of its committees, may also be required. Clients may not wish to commit the time and effort to work through the process with the Community Board until the real estate transaction is far enough along that it is reasonably certain the client will be purchasing or leasing the property at issue.

Due Diligence Considerations

The Liquor Authority generally treats the issuance of a liquor license as a privilege, not a right.[10] Pursuant to ABC Law §64(6-a), the Liquor Authority may consider the following factors in reviewing a liquor license application and determining if granting the license will be for the "public convenience and advantage": » Page 12

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Policy Change for Offerings Of **Out-of-State Condominiums** in New York

BY STUART M. SAFT

On May 5, 2016, the Real Estate Finance Bureau of the New York State Department of Law (the Office of the Attorney General) (the NYAG), issued Cooperative Policy Statement #12 (CPS-12), which provides guidelines for out-of-state offerors of cooperative interests in realty (including condominium units and cooperative apartments) in New York state.

CPS-12 provides an exemption from the regulatory requirements governing offerings of cooperative interests in realty and is a seemingly significant departure from the NYAG's long-standing policy relating to real estate offerings, in general, and out-of-state offerings, in particular.

Pursuant to New York General Business Law §352 et seq. (the Martin Act) and the regulations by the NYAG promulgated thereunder (the Regulations), the sponsor of cooperative interests in realty are required to register as a broker/dealer of securities in New York state and file an offering plan with the NYAG detailing the terms of the offering containing a complete disclosure of all the material terms of the offering, which presently results in offering plans containing 400-1,000 pages of disclosure. CPS-12 provides an application for an exemption from the requirement to file an offering plan or a New York Supplement to out-of-state offering material. To receive an exemption under CPS-12: (1) the offering must involve realty situated exclusively outside of New York state; and (2) the jurisdiction in which the realty is situated must have enacted laws to protect purchasers that are comparable to those of New York. Of course, that is the critical element of CPS-12 because nowhere in the world is there another jurisdiction with a law similar to the Martin Act and the Regulations. It is believed that it is the authority granted to the NYAG and the requirements of the Regulations as well as the detailed review of the offering plans by the staff of the NYAG that has helped New York avoid the financial losses on real estate offerings that are so common elsewhere.

The application to receive an exemption under CPS-12 contains the following requirements:

(1) Application, » Page 11

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BY DANIEL M. BERNSTEIN

Paths Forward for **Multifamily Properties** And **Conversions to Residential Use**

BY DANIEL M. BERNSTEIN

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Regardless of the 2016 expiration of the 421-a property tax exemption for new construction residential projects[1] (421-a benefits), existing multifamily properties have opportunities to utilize significant economic incentives—zoning bonuses, property tax exemption or abatement benefits, and/or various financial subsidies—for maintaining or extending the affordability of residential units or for performing certain rehabilitation or preservation construction work.

There are also significant incentives available for the conversion of existing non-residential buildings to allow residential use.

It would take a full issue of The New York Law Journal to provide a full and comprehensive discussion of the incentives for existing multifamily properties or conversions to residential use. Instead, this article is intended to provide a taste of the opportunities for developers and owners.

Opportunities for Existing 80/20 Rental Properties

This discussion relates to existing multifamily rental properties that have already made at least 20 percent of their apartments affordable at particular income and rent levels (Affordable Units) to qualify for 20- or 25-year property tax exemption benefits under the 421-a statute, and possibly to obtain other economic incentives, such as tax-exempt bond financing and low-income housing tax credits (LIHTCs) under §42 of the Internal Revenue Code. Affordable Units are typically affordable for at least the duration of 421-a benefits and possibly longer, pursuant to other Regulatory Agreements (which are the agreements governing affordability of units and other restrictions imposed by agencies granting subsidies). The remaining 80 percent of units are initially rented at market rates (Market Rate Units) and are subject thereafter to Rent Stabilization for at least the duration of 421-a benefits. I will refer to these as 80/20 Projects, though there are several varieties of 80/20 Projects discussed below.

To start, a threshold issue requires clarification. If units are subject to affordability requirements of the 421-a statute and Rules, and to one or more Regulatory Agreements with a financing agency, there is typically a period after which the Market Rate Units are no longer subject to Rent Stabilization and the Affordable Units are no longer subject to affordability restrictions or to Rent Stabilization. However, if units are affordable under an Inclusionary Housing Regulatory Agreement (IH Regulatory Agreement) with the NYC Department of Housing Preservation and Development (HPD) pursuant to §23-90 et seq. of the NYC Zoning Resolution (IH Program), such Affordable Units must remain permanently affordable (IH Units), consistent with the IH Regulatory Agreement.

Owners have several possible options for these 80/20 Projects:

• **Partial Sales Program Option:** Seek to offer a portion of the building's market-rate dwelling units for sale as cooperative or condominium units, while continuing to own and operate affordable units as income-restricted rentals, possibly with an increase in the number of affordable income-restricted rental units. This is referred to as the "Partial Sales Program" and exists as a limited exemption to the offering plan requirements of the Martin Act[2] as provided for by the Real Estate Finance Bureau of the New York State Department of Law.[3] The Partial Sales Program requires the permission of Regulatory Agreements and of the relevant housing finance agency or agencies granting 421-a property tax exemption benefits and issuing tax-exempt bonds, LIHTC, or other subsidies. Permission must also be granted by the New York State Attorney General, per the NY AG Partial Sale Memo.[4] The benefit of the Partial Sales Program to property owners is that it allows the offering for sale of market-rate units in an occupied building before the relevant requirements expire (and which would eventually allow the filing of an offering plan to convert the entire building to a market-rate condominium or cooperative). Ordinarily a conversion cooperative or condominium offering plan for such an 80/20 Project would have to include providing all bona fide tenants in occupancy with an exclusive right to purchase their units, which would not be possible until all of the dwelling units have exited affordability restrictions. The trade-off for accelerating the sale of a portion of the building's market-rate dwelling units is that an owner must commit to preserving the affordability of the Affordable Units and possibly make additional apartments affordable. This option may not be available where the Affordable Units are already subject to the IH Program, which requires permanent affordability. Note that certain types of subsidies prohibit home ownership units within the same project, and this objection must be addressed with the relevant housing finance agency. It may be necessary to create a condominium regime with a separate condominium unit consisting of the rental Affordable Units, with the remaining dwelling units being the market-rate units subject to a conversion offering plan.[5]

