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New Mass. condominium law has implications for unit owners and lenders

March 26, 2015 - Spotlights

Recent changes in the condominium statute in Massachusetts have implications for unit owners and lenders. The law applies to all existing condominiums as well as any that are created in the future. The new law also established a procedure for the implied consent from mortgagees with respect to amendments to condominium documents.

Rights to Use Limited Common Areas and Facilities

The new law clarifies whose approvals are needed in connection with the grant to unit owner(s) of the right to use the limited common areas and facilities within the condominium. Under the former law, the consent to such grants was required from (i) (a) all owners and first mortgagees of units that immediately adjoin the limited common area or facility, (b) 51% of the number of all mortgagees holding first mortgages on units who have given notice of their desire to be notified, and (c) those whose unit or units are directly affected thereby [emphasis added]. The former law also required that the grant be memorialized in a recorded amendment to the master deed.

The new law eliminates the requirement to record an amendment to the master deed and dispenses with the requirement of obtaining the consent of unit owners whose unit or units are directly affected thereby. The reason for these changes, it has been said, was to remove the conflicting and contradictory language contained in Sections 5(b)(2)(ii) and 5(c) (namely that Section 5(b)(2)(ii) did not require the consent of those whose units are directly affected, while Section (c) did).

Although the new law clarifies whose consent is needed in connection with a use grant, it does so at the expense of the rights of unit owners who may be affected by such grants, and at the expense of having record certainty of such grants. Before the recent change in the law, a unit owner could withhold its consent to an amendment to the master deed required to effectuate a limited use grant, if he or she believed that his or her unit was directly affected by the grant. If, for example, a condominium development contained a common area used by all for gardening purposes (which was a significant factor in the unit owner's reason for buying the unit) and the organization of unit owners decided to grant the right to use that space exclusively to the owner of one unit, a disgruntled unit owner could argue, under the former law, that its unit was directly affected. The parties would have to resolve their differences or have a court decide whether the grant directly affected the disgruntled owner's unit. Under the new law, the aggrieved unit owner has no recourse and will lose the right he or she had prior to January 7, 2015 (the date the new law went into effect).

This result may be particularly egregious in smaller condominiums (3 or 4 units) where the owners of a few units, who control the organization, can designate use rights to themselves to the detriment of other unit owners who do not have a sufficient voice.

The elimination of the need to record an amendment to the master deed means that record title may no longer reveal the existence of special use grants. A representation by the organization of unit

owners will be required to determine the existence of such rights.

Deemed Consent

The new law adds a new Section 23 under which mortgagee consent to an amendment to a master deed, declaration of trust or bylaw will be deemed given if proper notice is given to the mortgagee and the mortgagee does not respond or object within 60 days of the date of the mailing. Mortgagees must designate an appropriate person or department to receive such notices and educate their staff about the dangers of not responding within the 60 day period.

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