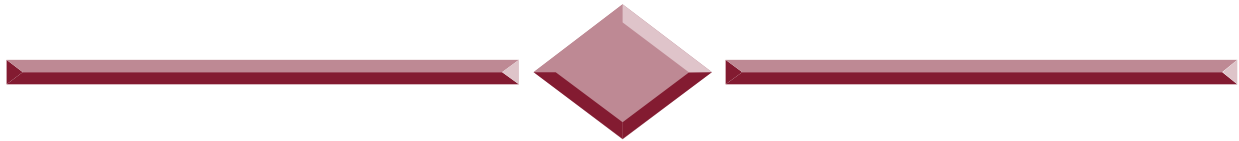


The Client Letter

Volume XX • Fall Edition 2007

This newsletter addresses current issues and developments in the law relating to development of planned communities. It is published periodically for distribution to clients and friends of Hyatt & Stubblefield, P.C., Attorneys and Counselors. The information presented is not intended as specific legal advice to any person. Principles of law expressed in this newsletter are subject to change from time to time.



***Pugliese v. Pukka Development, Inc.:* A New Interpretation of HUD Contract Requirements**

The United States District Court for the Southern District of Florida entered an order on October 3, 2007 in the case of *Pugliese v. Pukka Development, Inc.* (Case No. 07-14040-CIV-LYNCH) that could require changes to purchase contracts in subdivisions that do not qualify for certain exemptions under the Federal Interstate Land Sales Full Disclosure Act (15 U.S.C. § 1701, *et al*, the "Act"). The Act is designed to discourage fraud in the purchase by consumers of real estate by imposing various requirements on the sale or lease of lots. For purposes of the Act, the term "lots" includes condominium units, and the term "subdivision" includes a condominium building or project.

There are "full" exemptions to the Act which are set out in 15 U.S.C. Section 1702(a). Several of the most commonly relied upon exemptions under this subsection include (i) the sale or lease of lots in a subdivision containing less than 25 lots; (ii) the sale of a lot/home package by use of a contract which obligates the seller to construct the completed home and deliver the deed within two years of the date of contract; and (iii) the sale of lots to a builder for the purpose of engaging in the business of constructing buildings or for resale to the general public. 15 U.S.C. Section 1702

(b) also sets forth several "partial" exemptions to the Act. Under the "partial" exemptions, the seller is exempt from the registration requirements and certain other disclosure requirements, but the seller is not exempt from other requirements of the Act designed to protect consumers. One of the more commonly used "partial" exemptions is the sale or lease of lots in a subdivision containing fewer than 100 lots (the "99-lot exemption").

The seller in *Pugliese*, a condominium developer, claimed an exemption from registration and disclosure requirements of the Act under 15 U.S.C. Section 1702 (b) because the condominium contained fewer than 100 units. In reliance on this exemption, the seller claimed that it was exempt from the contract requirements under 15 U.S.C. Section 1703(d), which, by its terms, applies only to lots that are not exempt under Section 1702. Section 1703(d) permits a purchaser to revoke a contract to purchase property for a period of two years from the date of signing the contract, unless (a) the lots are exempt under Section 1702 of the Act, or (b) the contract contains the following provisions:

- (1) a description of the lot which makes such lot clearly identifiable and which is in a form acceptable for recording;
- (2) in the event of default by the purchaser, the seller will provide the purchaser with written notice of default and an opportunity to cure the default within 20 days after the date of receipt of such notice; and
- (3) in the event of default by the purchaser, the seller shall refund any amount of the earnest money which exceeds 15% of the purchase price of the lot or the amount of damages in-

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Housing Discrimination Complaints at an All-Time High

The U.S. Department of Housing and Urban Development ("HUD") reported in its 2006 fair housing report that the number of housing discrimination complaints filed with government agencies in 2006 reach an all-time record for a single year. Racial discrimination and disability discrimination were the two most common bases of housing discrimination. Many of the claims concerned alleged discrimination in the rental of housing, but there were still quite a few claims concerning the sale of housing or the use of housing. For example, HUD facilitated a settlement in the amount of \$15,000 for a Hawaii man with a disability who was denied permission to make structural modifications to his home that were needed in order to use and enjoy his home.