> The trade-off for accelerating the sale of a portion of the building's market-rate dwelling units is that an owner must commit to preserving the affordability of the Affordable Units and possibly make additional apartments affordable.

• **Extended 421-a Affordability Option:** Seek to extend the affordability of existing Affordable Units and to make an additional 5 percent of dwelling units affordable in order to extend the duration of the 421-a property tax exemption or, under this option, the 421-a EAB program. This is available only to 80/20 Projects that commenced construction before July 1, 2008, which commit to making Affordable Units affordable for at least 35 years at their current affordability level (incomes and rents, adjusted for family size), and to making an additional 5 percent of the dwelling units (taken from the Market Rate Units) affordable at or below 130 percent of Area Median Income for at least 35 years. The 421-a EAB program requires that all residential dwelling units be operated as rental units and extends the 421-a benefit schedule from 20 or 25 years to 35 years, subject to a new 421-a benefit schedule. 421-a EAB is a new program established by new subdivision 17 of §421-a, and properties seeking to participate in it must execute a Regulatory Agreement with HPD. On May 11, 2016, HPD adopted rules regarding the implementation of 421-a EAB which address, among other issues, the monitoring of the affordable units.

• **Financial Incentives for Extended Affordability:** Seek subsidy from HPD or another city, state, or federal agency for (a) extending the duration of the income and rent limits applicable to Affordable Units and/or (b) lowering the income and rent levels applicable to some or all Affordable Units. This would be subject to the requirements of each potential financing program.

• **Seek Rezoning to Add Floor Area:** Seek rezoning of property to increase the residential floor area available in exchange for making a certain percentage of the newly constructed residential units affordable. Obviously, this would be applicable only to properties that could structurally support additional floors. Whether this scenario would qualify for property tax reduction through the 421-a statute (if available and desirable), the J-51 program (J-51 benefits) (if available[6] and desirable), or other incentive program(s) remains to be determined. The amount of residential floor area and dwelling units added will determine whether the property would become subject to the affordability requirements of Mandatory Inclusionary Housing (MIH),[7] or whether it is exempt from MIH requirements.

Now that I have laid out the options, it is important to point out that the combination of certain 80/20 project options may not be possible. While owners may want to combine the Partial Sales Program with a longer 421-a property tax exemption, 421-a EAB is available only to projects where all residential tax lots are operated as rentals. As such, it will not be possible to extend the 421-a benefits of a project where a Partial Sales Program exception is received and where market-rate units are offered for sale as cooperative or condominium units. It may be possible to obtain subsidies for the continued afford-

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Condominiums

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in the form provided by the NYAG, including information about the offering and the jurisdiction in which it is governed with exhibits to the application that include a legal description of the cooperative interest in realty offered, a schedule of offering prices, the financials and budget for the offering, the governing documents of the offering, and an escrow agreement for New York offerees;

(2) Certification of the sponsor and its principals;

(3) Additional documents including an attorney transmittal letter, statistical information card, notice of appearance, Form M-10, and such other documentation as may be required by the NYAG; and

(4) Filing fees. As noted, the NYAG has complete discretion to accept or reject the CPS-12 application.

Although still subject to the NYAG's discretion, the issuance of the CPS-12 at the present time is surprising because, for the last few years, the NYAG has been fine tuning its Regulations, extending their reach and requiring additional disclosure to the already complex disclosure requirements of the Regulations. Moreover, unlike any other state's condominium acts, securities law, or other similar law or regulations, which do not require out of state condominium offerings to register with the state in which the buyer resides, it has not made a difference to the NYAG whether the condominium or other interests in realty are located in the regulator's state. The NYAG's policy is that if either the property is in New York state or the potential purchaser is a New York resident and heard about the property in New York state, no offer can be made prior to the purchaser receiving an Offering Plan that has been previously accepted for filing by the NYAG. This means that offerings in New York of properties in other states or countries could not proceed without the New York purchasers being provided the same information as an offering for a property in New York state. In addition, also unlike any other state, the offering plan is reviewed by the NYAG and marketing cannot commence prior to the offering plan's acceptance by the NYAG, which frequently requires extensive changes to the offering plan before it is accepted. The exception to the foregoing is the CPS-1, which is a Test the Market application, that allows pre-offering plan advertising that has been approved by the NYAG. This application permits the potential sponsor to gather the names of potential purchasers, but prohibits any agreement being executed or deposits being taken prior to the acceptance of an offering plan, its receipt by the potential purchaser and a period to review the offering plan before the purchase agreement is binding on the purchaser.

> The CPS-12 exemption does not significantly change things because the out-of-state Sponsor will still be required to show the NYAG that the local sales material satisfy the New York disclosure requirements and the local law is as strict as New York's.

