

## *Time is of the Essence — or Is It?*

**A**s signs appear that the overheated real estate market may be beginning to cool down, BBW&G is beginning to see more and more purchasers having second thoughts about closing; seeking to either delay the sale or get out of deals they thought were great when contracts were first signed.

In response, sellers increasingly are asking about their right to declare “time is of the essence”. These five magic words can be a powerful tool for enforcing rights under a contract to purchase or sell real estate. However, their true meaning is often misunderstood and improperly applied.

There are two separate and distinct ways that a closing date becomes “time of the essence”:

- ◆ The contract itself specifies that a particular date, either the original closing date or an adjourned closing date set forth in the contract, shall be “time of the essence”; or
- ◆ If the contract does not specify that a closing date is “time is of the essence,” and the closing date does not occur on the date set forth in the contract, either the seller or the purchaser may unilaterally send a notice to the other party setting a new closing date and stating that the new closing date is made “time is of the essence”.

In either case when “time is of the

essence,” the rights of the parties are quite clear—a court of law will enforce a provision that a closing date is “of the essence” and if one of the parties is not prepared to close on such date, regardless of the excuse, such party will be in default under the contract, allowing the non-defaulting party to enforce all of its rights under the contract.

For example, if the seller defaults, the purchaser shall have a right of specific performance or any other remedy set forth in the contract. If the purchaser defaults, the seller shall be entitled to all of its remedies set forth in the contract; the most common being the retention of the purchaser’s down payment.

Since the ramifications of setting a closing date as “time is of the essence” can be extremely severe (the unilateral ability to hold the party not prepared to close on such date in default), the Courts have required the party seeking to invoke the rule of “time is of the essence” to adhere to the following specific steps.

- ◆ The invocation of “time is of the essence” must be made by clear, distinct and unequivocal notice which clearly and unequivocally states that upon the other party’s failure to close on that date, such failure will result in the contract being canceled, permitting the non-defaulting party to enforce all of its rights upon such default under the terms of the contract.

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- ◆ The closing date set forth as “time is of the essence” must provide the other party a “reasonable” time to close.
- ◆ For example, if June 30<sup>th</sup> was the original non-time of the essence closing date, on July 1<sup>st</sup> one party may not send notice declaring “time is of the essence” setting a closing date of July 5<sup>th</sup>. This does not afford the other party “reasonable” time to close. What a reasonable time to close is, varies upon the circumstances of each case. While there is no hard and fast rule (and at least one court has held that a period of no more than two weeks was reasonable), most practitioners believe that if they wish to make time of the essence, the proper period to allow for the “time is of the essence” closing date should be no less than 30 days, which has been interpreted on many occasions to be a “reasonable” time to close.
- ◆ If time was not made of the essence in the original contract, it can only be invoked after a scheduled closing date has come and gone. If a closing is scheduled for June 30<sup>th</sup> and that closing date was not made “time is of the essence” in the contract, one

party may not declare June 30<sup>th</sup> to be “time is of the essence”. However, after June 30<sup>th</sup> has come and gone, either party can establish a “time is of the essence” closing date provided that it affords the other party “reasonable” time to close and adequate notice as discussed above.

The failure to specifically adhere to these rules will result in the court refusing to enforce a party’s unilateral declaration of “time is of the essence” and will most likely provide the other party with the ability to delay the closing longer than if no declaration was ever made.

The lesson is clear, if you seek to invoke “time is of the essence”, be sure you have the right to do so and ensure that you follow the specific requirements of the rule. Otherwise, in the words of Steve Miller’s classic song, you may find that “Time keeps on slipping, slipping, slipping, into the future.”

*This article was written by Howard Wenig, a partner practicing in BBW&G’s Transactional Department.*



Howard Wenig

## ***Brokerage Commissions: When Are They Due and Payable?***

**T**he New York State Department of State (“Department”) recently issued a Memorandum addressing when brokerage commissions become due and payable. The Memo confirms that, in New York State, unless otherwise agreed to in writing, a licensed real estate broker is entitled to a

commission when presenting a seller with a prospective purchaser who is ready, willing and financially able to purchase the property offered for sale. The same principles hold true for the sale of cooperatives and condominiums.

