Making the date specified for a real estate closing “of the essence” is a time-honored tool. It is a doctrine that has evolved over time without a concrete set of rules. There are general guidelines to consider when determining whether to assert — either at the time of contract formation or following the parties’ failure to close on the projected date — that timing is an essential component of a real estate contract. Parties must take care to avoid having a time of the essence notice backfire.

It is widely recognized, where time is not originally made of the essence in a real estate contact, that the time period between delivery of a time of the essence notice and the date set for closing must be reasonable in relation to circumstances leading up to delivery of the time of the essence notice. The party delivering such notice, however, must ensure that the notice itself is sufficiently specific to enable the recipient to comply, that the sender can perform on the date set for closing, that there are no open issues to be resolved between the date of the notice and the date set for closing, that the sender has not prevented the recipient from being able to perform on the date set for closing, and that, after delivering the notice, the sender does not waive its rights established thereunder by continuing to negotiate an alternative closing date. Unfortunately, as shown in a recent unpublished case, Farnella v. Brana, 2007 WL 2827554 (App. Div. Oct. 2, 2007), the party that first asserts a time of the essence closing date can be held in default of the real estate contract when the assertion is invalid and such party subsequently refuses to complete the real estate transaction.

Parties to a real estate contract are obligated to perform their duties within a reasonable period of time following execution of the contract unless otherwise agreed. In Re Estate of Yates, 368 N.J. Super. 226, 236 (App. Div. 2004). If the time of performance is material to the real estate contract, then the real estate contract or subsequent amendments thereto should expressly state this understanding. Gorrie v. Winters, 214 N.J. Super. 103, 105 (App. Div. 1986).

Simply specifying a particular closing date in a contract generally will not make time of the essence, as this date is generally considered a formality rather than a requirement. Paradiso v. Mazejy, 3 N.J. 110, 115 (1949).

Generally, for a stated closing date to be considered an essential component of a real estate contract, the real estate contract must clearly establish that the parties understood at the time that a failure to perform on such date, and in some cases even at a particular hour on such date, would result in the failing party’s forfeiture of all rights to enforce its rights under the real estate contract. Marioni v. 94 Broadway, 374 N.J. Super. 588 (App. Div. 2005).

While any intent to make time of the essence at the time of contract formation should be expressly stated in the real estate contract, contracting parties should also be aware that, while not common, a court could conclude, based on extrinsic evidence, that the parties...
intended the projected closing date be
time of the essence.

In another recent unreported case, 
_Steliga v. Ostrum_, 2007 WL 1215033 
(App. Div. April 26, 2007), the Appellate 
Division considered, but declined to 
uphold, a trial judge’s decision that a 
time of the essence requirement could be 
inferrerd from the seller’s testimony that 
the purchaser understood that the seller 
was agreeing to a certain price because of 
an urgent financial need to close. The 
_Steliga_ court’s acknowledgment that it 
did not “quarrel with the proposition that 
the intention of the parties to make time 
of the essence may be shown by persuasive 
circumstances” leaves open the ability 
of a New Jersey court to find in the 
future, based on extrinsic evidence, that 
contracting parties intended for time to 
be of the essence.

Even if time is not originally made 
of the essence in a real estate contract, 
either party can declare it to be following 
the date set for closing in the real estate 
contract when demanding a new closing 
date, provided that the closing date fixed 
in the demand notice is reasonable in 
light of the circumstances and in relation 
to the time already elapsed. The common 
practice is to set a new closing date not 
less than 10 calendar days following the 
demand date. _13A N.J. Prac., Real 
Estate Law and Practice_ § 26.192 (2d 
ed.). However, there is no set “mathematical 
calculation” and courts will examine three pivotal points in time and 
their relation to each other in determining 
whether a new closing date is reason-
able: (a) the date originally set for closing; (b) the date notice is given; and 
(c) the new date fixed for closing. _Finn v. 
Div. 1956). A party, to make time of the 
so that the purchase er is not 
by demand notice, must ensure that 
these three dates are reasonable in 
relation to one another in light of the 
specific circumstances.

Timing was held unreasonable in 
_Almeida v. Ward_, 2006 WL2571227 
where the seller served the purchaser 
with a time is of the essence notice set-
ning forth a new closing date two weeks 
later, after the purchaser had waited 
approximately seven months beyond the 
original closing date for the seller to 
cause his brother to vacate the property. 
At that point, the purchaser discovered 
that his mortgage commitment had 
expired and that a new appraisal would 
be required. However, the purchaser 
was unable to have the appraisal performed 
because the seller had shut off the utili-
ties at the property and refused to have 
them turned back on. The court held that 
the timing of the notice was unreasonable, 
because several months had passed 
since the original closing date and the 
purchaser could not comply with the 
seller’s new closing date due to such 
passage of time and the seller’s actions. 
A two-week notice period was also held 
insufficient in _Paradiso v. Mazej_, 3 N.J. 
110 (1949), where two months following 
the original closing date passed, in part 
by agreement and in part by inertia, 
before the seller attempted to set a time 
of the essence closing date.