Until now, no out-of-state offering could be made in New York state without a New York-style Offering Plan, which is subject to the review of the Offering Plan by attorneys, architects and engineers employed by the NYAG and the receipt of an acceptance letter. Moreover, the NYAG has taken the position that if the out-of-state offering material does not contain the same disclosure as that required by the Regulations, then the sponsor has to prepare a New York Supplement containing the omitted information. Having represented sponsors of offerings of property in other states and countries, I have always believed that it was faster and less expensive to do a separate New York Offering Plan for an out-of-state offering rather than attempting to cut and paste the missing pieces of an out-of-state offering plan into a New York Supplement, particularly because no other state requires the level of disclosure mandated by the Regulations. The Martin Act requires that the Offering Plan must contain a full disclosure of all material facts regarding the property and the plan. There is also no other state or country that applies extraterritorial jurisdiction to its securities laws. In other words, if someone wanted to sell New York property in Tucson or Tuscany, the local authorities in Arizona or Italy do not require any filing in their jurisdiction, but if someone wants to sell an Arizona or Italian property in New York, or even advertise in New York, an Offering Plan has to be accepted for filing by the NYAG prior to the commencement of marketing and sales. Based on the local law, this is sometimes difficult to accomplish because the local law may not have concepts similar to those in New York, such as certificates of occupancy.

Of course, the out-of-state property could be sold to a New York resident visiting in the other state or country, providing that no solicitation was made in New York state. It is possible that a New York resident walking into the out-of-state sales office did not see any advertising while in New York state, but the NYAG's presumption would be that the New York resident had seen it. Accordingly, until now, a Florida (for example) sponsor or developer had a choice of not advertising in New York but being able to sell to New Yorkers on vacation in Florida or doing a full offering plan filing in New York. In fact, an out-of-state sponsor or developer that had a choice of either (1) doing marketing in or to New York pursuant to the CPS-1 filing and not signing any Purchase and Sale Agreements (purchase agreements) with buyers, who are New York residents, or (2) not doing marketing in New York and being able to sign purchase agreements with New York residents, who learn about the project while in Florida and walk into the Florida Sales Office (a New York Buyer). This choice arises because, once marketing is done in New York there is a presumption that the New Yorker saw it and it would be impossible to satisfy the NYAG that the New York Buyer, who walked into the Florida Sales Office, did not hear about, or was solicited about, the project while in New York, so that the Sponsor cannot sign purchase agreements with New York residents without a New York offering plan. Therefore, there should be no marketing in New York until an offering plan is accepted for filing by the NYAG so that the Sponsor can sign purchase agreements with New York Buyers. Some actions which can and cannot be taken with potential New York buyers who walk into out-of-state sales offices include:

(1) There should be no marketing (advertising) and sales activities in New York until the acceptance of an Offering Plan by the NYAG. Moreover, New York residents cannot be invited to the Florida Sales Office while in New York.

(2) A New York resident, who does not hear about the project in New York, but instead hears about the project while in Florida and walks into the Florida Sales Office, can sign a purchase agreement before the acceptance of an Offering Plan by the NYAG if all of the following requirements are met:

- No materials can be sent (including by email) by the sales staff to New York (this includes sending materials to any of the New York Buyer's New York-based professionals such as lawyers, architects, engineers, designers or decorators).
- The New York Buyer should be represented by a lawyer located in and licensed by the state of Florida.
- While the New York Buyer is in Florida, the Florida Sales Office must give the filed Florida Offering Plan and only discuss a Florida purchase agreement and other materials to the New York Buyer.

However, satisfying the NYAG that the New York Buyer did not learn about the property if the Sponsor is advertising or has a sales office in New York, would be impossible.

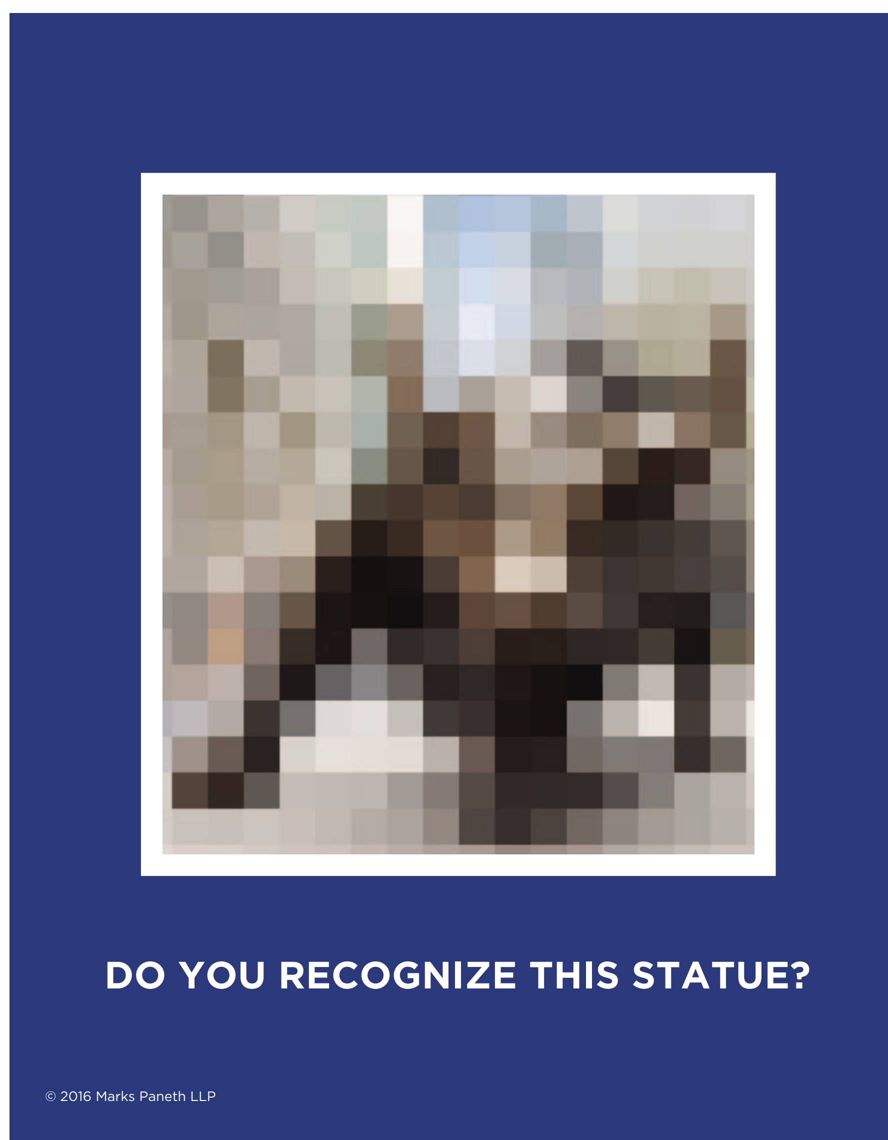
(3) Pursuant to an approved CPS-1 testing of the market application, the sales staff can discuss floor plans and how they can be modified, discuss the construction, fixtures, utilities, appliances and amenities of the building or a particular unit, but the Sponsor or Sales Office not give the Florida Offering Plan or a New York Supplement that has not been accepted by the NYAG to New York residents, execute a purchase agreement or any other document or take a deposit.

