

If Time Is of Essence for Zoning Change, Contract Better Say So

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A recent appellate ruling found that the trial court erred in validating a buyer's termination of its contract for the \$23.6 million purchase of a commercial parcel due to the seller's alleged failure to obtain a zoning change by the date specified in the agreement.

In the case of *Blue Lagoon Development v. Maury and Leon Medical Centers*, Blue Lagoon appealed the lower court's summary judgment in favor of Maury and Leon Medical.

Blue Lagoon executed a purchase and sale agreement in late 2007 for the sale of a large commercial real estate tract in Miami to Leon Medical Centers for approximately \$23.6 million. One of the conditions in the agreement was that Blue Lagoon would obtain a change in zoning from RU-2 to BU-2 by July 31, 2008, but the agreement did not contain a "time is of the essence" provision.

A zoning hearing based on Blue Lagoon's application was conducted on July 16, 2008, the Citizens Zoning and Appeals Board approved the application, and a resolution approving the zoning change was certified by a deputy clerk of the Miami-Dade County Department of Building and Zoning on July 23, 2008. The resolution was not appealed during the subsequent 14-day appeal period that expired on Aug. 4.

Leon Medical Centers, which had closed on another commercial parcel for the same intended use on July 11, 2008, for approximately \$11 million less than it had agreed to pay for the Blue Lagoon site, sent a termination letter to Blue Lagoon on July 31 exercising its right to terminate the contract because it maintained that Blue Lagoon did not obtain the requisite zoning by July 31, given the possibility of an appeal after that date. The

company moved forward with the construction of the medical facility that it originally planned for the Blue Lagoon site on the new parcel.

Blue Lagoon sued Leon for breach of contract, seeking damages that included the escrowed deposit, benefit-of-the-bargain damages and specific performance, and Leon filed a counterclaim for the return of its deposit. In October 2012, the trial court entered a final summary judgment in favor of Leon finding that its termination of the contract was valid.

Based on the date in which Blue Lagoon secured the zoning change, which was prior to the July 31 deadline, the absence of express contract language requiring that any appeal period must expire before the "outside date" of July 31, and the absence of a "time is of the essence" clause in the agreement, the Third District Court of Appeal concluded that the property was rezoned from RU-2 to BU-2 as stipulated under the agreement and reversed the lower court ruling.

The appellate panel based its ruling in part on the opinion by the Fourth DCA in a 2012 decision finding that "the mere designation of a particular date for performance of such a condition does not make that date the essence of the contract; time is not of the essence, even in an agreement setting forth a specific date for performance, absent a showing that reasonable delay would have constituted a material breach or that the party entitled to performance suffered a significant injury due to the delay in performance."

It reversed the final summary judgment for Leon, concluding that "the effective date of the change in zoning was an issue of law based on the unambiguous language of the contract."

This opinion illustrates the importance of drafting real estate transaction agreements in a specific, clear and unambiguous fashion and including all of the necessary contractual provisions in order to protect and enforce your rights under the law.

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Read more: <http://www.dailybusinessreview.com/id=1202731425019/If-Time-Is-of-Essence-for-Zoning-Change-Contract-Better-Say-So#ixzz3fXFRD0vn>

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