In another case in Puerto Rico, homeowners filed a complaint against the developer of a condominium because the developer failed to construct the units and the common areas in accordance with the Fair Housing Act's accessibility requirements for multifamily



dwellings, which includes making the public and common use areas be readily accessible to persons with disabilities, that all doors in the units be wide enough for wheelchair access, and that kitchens and bathrooms are usable by persons in wheelchairs. The developer agreed to settle the suit, but as part of the settlement, the developer had to make the homeowners' unit compliant with the accessibility requirements and reimburse the homeowners for their expenses incurred. The developer also had to notify all unit owners of their rights to have their units retrofitted to include accessibility features and modify certain common area facilities to make them more accessible.

In addition to making sure that your construction plans are compliant with all federal, state, and local fair housing requirements, it is prudent for developers to educate their sales agents about fair housing requirements to ensure that their actions do not give rise to claim in connection with the sale of the homes.

When Time Is of the Essence

For years courts have held that time is of the essence of the contract when it is material that performance should be rendered or payment made at the time stated in the contract. Time is also of the essence when the contract expressly provides that time is of the essence. But what happens when the time for performance falls on a Saturday or Sunday?

That was exactly the issue in *Metro Development Group, L.L.C. v. 3D-C & C, Inc.*, 941 So. 2d 11 (Fla. Dist. Ct. App., 2nd Dist., 2006). The plaintiff executed an option contract to purchase property from defendants and paid an initial escrow deposit. Under the terms of the contract, the defendant was either to terminate the contract or to make an additional payment on or before the 45th day after the effective date. The contract made no reference to whether the 45 days were business days or calendar days. In this case, the 45th calendar day after the effective date fell on a Saturday. The contract did not contain provisions that permitted the date for performance to be extended to the following Monday. The contract also contained the

general provision: "Time is of the essence of this agreement."

The plaintiff paid an additional escrow deposit on Friday but did not make the full payment required until the following Monday. The defendants rejected the check tendered on Monday and notified the plaintiff that the option had not been extended since payment was not timely made and that the initial escrow deposit has been disbursed to the defendants. The plaintiff sued, claiming that the contract was ambiguous as to when payment was due. However, the court found no ambiguity and explained that "[t]he circumstance that the forty-fifth day after the effective date of the contract might fall on a weekend or holiday is a circumstance that is obvious."

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The plaintiff further argued that the custom in the real estate industry is to extend the deadline to the next business day after the weekend or holiday. The court was not persuaded by this argument. The contract did not provide for any such extension of time, and the contract specifically provided that time was of the essence. Therefore, payment had to be made on or before the Saturday due date. If a contracting party realizes after signing the contract that the due date for performance falls on a weekend or holiday and the party will not be able to make payment or render performance at such time, then the burden is on the party to get an extension of time from the other party or to render performance before the due date.

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curred by the seller as a result of the breach, whichever is greater.

However, the purchaser is not entitled to revoke the contract where closing occurred within 180 days after the purchaser signed the purchase contract. Note that it is not sufficient for the contract to obligate the seller to deliver the deed within 180 days; the closing must have already occurred within those 180 days for the purchaser to lose the right to revoke if the contract did not contain the provisions stated above.

The seller's interpretation of the statute is consistent with the interpretation of another court in Florida in the case of *Mayersdorf v. Paramount Boynton, LLC*, 910 So.2d 887 (Fla. 4th Dist. Ct. App. 2005), and of HUD itself. The seller cited an opinion letter by Ivy Jackson, the Director of RESPA and Interstate Land Sales Office, which stated that the requirements of 15 U.S.C. Section 1703(d) do not apply to the sale or lease of lots that are exempt under the 99 lot exemption of 15 U.S.C. Section 1702(b)(1). However, the U.S. District Court did not agree.