(4) Once the New York Offering Plan is accepted, purchase agreements can be signed with New York residents provided that they receive the Florida Offering Plan and the New York supplement or Offering Plan. New York residents will have the right to rescind the purchase agreement for either (a) 15 days from signing the purchase agreement and receipt of the condominium documents, or (b) seven days from signing the purchase agreement (including the New York rider to the purchase agreement) and receipt of the New York Offering Plan, whichever is longer.

However, the CPS-12 exemption does not significantly change things because the out-of-state Sponsor will still be required to show the NYAG that the local sales material satisfy the New York disclosure requirements and the local law is as strict as New York's. Since no other state or country has a law or regulations containing the scope or authority of the Martin Act, or the hundreds of pages of regulations, or the pre-acceptance review of the Offering Plan, or the enforcement powers of the NYAG under the New York law and Regulations, it is unlikely that the new CPS-12 will benefit sponsors of developments in most locations. Accordingly, it is unlikely that local jurisdictions provide legal protections comparable to those offered to purchasers in New York. It should also be noted that the CPS-12 exemption does not limit the NYAG from taking enforcement actions against the sponsor and its principals, which includes both civil and criminal penalties, and permanently baring the Sponsor and its principals from selling securities in New York state.

In addition to requiring that the disclosure contained in the local filings meets the disclosure requirements of the Martin Act, the Sponsor will also be required to retain the deposits from New York Buyers in escrow pursuant to the Martin Act and the Regulations. That means that the deposits cannot be used in the development without the approval of the NYAG, which is unlikely to occur. This is a practice that is common outside of New York, but forbidden in New York except in unusual circumstances. It also means that the funds have to be retained in New York state banks unless the bank is a participating member of the FDIC.

Finally, it is important to note that notwithstanding the cost and time involved in complying with the Martin Act and the Regulations and the ultimate size of an Offering Plan that has been accepted by the NYAG, considering the size, cost and scope of condominium projects in New York, there have been relatively few of the financial and construction debacles in New York compared to elsewhere in the country and the world. During and after the last recession, and notwithstanding the talent and creativity of the lawyers representing unhappy purchasers of condominium units, there probably have been fewer successful lawsuits in New York than any other state and a limited amount of enforcement actions by the Attorney General. This has to be directly related to the Martin Act and the Regulations. It is because New Yorkers have received such a benefit from an extremely complex law, that it is unlikely that the NYAG will find that many other locations offer New Yorkers the same protection as that available to them for projects in the state of New York.



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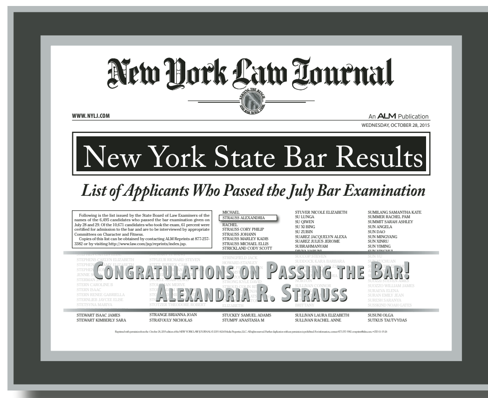
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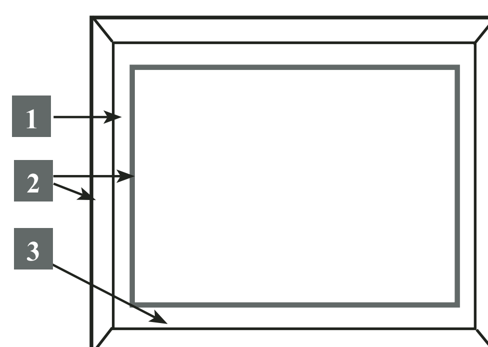

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Liquor License

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• Number, class and character of other licensed premises in proximity and in municipality or subdivision

• Evidence that applicant has all other necessary licenses and permits to operate from the premises

• Effect on vehicular traffic and parking

• Noise level

• History of liquor violations and criminal activity (even while the premises was operated by a different party.)[11]

In practice, however, these factors are more closely scrutinized if the "500 Foot Rule" is applicable.[12] This rule applies if the client is seeking to serve liquor (as opposed to only beer and/or wine) for on-premises consumption in a city, town or village with a population of 20,000 people or more. The rule states that if the premises is within 500 feet of three or more other locations that serve liquor, and not just beer and wine, for on-premises consumption, a 500 Foot Rule public hearing must be held to determine whether issuance of the new license is in the public interest.[13] Any delay in scheduling this hearing may impact the timeline for the real estate transaction.

