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Condominium within a condominium should be used more often than it has been used in Mass.

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A resurgence of condominium activity in the current real estate market together with issues regarding mixed-use condominiums requires all of us to be knowledgeable about the structure of a mixed-use condominium.

We are experiencing a large number of new condominium projects. Many of them are mixed-use developments. In this article, I will address whether to use a single tier or two tiers in a mixed-use development. For various reasons, the single tier has been used far more in Mass. than in other parts of the U.S. In this article, I will make the case that the use of two tiers - usually called "a condominium within a condominium" - should be used more often than it has been used.

A mixed-use condominium is not the same as a residential condominium or a commercial condominium. Most mixed-use condominiums that I have created consist of retail and/or office units in the lower floor or floors and residential units in the remainder of the building. Mixed-use condominiums are becoming an important part of the urban landscape, and lawyers should become more familiar with them.

Some of my thoughts on mixed-use condominiums come from my work on Folio Boston Condominium in the financial district and The Clarendon Condominium in the Back Bay. I prepared condominium documents for Folio Boston Condominium, a 14-story mixed-use building at 80 Broad St. which consists of 96 luxury residential condominium units comprising 105,651 s/f, three commercial units and a garage with 118 below-grade parking spaces. In addition, my office represented the Developer in all of the closings for Folio. I also prepared condominium documents as condominium counsel for The Clarendon Condominium, a 33 story mixed-use building at 400 Stuart St., which consists of 103 luxury residential condominium units, 176 rental apartments, three commercial units and a garage with below-grade parking spaces.

Single v. Two Tier. One of the first questions to be addressed in a mixed-use condominium is whether to have one condominium or more than one condominium. The latter is sometimes called a condominium within a condominium. In Folio and The Clarendon, we opted for one condominium. Most developers and their counsel in Boston have believed that the two tier approach should be used sparingly. However, there are often good reasons to use the two tier approach.

For example, I recommend the two tier approach when the bottom half of the building is a hotel and the top half of the building is a luxury residential condominium. The hotel wants to be totally independent of the residential condominium. In this scenario, there will be a two unit primary condominium consisting of the hotel unit and the residence unit. There will be a secondary condominium consisting of all of the residential units. The hotel will want broad power. For example, the primary condominium will be run by three directors. The hotel will want to select two of the three

directors with only one director selected by the residences, but the residential director will have a veto over "major decisions." The concept of a condominium within a condominium works in this situation.

An Historical Overview. I believe that a main reason that the two tier concept was not used more often in the past was because of an ambiguity in the Mass. Condominium Statute, Chapter 183A. Section 1 of Chapter 183A defines a "condominium" as:

"The land or the lessee's interest in any lease of such land which is submitted to the provisions of this chapter, the building or buildings, all other improvements and structures thereon, and all easements, rights and appurtenances belonging thereto, which have been submitted to the provisions of this chapter."

This means that the condominium has to include land or the interest of the lessee in a leasehold condominium.

The issue then for a condominium within a condominium is what land does the secondary condominium have. The answer is that a secondary condominium unit has an interest in the common areas and facilities of the primary condominium. Therefore, the secondary condominium has an interest in the land. Because we have overcome this hurdle, we can and should start using the concept of a condominium within a condominium more frequently.

Zoning. Whether a one tier or a two tier structure is used, zoning issues must be addressed.

Before an attorney can begin to draft the documents for a mixed use condominium, he should carefully review the zoning ordinances or zoning by-laws. The use clause in the condominium documents must be sensitive to the use provisions allowed in the zoning ordinance or zoning by-law. In many cases, permits from the local zoning board must be obtained before the development can go forward. In any event, a zoning/permitting analysis is necessary before creating the mixed-use condominium.

Secondary Mortgage Market Considerations. By using the two tier concept, we can make it easier to achieve compliance with the secondary mortgage market for the residential unit.

One of the most important issues developers and their attorneys typically need to address in the development of a mixed-use condominium with residential units is Federal National Mortgage Association (FNMA, or Fannie Mae) compliance. A condominium with commercial or nonresidential space that exceeds 20% of the building or buildings will not be in compliance with FNMA approval requirements - special approval will be necessary. Apartments are considered to be "commercial," as they are income producing. I have drafted documents for large mixed-use condominiums with for-sale condominium units and developer-owned apartments. Where the apartments and other commercial units comprise more than 20% of the project, special approval has been required for FNMA compliance.

However, by using the condominium within a condominium approach, we can treat the secondary condominium containing the residential units as a separate condominium and thereby satisfy FNMA because 100% of the condominiums in the secondary condominium are for sale residential units.

The Tension Between Residential Owners and Commercial Owners. The major issue in mixed use condominiums is the tension between residential owners and commercial owners in many matters: use, control, insurance, maintenance, and contribution to expenses, for example. The condominium documents must address this tension.

I believe by having a two tier structure that keeps the residential owners in a separate condominium, many of these tensions can be alleviated.

Restaurants. Often a building consists of the restaurant on the first and second floors of a building and residential units in the remainder of the building. Using a two tier approach is a good way of keeping the restaurant separate from the residential units. The two unit primary condominium would consist of the restaurant unit and the residential unit. The secondary condominium would be the residential units in the residential unit. The restaurant could function separately. The idea would be to have the restaurant unit and the residence unit include as much of the building as possible, thereby decreasing the issues that the two units would fight about.

The Parking Garage. The best way to handle a parking garage is to make it a separate Unit in the primary condominium. Again, the goal is to keep the garage as separate as possible from the rest of the building. Parking spaces could be sold as easements to residents and other occupants of the building and also to others who have no connection with the building. Conceivably, the parking garage could be a secondary condominium with the parking spaces sold as condominium units.

Separate Condominium Boards. The primary condominium will have a board of directors or trustees responsible for the maintenance of the building common areas and facilities, general use restriction enforcement, exterior signage as well as architectural and landscape control. The residential and commercial owners share certain amenities and facilities that they use and work together on common issues, but the residential owners can control their space and the commercial owners can control their space with relative autonomy from each other. Separate boards are created to govern their respective portions of the building. The two-tier approach separates the residential units from the commercial units more than a single tier approach.

Drafting the Documents. The key drafting point is to make the boundaries of the two units in the primary condominium as all-encompassing as possible. This will mean that the building common elements will contain as little of the building as possible. It is the building common elements which will be governed by the board of the primary unit. The less the building common elements contain, the less there is to fight about.

The Future. In the future, we will see urban mixed-use condominiums consisting of commercial uses on the first and second floors and luxury mini residential units in the remainder of the building. We will also see urban luxury residential use in the upper part of a building with office use in the lower part of the building. These buildings will be built near public transit and may have no on site parking. In any event, they will be condominiums and I believe that they will be developed under a two tier structure.

Saul Feldman, Esq. is a real estate attorney with the Law Offices of Feldman & Feldman, P.C., Boston, Mass.