The Department’s Memo cautions those

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involved in residential real estate transactions to carefully review the listing agreement to determine when the seller's obligation for the payment of commission vests. BBW&G's general advice to sellers is that any listing agreement or brokerage agreement clearly state that the commission payable to a broker for the sale of a property is payable only if, as, and when a closing occurs. Other key provisions for a seller to include in a brokerage agreement to ensure that the vesting of payment of the commission to the broker takes place only upon closing (which will not be explored in this article) can also prevent a seller from becoming liable for the payment of brokerage commission when a closing does not take place. The protections can and should be dealt with before signing any listing agreement or brokerage agreement.

Although not addressed in the Memo, it is, nonetheless, important to emphasize the importance of having a written brokerage agreement in effect when selling property. Under New York State's case law, a real estate broker arguably has earned and is entitled to collect a commission when

presenting a seller with a purchaser who is ready, willing and financially able to purchase the property offered for sale. Therefore, from a seller's perspective, it is crucial to tie the liability for the fee to the sale, not just the broker's presentation of a purchaser

Lastly, although the Memo specifically addresses residential sales, the concepts apply to commercial real estate transactions as well. Accordingly, it is imperative that a written brokerage agreement be executed by the seller of a property before listing a property with a broker (the most common occurrence in a residential transaction), and certainly before forwarding the contract of sale to a prospective purchaser for review (as often occurs in a commercial transaction).

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## *Legislation Gives Condominiums the Right to Borrow*

**C**ondominiums have traditionally faced problems paying for capital improvements because, unlike cooperatives, condominiums were not able to mortgage the building. The options for raising funds were limited to unit owner assessments and increasing common charges. However, in 1997, the New York State Real Property Law was amended to permit condominiums to borrow money; giving condominiums more flexibility in financing capital improvements.

On August 26, 1997, the New York State

Real Property Law was amended to include a new Section 339-jj entitled "Borrowing by Board of Managers." This section provides, in pertinent part, that:

"To the extent authorized by the declaration or the by-laws, the board of managers, on behalf of the unit owners, may incur debt ... provided that such debt is incurred no earlier than the fifth anniversary of the first conveyance of a

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unit and the incurrence of such debt shall require the consent of a majority in common interest of the unit owners.”

Unlike cooperative building financing, the condominium does not pledge the building as collateral for the loan, so there is no mortgage to be recorded and, therefore, no mortgage recording tax to be paid. Instead, the loan is secured by the condominium’s assignment to the lender of its rights in and to receive future income and common charges. In essence, the condominium pledges its future revenue stream as collateral. Instead of giving the lender a mortgage, the condominium executes a loan security agreement which grants the lender a security interest in the funds or other property that it holds, agrees that all common charges received and to be received by it (and the right to receive such funds) shall constitute trust funds for the purpose of paying the debt, and the common charges received shall be first used to pay the debt before using any part for any other purpose (see Section 339-jj.2).

Most lenders generally do not require a full title report, but only require a lien and judgment search against the condominium, which can be obtained at a nominal cost. Most condominium bylaws will typically provide that the board of managers can seek financing when the money is required for the operation, care, upkeep and maintenance of the condominium’s common elements. Most condominium bylaws allow the board of managers to borrow up to a stated maximum amount (generally not more than \$100,000) without the consent of its unit owners. If the board of managers wishes to borrow more than the stated maximum, the board of managers must first secure the consent of its unit owners. While the statute only requires majority consent, many condominium bylaws require the consent of 66-2/3% of all unit owners to borrow above the stated maximum amount. The lender will



require the board of managers to provide at closing a form of resolution evidencing unit owner consent to borrow.

The enactment of Section 339-jj gives a board of managers the means to make capital improvements without having to significantly raise common charges or impose assessments on its unit owners. The cost to a condominium to obtain such a loan is relatively inexpensive and, unlike cooperative building finance transactions, there is less time needed to prepare for the closings as there are fewer loan documents, no title reports to review and less documentation to provide to the lender prior to closing. As a result, a number of lenders have become active in extending loans to condominiums.

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