Clients should also be aware of the "200 Foot Rule" contained in ABC law §§64(7), 64-a(7) and 105(3). This rule requires the Liquor Authority to consider, in connection with any application for a license for the on-premises consumption of liquor (as opposed to a beer and/or wine license) or a license to sell liquor and wine for off-premises consumption (such as a package store or wine store), whether the premises is within 200 feet of any locations used "exclusively" as a school, church or place of worship. If the premises for which the application is submitted is within 200 feet and on the same street as any such school, church or place of worship, the location will be ineligible for a liquor license. If the premises is within 200 feet but is not on the same street as the school, church, or place of worship, the Authority will determine if issuing the license is appropriate, given the circumstances. The Authority measures the distance in a straight line from one entrance to the other.[14] Even though the school, church or place of worship may have other "incidental" uses, these will not, as a general matter, defeat the "exclusive" use of the property as interpreted by the Liquor Authority and courts.[15] For example, the conduct of bingo games or fundraisers, the use of the building by other groups or for social activities, the conduct of health-focused activities such as yoga or exercise classes, or the occasional rental of the building to non-congregate individuals for private social functions will not render the building's religious or educational use "non-exclusive."

It is also important for the attorney to review diagrams of the premises, particularly if the business holding the liquor license will operate in a physical space that does not encompass the entire building. A liquor license will only be granted to allow service (and consumption, in the case of an on-premises license) within the area under the "exclusive dominion and control" of the applicant.[16] Exclusive dominion and control generally must include the power to control and oversee the service and consumption of alcohol, the employment or control of those serving the alcohol, and the ability to remove patrons that may be violating Liquor Authority rules (e.g., by being disorderly or intoxicated). This area is known, in liquor licensing parlance, as the "licensed premises."

If the "licensed premises" is only a part of the physical structure, the client must be careful not to run afoul of the rule prohibiting interior access between the "licensed premises" and any unlicensed area in certain cases.[17] In addition, the licensed premises must generally have its own exterior entrance. In certain cases where these requirements cannot be met, the client may need to license the entire building, even if it only plans to serve alcohol within a limited area. If the entire facility constitutes the "licensed premises," however, children under 16 must be accompanied by a parent or guardian while at certain licensed entertainment venues, such as skating rinks and bowling alleys.[18]

Other physical attributes of the real property to be considered during the due diligence stage include:

• Whether alcohol will be stored in an area under the client's exclusive control. If alcohol will be stored in the basement, the client will need to have exclusive control over the basement and will have to license it.

• Whether there are at least two restrooms. If not, a bathroom waiver will be required.[19]

Finally, the attorney should check whether any prior liquor licenses have been issued for the subject address. A physical location can be ineligible to be licensed for two years after certain disciplinary violations, particularly revocation.[20] This may be the case even if the new applicant is unrelated to the owner at the time of the violation.[21] A client that purchases a building to open a bar, restaurant, hotel, etc. and only learns after the closing that a liquor license cannot be obtained for two years, is unlikely to remain a client.

Liquor licensing counsel should review the lease to determine **whether the profit sharing is high enough** to require that the landlord act as a "'co-licensee" under the liquor license.

Liquor Licensing Contingencies

When negotiating the purchase or lease of property where alcohol will be sold as either a new venture or the continuation of an existing business, a contingency for obtaining a liquor license should be included in the purchase and sale contract or lease. Such contingency should allow the buyer to terminate the agreement before closing or lease commencement if the liquor license cannot be obtained. Clients seeking an on-premises retail license may have to wait several months for the license to be issued. However, for the payment of an additional fee, a client can often obtain a Temporary Retail Permit from the Liquor Authority[22] much more quickly. This permit will allow the client to serve alcohol while the full application is being reviewed by the Liquor Authority, but does not guarantee that a license will be issued.[23] Due to the length of time it may take to obtain a liquor license, the buyer/tenant should apply for the liquor license and Temporary Retail Permit as soon as the purchase and sale contract/lease is executed. Sufficient time to satisfy the license contingency should be included in the agreement.

Considerations in Leases

When the applicant for a liquor license is leasing the "licensed premises," there are additional factors the Liquor Authority will consider during the application process. These factors may include the following: (1) whether the term of the lease is at least as long as the term of the liquor license being sought; (2) whether the lease identifies the property by street address (as opposed to legal description only); and (3) whether the rent is designated as a set dollar amount (as opposed to a rent equal to operating costs, debt service on the property, etc.)[24]

In addition, if the tenant will pay a portion of the profits to the landlord as rent or in repayment of landlord-financed renovations, a number of additional concerns should be addressed. Liquor licensing counsel should review the lease to determine whether the profit sharing is high enough to require that the landlord act as a "'co-licensee" under the liquor license. In that case, the landlord will be required to provide financial and business information, personal information on its owners, and will be subject to potential liability for alcohol-related issues.

