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Are phasing rights in a phased condo real property, personal property, and/or contract rights? - by Saul Feldman and Angel Kozeli Mozina

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In this article I am going to address whether development/phasing rights in a phased condominium are real property, personal property, and/or contract rights.

I have been treating development/phasing rights as real property since the early 1970s. Only recently have I learned that development/phasing rights in a phased condominium are still treated as personal property and/or contract rights by at least one of the major title insurance companies doing business in Massachusetts. It is time to resolve this issue once and for all.

If Massachusetts had adopted the Uniform Condominium Act, there would be a clear definition of development/phasing rights. Unfortunately, Chapter 183A, the Massachusetts Condominium Statute, lacks a definition of development/phasing rights. Rather, Chapter 183A mentions the concept only in one place, referencing the addition of units and/or land and the alteration of each unit's undivided interest that would result from such addition (Section 5(b)(i)).

Phasing rights are important not only for developers of a condominium who want the right to expand the condominium horizontally by the addition of a series of buildings over a period of time, but also for developers of a condominium who want the right to expand the condominium vertically by adding additional floors to the building. These "air rights" are an interest in real estate which a title insurance company should insure.

There are three places to which we can look to understand the concept of development/phasing rights in Massachusetts:

(1) A well drafted Master Deed will clearly describe the phases of a so-called phased condominium. For example, in a condominium consisting of Phase I with one building and two units, and a second phase yet to be built that will also consist of one building with two units, ALL of the land will be initially put into the condominium when the condominium is created by recording the master deed and the site plan showing all of the land. However, the "as built" floor plans will be recorded only for Phase I. The master deed will provide that the declarant and his successors and assigns reserve the right and easement unilaterally to amend the master deed by a phasing amendment to add Phase II. A well drafted master deed will also provide that this right inures to the benefit of a successor declarant as well as to a foreclosing mortgagee, its successors and assigns, and a purchaser of the note and mortgage on the property. The development/phasing rights may be contract rights as well as an interest in real property. Whether just real property or a hybrid of real estate and contract rights, such rights are insurable by title insurance.

There is absolutely no doubt whatsoever, in my opinion, that the declarant of a phased condominium has in the phasing rights an interest in real estate. I have been able to obtain title insurance in this situation without a problem, beginning with Weymouthport Condominium in 1971. My developer client was unable to obtain planning board approval to subdivide the lot into three lots. Weymouthport was one of the first phased condominiums built on a single lot in Massachusetts. The site plan showed three phases on a single lot with phasing lines delineating the three phases. Much more recently, for another example, I drafted a phased condominium in 2007 for Olde Village Sq. Condominium, a multi-phased residential condominium on one 298,930 s/f lot in Medfield, Mass. Again, my developer client had absolutely no problem in obtaining title insurance for himself, his mortgagee, his buyers and their mortgagees, insuring the development/phasing rights as interests in real estate.

Therefore, one place to look in deciding that development/phasing rights are real property is to look to the practice of condominium lawyers over the last forty to fifty years.

(2) Another place to look is the common law in Massachusetts. Massachusetts case law has been that Phasing Rights are real property, *Queler v. Skowron*, 438 Mass. 304 (2002). Therefore, the rights to add additional land and/or units by one or more phasing amendments are real property rights for which title insurance should be available.

(3) The Uniform Condominium Act has a definition of development rights. *Barclay v. DeVeau*, 384 Mass. 676 (1981), stated in footnote 17 that where Chapter 183A is vague, it is permissible to look to the Uniform Condominium Act, even though it has not been adopted in Massachusetts.

CONCLUSION

As a condominium lawyer who is also an aficionado of the condominium form of ownership, I am very concerned that it is not settled in Massachusetts that development/phasing rights are real property.

This issue is important for suburban condominium developments that will expand horizontally.

It is also important for urban condominiums that will expand vertically, as long as air rights are real property. The tremendous current demand for condominiums in Boston makes the issue very relevant. To the extent that development/phasing rights are real estate, an attorney drafting a master deed can provide in the master deed the right to develop additional floors above an existing building.

Whether they are called phasing rights, reserved rights, or development rights, such rights to expand a condominium horizontally and vertically are rights in real property. Therefore, every title insurance company in Massachusetts may and indeed should insure them.

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