



Counsel's Corner
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Land Use Clause V. Legally Fulfilling Clause

May a Landlord enforce a lease obligating the tenant to operate a nightclub or bar, when the tenant cannot obtain a liquor license? Merry Homes, Inc. thought so. Chi Hung Luu thought differently.

The Houston trial court entered a judgment declaring the commercial lease void for illegality, since Luu could not obtain a liquor license. Evidently the Bellaire site was too close to a school and hospital. The Houston trial court awarded Luu \$6,000 for the security deposit, and \$25,300 in attorneys' fees. Merry Homes – the landlord – appealed.

In June 2005 Luu signed a 5-year Lease. The use clause provided that Luu may only use the premises to operate a nightclub or bar, and “for no other purpose.” The Lease also stated that Luu could not use the premises for any activity that violates laws.

Luu promptly submitted his liquor application to the City of Houston after the Lease was signed. The application was denied. The site was within 300 feet from a public school and a public hospital, and consequently, no nightclub / bar license would be issued. The City suggested that Luu might qualify under the “restaurant exception” rules, but Luu chose not to do so because of the expense of installing a full kitchen.

Luu requested the return of his deposit and termination of the Lease. Merry Homes refused.

Luu never occupied the premises. Instead he sued Merry Homes, requesting a judicial determination that the purpose of the Lease was impossibly frustrated, and therefore the Lease must be terminated.

The Houston Court of Appeals decided on February 19, 2010, that both the Houston trial court and Chi Hung Luu were correct. Mr. Luu could not legally perform his obligations in the Lease. A contract to fulfill an obligation which cannot be performed without violating law is void. The Lease was terminated by the Court.

Bottom line:

1. Be careful with use clauses. It may have been better for the Landlord to offer some flexibility in that provision.
2. The Landlord may have enjoyed a better position if it had clarified that rent was due regardless of Tenant's use or non-use of the premises.
3. A provision in a Lease stating that the Tenant has fully explored compliance with all laws and is satisfied might also have helped this Landlord.

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