Considerations in Property Sale

Liquor licensing considerations can be important when representing a seller of commercial real property. If the property is currently licensed, or if the buyer will be using the premises for a business that will seek a liquor license, the timing with respect to the liquor license process can affect the transaction. The seller cannot transfer its liquor license to the buyer, and the buyer must instead apply for its own liquor license. The current liquor license will need to be surrendered or placed into "safekeeping" with the Liquor Authority to allow for the issuance of a new liquor license or permit to the buyer, which may make it difficult to coordinate a closing.[25]

Conclusion

Liquor licensing considerations can be important in the purchase, sale or lease of real property in New York. Often overlooked, these considerations may have a significant impact on the timing of real property transactions, as well as on the client's ultimate ability to serve alcohol at the new location.

1. N.Y. ALCO. BEV. CONT. LAW §3(26) (McKinney 2016).
2. ALCO. BEV. CONT. LAW §3(34).
3. See, e.g., ALCO. BEV. CONT. LAW §§55, 55-a, 64, 64-a, 64-b, 79-b.
4. See, e.g., ALCO. BEV. CONT. LAW §§54, 54-a, 63, 79, 79-a.
5. ALCO. BEV. CONT. LAW §110-b; Application Notice to Local Municipality or Community Board, LIQUOR AUTHORITY https://www.sla.ny.gov/application-notice-to-local-municipality-or-community-board (last visited May 16, 2016).
6. Id.
7. Id.
8. See www.maps.nyc.gov/doitt/nycitymap (last visited May 16, 2016).
9. See e.g. Community Board No. 2, N.Y.C., http://www.nyc.gov/html/bkncb2/html/applicants/liquor.shtml (last visited May 16, 2016).
10. *Rios v. State Liquor Authority*, 32 A.D.2d 995, 995 (3d Dept. 1969).
11. ALCO. BEV. CONT. LAW §64(6-a).
12. ALCO. BEV. CONT. LAW §§64(7), 64-a(7).
13. Id. See also "'Measuring the Distance' The 200 and 500 Foot Rules," N.Y. STATE LIQUOR AUTHORITY available at http://www.sla.ny.gov/system/files/200-500-foot-rules-050213.pdf (last visited May 16, 2016).
14. Id.
15. See id.
16. N.Y. COMP. CODES R. & REGS. tit. 9, §48.4(b)(1).
17. ALCO. BEV. CONT. LAW §106(9).
18. See N.Y. COMP. CODES R. & REGS. tit. 9, §48.2, N.Y. GENERAL BUSINESS LAW §§398-c & 399-d.
19. N.Y. COMP. CODES R. & REGS. tit. §48.4(d)(2).
20 ALCO. BEV. CONT. LAW §113.
21 Id.
22 Temporary Retail Permit, NEW YORK STATE LIQUOR AUTHORITY, https://www.sla.ny.gov/temporary-retail-permits (last visited May, 16, 2016).
23 ALCO. BEV. CONT. LAW §97a.
24 ALCO. BEV. CONT. LAW §105(1), 106(1), 110(g).
25 State of New York Liquor Authority, Surrender and safekeeping of licenses, Advisory #2015-5 (March 10, 2015) available at https://www.sla.ny.gov/system/files/Advisory_2015-5_-_Surrender_and_Safekeeping.pdf.

Properties

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ability of Affordable Units, but this would be subject to the discretion of a financing agency. Where several programs (property tax exemption, Regulatory Agreement, etc.) all impose restrictions on a project, the most restrictive requirements of each must be complied with. It may be possible to seek a property tax exemption other than 421-a EAB for a condominium tax lot within an 80/20 Project consisting of only Affordable Units, assuming that eligibility requirements align. The main alternative property tax exemption programs for the preservation of Affordable Units are under Article XI of the Private Housing Finance Law (though this program depends upon the exercise of discretion of the City Council) or §420-c of the NY Real Property Tax Law (if LIHTCs are obtained and other eligibility criteria are met).

If no option of continued affordability is appealing, and if permitted by applicable Regulatory Agreements, Statutes and Rules, owners can explore removing Affordable Units from affordability restrictions and from Rent Stabilization—typically upon the occurrence of vacancies after the expiration of the affordability term of all applicable programs. This option is not available where the Affordable Units are permanently affordable, such as units subject to the IH Program.

Opportunities for Market-Rate Projects with Relatively Low Rents

This discussion relates to existing multifamily rental properties, usually located in relatively weaker rental submarkets within NYC. Owners have several options for obtaining incentives in exchange for affirmatively committing to make apartments within these projects affordable pursuant to specific income and rent limitations.

• HPD's voluntary IH Substantial Rehabilitation and Preservation programs grant a zoning bonus for the rehabilitation or preservation of units that will then become IH Units. The amount of the zoning bonus depends upon the square footage of the low-income floor area (the Generating Site) and the location of the building(s) receiving the zoning bonus (the Receiving Site(s)). HPD will review an Affordable Housing Plan to determine whether the income of tenants, rents and rental assistance, underwriting, physical condition of the Generating Site, reserve funds, payment of debt as needed to preserve affordability, and other criteria, as applicable, meet HPD's criteria and those set out by the NYC Zoning Resolution. Depending upon the Generating Site's location and the details of the receiving site, the zoning bonus generated can be conveyed to projects located within an Inclusionary Housing Designated Area within the same Community District or within half a mile of the Generating Site. HPD recently issued a term sheet for the IH Preservation program, which articulates how an IH Preservation project would be reviewed by HPD.[8]

• Rehabilitation (substantial or moderate) of existing multifamily properties may qualify for J-51 benefits. Eligibility depends on meeting very specific criteria in the J-51 Statute and Rules.

