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Phased condominium developments: An update on the Lilac Lane Condominium case - by Philip Hastings

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As discussed in this space a year ago, a 2017 New Hampshire Supreme Court case – Condominiums at Lilac Lane Unit Owners’ Association v. Monument Garden, LLC – highlighted the methods for developing large-scale condominium projects in several phases over a period of time and some of the complexities involved (<http://nerej.com/phased-condominium-developments-highlighting-some-of-the-complexities-that-can-arise-by-philp-hastings>).

The Lilac Lane Condominium case affirmed that N.H.’s Condominium Act allows the developer (i.e., declarant) to use any one of three methods in doing a phased condominium development. The first method is by designating part of the condominium common area as convertible land or convertible space for future units. The second method is by designating land outside of the condominium (expandable land) to be added to the condominium for future units. The third way, used in the Lilac Lane Condominium, involves the submission of the entire parcel to the condominium and fully describing all of the units built and to be built in the initial condominium documents. Even though some of the units in that case were created prior to their construction and the condominium did not include any convertible or expandable land, the court agreed that this method complied with the Condominium Act because the recorded condominium plans identified some of the units as completed, and some as not yet completed or not yet begun.

The Lilac Lane Condominium decision has drawn criticism. Recent New England Real Estate Journal articles, for example, derided the phased approach permitted in that project as a “loophole” and termed the decision, “troubling because it is not in line with the act’s fundamental purpose to protect the interest of the public.” The criticism implies that this “loophole” is new and is being used to take advantage of unsuspecting condominium purchasers.

As someone who has practiced real estate law in New Hampshire for over 25 years and has been involved in the development of dozens of condominium projects (including, it should be noted, the Condominiums at Lilac Lane), we respectfully disagree with the criticism. The phased approach used in that condominium project has been utilized for decades; it is neither a loophole in the

statute, nor a method to evade appropriate disclosures. Prospective purchasers are protected in several ways. Each unit's status (completed, not yet completed, or not yet begun) is shown on the recorded plans and described in the condominium documents, and the declarant is obligated to complete all improvements shown on the condominium plans as "not yet completed," (unless the condominium documents expressly exempt the declarant from this requirement) and to specify in the condominium documents the extent to which it is required to complete any improvement labeled as "not yet begun." The registration and public offering statement requirements - administered and enforced through the N.H. Attorney General's Office - provide additional consumer protection.

Regardless of these differing opinions, the N.H. legislature crafted a response to the Lilac Lane Condominium case in its recently concluded session. As originally introduced, House Bill 1601 presumably would have closed so-called loopholes by expressly limiting the declarant's options for creating units to "exclusively, from convertible land, convertible space, or expandable condominium." The final version of the bill, signed into law as N.H. Laws 2018, ch. 192 (effective August 7, 2018), is less direct. The law reads: "All lands within the declaration of a condominium which are within the original bounds of the condominium shall be identified therein as individual units, common areas, limited common areas, convertible spaces, or convertible lands. All lands proposed for possible future expansion shall be identified as expandable land." At the same time, both the original and final versions of HB 1601 incorporated a new definition of the term "improvement" to mean "any addition to condominium land, facilities, or amenities other than condominium units" (emphasis supplied).

While the full import of new legislation is not entirely clear, the new language seems to still allow doing a phased condominium without the use of convertible or expandable land, so long as the individual units are identified in the condominium documents. At the same time, by excluding condominium units from the definition of "improvements," it now appears that the declarant has no statutory obligation to complete units labeled as not yet completed or not yet begun. Surely, this is not what the critics of the Lilac Lane Condominium case had in mind!

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