New Jersey courts have also held, 
in certain circumstances, that a party can 
unilaterally declare time to be of the 
essence before the closing date set forth 
in the real estate contract passes if the 
other party has anticipatorily repudiated 
the real estate contract. In _Earlin v. 
Mors_, 1 N.J. 336 (1949) (overruled on 
other grounds), the purchaser’s attorney 
notified the dual real estate broker three 
weeks before the closing date set forth in 
the real estate contract that the purchaser 
would be unable to complete the pur-
chase due to financial inability. In 
response, the seller’s attorney delivered 
time of the essence notice for the orig-
inal closing date. The New Jersey 
Supreme Court held that this time of the 
early notice was valid. However, it is 
unclear whether a time of the essence 
notice would be upheld in similar cir-
cumstances in the absence of affirmative 
note that one party anticipates breach-
ing the real estate contract.

Where time is made of the essence 
for a real estate closing date, either in a 
reasonably timed demand note or in 
the original real estate contract, a party 
to a real estate contract, in order to both 
benefit from the doctrine and to avoid 
being held in breach, must be ready to 
perform and not have caused the other 
party to be unable to perform on such 
date. In _Marioni v. 94 Broadway_, 374 
N.J. Super. 588 (App. Div., 2005), the 
seller’s attempt to set a time of the 
eclosing date was held invalid, 
because the seller himself had failed to 
remove substantial debris and otherwise 
put the property into “broom clean” con-
dition as required by the real estate con-
tract, incorrectly believing that he should 
be relieved of such obligation after 
spending thousands of dollars to remove 
a tenant from the property. In _Cornerstone Management, Inc v. 
Div., Oct. 25, 2002) (unreported), the 
purchaser contracted to purchase the 
land for development purposes, but the 
seller retained approval rights with 
respect to the purchaser’s architectural 
plans. The closing was delayed for sev-
eral months due to a necessary delin-
eation of wetlands, unanticipated when 
the real estate contract was signed, after 
which the seller attempted to set a time 
of the essence closing date for two 
weeks hence. This was not reasonable 
because the seller had not yet approved 
the buyer’s architectural plans, which 
meant that the buyer had not yet been 
able to apply for and obtain septic sys-
tem design approval and building per-
mits to satisfy its own real estate contract 
contingency.

In a case where the time for closing 
of a real estate contract is made of the 
eceness by subsequent notice from one 
party to the other, any open issues should 
have been resolved prior to delivery of 
such notice. In _Farnella v. Brana_, 2007 
(unreported), the sellers were still 
working to resolve a mortgage that had previ-
ously been satisfied but not discharged 
as of the closing date set forth in the 
real estate contract — the closing date was 
not time of the essence. The purchasers 
promptily sent a 10-day time of the 
ecess notice to the sellers, even though 
the parties had not yet resolved responsi-
ibility for removal of dead trees and
limbs at the property. On the 11th day, when the sellers had agreed to remove the dead trees and branches but were still resolving the open mortgage issue, the purchasers declared the sellers to be in default and demanded return of their deposit monies. Three days later, when the open mortgage issue had been resolved, the sellers sent a time of the essence notice to the purchasers, setting closing for 17 days later. Once this date had passed, the sellers declared the purchasers to be in default of the real estate contract and, months later, sold the property to a third party.

The court held that the purchasers’ time of the essence notice was ineffective, because 10 days was not a reasonable period in which to resolve responsibility for the dead trees and branches and to arrange for removal. Consequently, the purchasers were held to have breached the real estate contract when they refused to close on the subsequent date set by the sellers and were held liable to the sellers for monetary damages. In this case, the purchasers’ reliance on a time of the essence notice was misplaced and they suffered monetarily as a result.

A party that intends to rely on the time is of the essence doctrine must also be careful to avoid waiving the requirement that the real estate transaction close on the set date. In Cornerstone, the previously discussed case in which the court held that the seller’s time of the essence notice was invalid because the seller had yet to approve the purchaser’s architectural plans, the court further held that, even if such notice had been valid, the seller waived any rights that would have been created in his favor by continuing to negotiate an acceptable closing date with the purchaser. In fact, it has been held in New Jersey that a time of the essence requirement in a real estate contract can be waived by the parties’ conduct, even if the real estate contract states that any provision thereof can only be modified in writing. Salvatore v. Trace, 109 N.J. Super. 83 (App. Div. 1969).

The time of the essence doctrine has evolved in New Jersey through the resolution of disputes as to its application. However, judicial decisions show that a totality of the circumstances must support a party’s reliance on this doctrine and that any such reliance can be misplaced if the timing is unreasonable or the asserting party has caused a delay. Therefore, to avoid having the doctrine backfire, the party asserting that the other party has breached must be certain that the circumstances support its assertion. Otherwise, as exemplified by Farnella, such party could ultimately be held in breach of the real estate contract and liable to the other party for its damages.