• Subsidies and/or financing may be available from HPD, HDC, HCR, HUD, or other agencies for the preservation of affordable housing, for moderate or substantial rehabilitation, to reduce operating expenses (including utility costs), to improve energy and water efficiency, and/or for the rehabilitation of properties listed on the National Register of Historic Places (Historic Preservation Tax Credits).[9]

• Properties owned by entities whose purpose is to provide affordable residential units, such as Housing Development Fund Corporations formed pursuant to Article XI of the Private Housing Finance Law and the Business Corporation Law for the purpose of providing low-income housing, will be prevented from converting to market-rate units.[10]

Conversions From Non-Residential Use to Residential Use

• Conversions of existing buildings from non-residential use to mixed-income residential use (Conversions) may present opportunities for a range of economic incentives. Conversions can of course be developed as 100 percent market-rate projects, but developers should consider whether the underwriting is more favorable if a portion of the units are Affordable Units. There is significantly more flexibility in this analysis for Conversions of properties where residential use is as-of-right (As-of-Right Conversion) and requires no rezoning or other discretionary permission from a NYC agency which could trigger the requirements of the MIH program (MIH Conversion) (collectively, Conversions).

Owners of existing multifamily properties or existing properties that can be converted to residential use may want to **investigate using currently available economic incentives** to preserve affordability, rehabilitate existing housing, or create new mixed-income residential properties through Conversions.

• As-of-Right Conversions may be eligible for subsidies for the creation of Affordable Units, and, if such subsidies are received and other eligibility criteria are met, As-of-Right Conversions may also qualify for J-51 benefits, which can provide a very significant reduction in property taxes. If the owner is willing to make the Affordable Units permanently affordable, the IH program could also allow the generation of valuable development rights.

• MIH Conversions, with limited exceptions, will be required to provide 25 percent or 30 percent of residential floor area and dwelling units as Affordable Units. If Agency subsidies are received for the creation of Affordable Units, J-51 benefits may also be available.

In this climate of uncertainty about the 421-a statute's availability for new construction projects, developers of new mixed-income rental projects have been largely frozen in place. Owners of existing multifamily properties or existing properties that can be converted to residential use may want to investigate using currently available economic incentives to preserve affordability, rehabilitate existing housing, or create new mixed-income residential properties through Conversions.

1. N.Y. Real Prop. Tax Law §421-a (the 421-a statute). Per Subdivision 16-a of the 421-a statute, 421-a benefits are not available for projects commencing construction in 2016 and thereafter (pending legislative extension or replacement), because of the inability of NYC real estate developers and construction labor unions to come to an agreement by Jan. 15, 2016 as to construction wage requirements applicable to new projects seeking 421-a benefits.
2. See N.Y. Gen. Bus. Law §352-eeee(1)(a), which requires an offering plan whenever an owner wishes to convert a building or multiple buildings in NYC from residential rental status to condominium or cooperative ownership.
3. See N.Y. Att'y Gen. Dep't of Law, Real Estate Finance Bureau Memorandum Re: Exemption for Partial Building Sales in Residential Rental Buildings (2014) (NY AG Partial Sale Memo).
4. Id.
5. See N.Y. Att'y Gen. Dep't of Law, Real Estate Finance Bureau Memorandum Re: No-Action Letter Requests for Projects That Include an Affordable Housing Component or Involve the New York City Department of Housing Preservation and Development (2016) (NY AG Affordable N.A. Letter Memo).
6. "J-51" was extended through Local Law 60 of 2016, signed by Mayor Bill de Blasio on May 10, 2016, and provides that eligible projects must complete construction prior to June 30, 2019. However, J-51 restricts the benefits available for projects that include new cubic content.
7. See N.Y.C. Zoning Resolution §23-154(d).
8. See N.Y.C. Dep't of Hous. Pres. and Dev., Inclusionary Housing Term Sheet: Preservation Projects (2015), http://www1.nyc.gov/assets/hpd/downloads/pdf/developers/IH-Term-Sheet_Preservation.pdf.
9. On the federal level, the recently introduced S. 2962, the "Affordable Housing Credit Improvement Act," would expand the LIHTC by 50 percent over five years beginning in 2017 and would provide additional flexibility in program administration. On the NYC level, HPD (http://www1.nyc.gov/site/hpd/developers/private-site-preservation.page) and HDC (http://www.nychdc.com/pages/Termsheets.html) offer multiple financing programs to facilitate preservation of multifamily housing, including affordable housing.
10. See N.Y. Att'y Gen. Dep't of Law, Real Estate Finance Bureau Memorandum Re: Guidance on Housing Development Fund Corporations Seeking to Transfer or Sell Property for, or Otherwise Convert Property to Market-Rate Use (2015).

Time

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given the well-established precept that the law abhors a forfeiture, it is advisable that the TOE clause be included in the particular contract section (and bolded, capitalized and underlined) in which the obligation is specified, such as the closing date or renewal option deadline, rather than in a "catch all" provision.

The Magic Words

Although expressly using the words "time is of the essence" is good drafting practice to avoid any misunderstanding, a contract need not expressly use those magic words in order to acquire the desired legal effect. For instance, in *Jannetti v. Whelan*, 131 A.D.3d 1209, 17 N.Y.S.3d 455 (2d Dept. 2015), the Second Department, held that a clause providing that the contract would be "null and void" if closing did not occur on or before a specific date, was sufficient to make time of the essence. In *Jannetti*, buyer entered into a contract with sellers to purchase real property for $6,050,000. To fund the purchase, buyer was to enter into a purchase money mortgage with sellers for a portion of the purchase price. The contract provided that closing was to occur on Dec. 24, 2010, and that if buyer failed to close on or before that date, the "contract shall become null and void and [seller] shall retain the deposit." On December 3rd, sellers advised buyer by letter that they were prepared to close subject to buyer's submission of financial information necessary for the purchase money mortgage. The closing date passed without a closing, and sellers sought to retain the down payment as damages. Buyer subsequently sued sellers for specific performance alleging that seller's letter constituted an anticipatory repudiation of the contract. Crucial to the court's decision was the "null and void" provision if buyer failed to close on the specified date, while simultaneously notifying the buyer that such failure would jeopardize the return of their deposit. The totality of the language was sufficient to make the stated closing date strictly enforceable, as if "TOE" had been specified.