The court contrasted the "full" exemption granted in 15 U.S.C. Section 1702(a), which provides that the Act shall not apply to the listed types of transactions, with the "partial" exemption in 15 U.S.C. Section 1702(b), which only exempts that the listed types of transactions from the registration and disclosure requirements of 15 U.S.C. Sections 1703(a) and 1704 to 1707. Therefore, while the contract provisions of Section 1703(d) may appear by their terms to be inapplicable to a transaction that qualifies for any exemption under Section 1702, the court held that only transactions that qualify for a full exemption under Section 1702(a) are exempt from the contract requirements of Section 1703(d). The judge stated that Section

Generally, buyers and sellers of property want time to be of the essence because you want the other party to perform within a specified time instead of have some unspecified reasonable time to perform. When dealing with specified time frames for performance, the best course of action at the time of signing the contract is to specify a certain date for performance instead of or in addition to the stated number of days for performance. When the due date falls on a weekend or holiday, you should change the due date to a weekday or insert a provision that performance will not be due until the following weekday.

1703(d) cannot give the exemption greater scope and effect than the express provisions of Section 1702(b). In this case, because the contract at issue did not contain the provisions required by Section 1703(d), the purchasers were entitled to revoke the contract for a period of two years after the date the contract was signed.

The holding of the U.S. District Court for the Southern District of Florida is not binding on courts in other jurisdictions. In addition, it is our understanding that the decision is being appealed. However, this case illustrates that a purchaser's attempt to get out of a contract can be a bigger concern to developers than the threat of HUD enforcement action, particularly in projects where a lender has relied on the developer's presales in making a development loan. Until other court decisions are issued which either adopt or reject this opinion, the safest approach for any seller who is subject to the Act's registration requirements or is relying on anything other than full exemption under 15 U.S.C. Section 1702(a) "partial" exemption under Section 1702(b) (such as the 99-lot exemption or a regulatory exemption under 24 C.F.R. Sections 1710.14 through 1710.16) is to be sure that the sales contract complies with the requirements of 15 U.S.C. Section 1703(d) to avoid opening the door for purchasers to revoke contracts.

Furthermore, while *Pugliese* only addressed the contract requirements of 15 U.S.C. Section 1703(d), the reasoning in this case could easily be applied to the contract requirements found in Section 1703(b), which requires that the contract provide for a revocation period for the purchaser to revoke the contract until midnight of the seventh day following signing, unless state law provides for a longer revocation period. Section 1703(b), like Section 1703(d), also applies to transactions that are not exempt under Section 1702. Out of an abundance of caution, developers may also want to include a seven-day revocation period in the contract.



Inside News

- Welcome back to Wayne Hyatt, who returned at the beginning of September from a three-month sabbatical in Santa Fe, New Mexico.
- Jan Bozeman and David Herrigel spoke on the subject of legal considerations when marketing and selling 50+ housing at the Building for Boomers and Beyond: 50+ Housing Symposium sponsored by the National Association of Home Builders in Denver, Colorado on May 30 – June 1, 2007.
- Congratulations to Rebecca Glatzer, who became a member of the Georgia Bar this past summer.
- David Herrigel presented an Overview of the Housing for Older Persons Act of 1995 at the fall meeting of the American Bar Association Taxation and Real Property Sections held in September in Vancouver.
- Jo Anne Stubblefield was the faculty chair for a two-day continuing legal education seminar entitled "Resort Real Estate and Clubs: Formation, Documentation and Operation" sponsored by the American Bar Institute-American Bar Association, held on July 12-13, 2007 in San Francisco, California.

HYATT & STUBBLEFIELD, P.C.
225 Peachtree Street, N.E.
1200 Peachtree Center South Tower
Atlanta, Georgia 30303