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Condominium Phasing Rights

By Mark A. Kablack

Large condominium projects are often developed in phases, a practice that is widely accepted in Massachusetts and accommodated through provisions of the Massachusetts Condominium Statute (M.G.L. c.183A). In a phased project, groups of units are completed over several years and formally become part of a condominium through the recording of phasing amendments to the master deed. The right to phase in future units is usually retained by the original developer (or declarant) in conjunction with a predetermined phasing plan and phasing schedule. These reserved rights can provide considerable flexibility to the developer on the pacing of unit construction based upon market conditions. Problems often arise, however, particularly in a down economy, if the development of new units slows and the outside phasing date closes in. When this occurs, a developer's phasing rights are at risk, and a developer must negotiate with the condominium association for an extension. A recent decision by the Supreme Judicial Court (SJC) in the case of *Scully v. Tillery*, 456 Mass. 758 (2010), is helpful in explaining the potential parameters of negotiation.

In the *Scully* case, a condominium was initially formed with the prospect for development in two phases. Phase I was to consist of 20 units and Phase II was to consist of 48 units. Phase I was constructed more or less on schedule. However, as a result of a successive series of development delays, Phase II was completely off schedule. A successor developer was faced with the predicament of wanting to modify the Phase II plan in an increasingly narrow window of development opportunity. The condominium association resisted the alternative development proposal, and litigation and negotiation between the parties ensued. Eventually the parties reached a settlement agreement which provided for a reduced Phase II development proposal (20 units instead of 48) and an extended phasing deadline.

In the settlement agreement, the condominium association successfully achieved several concessions from the developer regarding a) the apportionment of percentage interest; b) the division of common expenses; and c) the governance of the association. These concessions were generally designed to shift a disproportionate amount of expense to the new Phase II units, while preserving (and enhancing in some instances) the governing control of the association by the Phase I units. All of these negotiated points were subsequently recorded as formal amendments to the condominium master deed and declaration of trust.

As Phase II units were developed and sold, the new unit owners began to question and contest the disproportionate terms contained within the amendment documents. They first commissioned an appraisal and determined that percentage interest was not apportioned among Phase I and Phase II units based upon relative market value. They then petitioned the condominium association to reallocate percentage interest and to alter the constituency of the condominium board in a more equitable fashion. Both requests were denied, and the Phase II unit owners eventually brought suit against the condominium association arguing that the concessions previously agreed to by the developer were in contravention of the Condominium Statute (M.G.L. c. 183A, Sections 5 and 10).

The Phase II unit owners argued, in essence, that the statute provided certain equitable protections to all unit owners that could not be compromised or waived. The case was initially heard at the Land Court, where Judge Gordon H. Piper upheld the terms of the settlement agreement to the chagrin of the Phase II unit owners. The Supreme Judicial Court heard the appeal on application for direct appellate review and also found in favor of the settlement agreement terms.

The SJC decision in *Scully* is notable for several reasons. First, the SJC upheld a long line of prior case decisions that have interpreted the Condominium Statute to be enabling legislation, mandating certain minimum requirements, but providing flexibility on project specific terms. Second, the SJC rejected the argument that the statute was specifically worded to afford fairness to all existing and future unit owners in the nature of a public interest. Third, the SJC was content with the advance notice of specific terms contained within the formal amendments to the master deed and declaration of trust. The SJC was convinced that Phase II unit owners were properly on notice of the disproportionate treatment contained within the amendment documents, and that proper disclosure had been made regarding the assessment of common expenses.

The *Scully* decision should be carefully referenced in all phased condominium projects, where a developer proposes to alter a predetermined phasing plan or extend a phasing schedule. Condominium associations and developers alike should understand that the scope of negotiation in any extension or amendment of phasing rights can be quite broad and creative. Unit owners should be made aware that amendment terms contained within a master deed or declaration of trust can have significant impact on the allocation of percentage interest and common expense assessment. Such terms should be carefully reviewed by a real estate professional. ◆

Mark A. Kablack is a principal of M.A. Kablack & Assoc., a Westborough-based real estate law firm specializing in land-use law and real estate development.