**ASK SIMON – 6/1**

**Q. I am a builder and developer. I recently entered into a purchase and sale agreement for property contingent on rezoning the property to industrial use. Although the zoning board approved the rezoning, a neighboring property owner appealed, and the ensuing delay caused the seller to back out of our deal as result of my failure to close given the pending appeal. Is there anything I can do to prevent this in the future?**

A. Yes, there is something you can do. Builders and developers frequently enter into purchase and sale agreements that are contingent upon having the property rezoned. Of course, the builder/developer wants to know it can use the land for the purpose for which it is purchasing the property. The typical purchase and sale agreement in this situation contains a contingency clause or addendum stating that the agreement is contingent upon the successful rezoning of the property to a certain classification. If the property owner cannot successfully obtain rezoning, the purchaser can walk away from the deal.

In most instances, the property is rezoned and the parties subsequently close on the property without issue. However, there are cases where the rezoning is successful but then appealed by a neighbor. The appeal of a zoning decision is de novo, meaning the parties present their case again in toto to the superior court. Depending on the judge, it can take some time before the appeal is ruled on and ultimately resolved. This presents a big problem for parties looking to close on a deal, especially if the appeal extends past the closing date. In such a case, if the seller refuses to extend the closing date pending appeal, the purchaser-developer may lose the property.

Fortunately, parties can structure their purchase and sale agreements to account for the uncertainties in the zoning process, including appeals. Developers purchasing land contingent upon rezoning should draft the contingency provision in their agreements such that the contract is contingent upon a successful rezoning, *including the exhaustion and final adjudication of any and all appeals*. The agreement should further provide that the closing date for the agreement occurs on a date certain, *or 30 days following the final decision of the zoning board or after the exhaustion and final adjudication of any and all appeals, whichever is later*.

Developers purchasing land contingent on rezoning should take care to remember that appeals are possible, that appeals can delay the closing, and that appeals can cause the developer to loose the land. However, structuring the purchase and sale agreement to account for the potential of a zoning appeal will give the developer some certainty that it will be able to close on the property notwithstanding any delays caused by an appeal.

In addition, parties entering into purchase and sale agreements contingent upon rezoning should specify in the contract which party will be responsible for petitioning for rezoning, defending appeals, as well as which party will be responsible for the costs of the rezoning efforts and appeals. The more the parties take care to structure their contracts to account for the various land mines in these zoning-contingent deals, the more likely the parties will ultimately close on the property.