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Phased condominium developments: Highlighting some of the complexities that can arise - by Philip Hastings

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Large-scale condominium projects are often developed in several phases over a period of time. While this approach may be beneficial to the developer for a number of reasons, phased condominium developments can be complicated. A recent New Hampshire Supreme Court case – *Condominiums at Lilac Lane Unit Owners' Association v. Monument Garden, LLC* - highlights some of the complexities that arise with the phased development of a condominium under the state's Condominium Act.

The Lilac Lane Condominium case centered on a dispute between the condominium association and the successor to the original developer/declarant. Created in 2010, The Condominiums at Lilac Lane in Dover was planned as a 120 unit condominium to be constructed over time, with 24 units in five separate buildings. At the time of its creation only one building was fully completed, with a second under construction. Construction had not begun on the other three buildings. After a change of ownership and some delay, the new developer restarted construction on the unfinished buildings in 2013 and 2014.

The association objected to the plans to complete the project and brought suit against the developer. It claimed that the only way a condominium can be developed in phases in New Hampshire is if the declarant designates certain portions of common area as “convertible land” at the time of the condominium's creation and subsequently converts that area into additional units as described in the condominium documents within certain time limits set forth in the Condominium Act. The association argued that because the partially completed and unconstructed buildings in the Condominiums at Lilac Lane had not been treated as “convertible land,” they could not be built out as originally planned.

The court rejected the association's argument, recognizing that, in addition to using convertible land, there are in fact two other distinct ways that a condominium project can be developed in phases in New Hampshire. The second method uses “expandable land”. In this method, the developer withholds a portion of the developable land from the condominium, reserving the right to add it to the condominium and build additional units on it at some later date. The expansion must take place

within certain time limits, but, unlike with convertible land, the expandable land never becomes part of the condominium unless the developer exercises its rights in a timely fashion. The expandable land also must be a separate lot for zoning and tax purposes, in case the expansion never takes place.

The Condominiums at Lilac Lane represents a third model of phased condominium developments. There, the developer submitted the entire parcel to the condominium and described all 120 units in the initial condominium documents. The Court agreed with the developer that, even though some of the units were created prior to their construction and the condominium did not include any convertible or expandable land, this method complied with the Condominium Act because the recorded condominium plans identified some of the units as completed, some as not yet completed and some as not yet begun.

Each of the three methods for creating a phased condominium in New Hampshire have advantages and disadvantages. As the Court noted in the Lilac Lane Condominium case, the use of convertible land and expandable land is subject to a number of requirements in the statute, including fairly stringent time limitations. While the third method does not contain the same time limitations and other restrictions associated with convertible or expandable land, creating all of the units at the start may impose certain obligations on the developer that can be avoided or minimized by using convertible or expandable land.

While the Condominium Act gives the developer flexibility with respect to phasing a condominium project, several factors must be considered with each approach. These include the project financing, property tax implications, and marketing strategy. The choice of approach may also have ramifications for the project's permits and approvals and for the sales registration process with the Attorney General's office.

Before beginning any condominium project, the developer should consult with his legal advisors and other consultants to craft the best approach in the particular circumstances.

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