Sometimes, using the magic words is not successful. If delivered before the contractual performance date, unilateral notice of time is of the essence is premature and ineffective. For example, in *Baltic v. Rossi*, 289 A.D.2d 430, 735 N.Y.S.2d 148 (2d Dept. 2001), the contract stated that closing would take place on June 30th, but did not declare that time was of the essence. In response to seller's request for a one month adjournment of the closing date, buyer sent a letter to seller on June 1st, characterizing the adjournment request as an anticipatory breach and declared that time was now of the essence. The closing never occurred and seller retained the down payment as liquidated damages. The court held that the buyer was not entitled to declare that time was of the essence before the date set forth in the contract.

TOE and Equitable Relief

Courts will enforce TOE clauses as to non-closing obligations with the same exactitude. In *Trieste Group v. Ark Fifth Avenue*, 13 A.D.3d 207, 787 N.Y.S.2d 258 (1st Dept. 2004), the parties entered into a 10-year sublease, which provided that "the term of this sublease may be renewed for one (1) additional five (5) year term … providing that the Lessee … must give the Lessor written notice that the Lessee is exercising its option to renew on or before [a date certain] which time is hereby made of the essence of this sublease."

On or about the deadline, lessor notified lessee that due to its failure to timely exercise the renewal option, the sublease would expire by its terms. Lessee quickly attempted to exercise the renewal option arguing that it was entitled to equitable relief due to the substantial improvements it made to the premises during the term. The Appellate Division affirmed the trial court's finding that the option to renew was TOE and modified the trial court's findings by holding that since only $67,000 worth of improvements were made after the initial build-out, "the improvements made by [lessee] did not warrant equitable relief for [lessee's] failure to exercise its renewal option in a timely manner." Query whether the decision would have been different if the value of the improvements was more substantial, perhaps affecting the analysis of the equities of the situation.

In *ADC Orange v. Coyote Acres*, 857 N.E.2d 513, 7 N.Y.3d 484 (2006), the Court of Appeals held that the phrase "in no event later than" was not sufficient to make time of the essence in connection with an additional installment payment as mandated under a contract of sale. In *ADC Orange*, the contract for the sale of land required that the buyer make an interim payment of $250,000 upon the later occurrence of two events, "but in no event later than Dec. 31, 2001." The contract contained no TOE clause and did not provide that the buyer's failure to make the interim payment by Dec. 31, 2001 would constitute a default. On Dec. 26, 2001, seller sent buyer a fax reminding it of the additional payment required under the contract to "be made no later than Dec. 31, 2001." The fax, likewise, did not contain the "magic words" of TOE, nor did it provide that failure to make the payment would trigger a buyer default. Buyer acknowledged the interim payment requirement as of Dec. 31, 2001 and informed seller that its principal was out of the country and that it would transfer the funds upon his return on Jan. 14, 2002. On Jan. 10, 2002, seller wrote to buyer informing him that seller considered buyer in default. Buyer responded the next day by enclosing a $250,000 check and insisting that the delay in making the payment did not constitute a default under the contract.

After several months of failed negotiation attempts, buyer brought an action seeking specific performance of the contract. Both parties moved for summary judgment; the Appellate Division held that buyer's "late payment constituted a material breach of the contract, entitling [seller] to keep the down payment." The Court of Appeals, however, reversed determining that whether the late installment payment constituted a material breach depended on whether time was "of the essence" with respect to that payment. Applying the long held precedent that "mere designation of a particular date upon which a thing is to be done does not result in making that date the essence of the contract," the court concluded that there was "no reason why the same rule should not be applied … with respect to the installment payment."

In *Imperatore v. 329 Menahan Street*, 130 A.D.3d 784, 13 N.Y.S3d 526 (2d Dept. 2015), the parties entered into a contract to sell real property in which the closing date was set for Oct. 30, 2013 and provided that the seller was to retain the down payment as liquidated damages in the event of a buyer default. On Nov. 8, 2015, seller sent a letter to buyer informing him that closing was scheduled for Dec. 3, 2013, that time was of the essence and that seller would be in default if the closing did not occur on that date. Prior to the December 3rd closing date, seller sent email to buyer offering to extend the closing date for additional consideration. Buyer did not respond to the email. When buyer failed to appear at closing, seller notified buyer that it was declaring buyer in default and was retaining the down payment as liquidated damages.

Buyer argued that the seller's email offering to extend the closing date voided the time is of the essence declaration. The Second Department, reversing the trial court, held that seller had established that it was ready, willing and able to perform on the law day and that buyer failed to proceed with the closing. The court also held that there existed "no evidence of any post-closing negotiations that might have estopped the seller from asserting that the buyer was in default." In *Imperatore*, the court did not find any grounds for asserting equitable relief to assist buyer from avoiding the harsh impact of TOE.

Conclusion

The immutability of TOE could be as well-settled a proposition as there is in real estate contract law. There may be factual issues as to whether it is properly invoked, but once recognized, parties defy it at their peril.