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Condo developer can't unilaterally extend phased development period

Developer bound by the master deed

By Roger L. Smerage | September 16, 2021

The Appeals Court has ruled that a developer could not unilaterally extend the phased development of a condominium past the period stated in the master deed.

The developer, plaintiff Kettle Brook Lofts, recorded a master deed with a stated time limit of seven years to complete phased development of a proposed six-wing, 109-unit condo complex in Worcester.

No new units were added beyond the 53 that were completed within two months of the condominium's existence. The day before the phasing rights were to expire, the developer unilaterally recorded a series of instruments purporting to extend the development period while expanding its power over condominium governance.

A Land Court judge found that the developer's actions violated both the terms of the master deed and the state condominium law, G.L.c. 183(A).

The Appeals Court affirmed.

"[T]he master deed allowed the purchasers of the units to make 'an accurate determination of the alteration of each unit's undivided interest that would result' as phases were added," Judge Gregory I. Massing wrote, quoting §5(b)(1) of the condo statute. "They could also make an accurate determination when their exposure to such changes, without their consent, would come to an end. The unit owners 'had a right to rely' on the phasing provisions of the master deed at the time they acquired their units."

Thomas O. Moriarty

The court also found in a related dispute between the unit owners and the lenders who financed the development project that when the lenders released their mortgage interest in the units that had been sold, that did not release their entire mortgage interest in common areas (see sidebar below).

The 28-page decision is Kettle Brook Lofts, LLC, et al. v. Specht, et al. (and a consolidated case), Lawyers Weekly No. 11-106-21.

IMPORTANT LESSONS

Thomas O. Moriarty of Quincy, who represented the unit owners challenging the developer's actions, said the decision reinforces that not only does each unit owner have a right to accurately determine how its undivided interest in the condominium will be impacted by subsequent phases of development, but that that right includes the ability to know when the phasing rights will "come to an end."

Braintree attorney Henry A. Goodman, who represented the developer, said the court "attempted to rein in" the broad flexibility given to developers in the condominium statute by "hand-picking certain clauses under the statute while glossing over other portions which grant the organization of unit owners the right to make the very changes it was denying to the developer."

For example, he said, the court indicated that percentages could not be changed unless provided for in the master deed.

"The court recognizes that this master deed provided for such changes when phases are added," Goodman said. "Therefore, it should follow that if the developer has broad power to amend the document by extending the development rights, all such rights including the changes in percentage interest should follow. The focus should not be on the result but on the right that brings about the result."

Other condominium attorneys weighing in were unsurprised by the decision and said it provided important lessons.

"The adage that an ounce of prevention is worth a pound of cure really shines here," said Scott J. Eriksen of Westford. "The court recognized that the condominium act is an enabling act, and to a large extent you get to set the rules of the game with your master deed. This means practitioners advising developers need to think carefully about what your deadlines and timelines are and what a reasonable timely deadline for completing the project will be."

Boston attorney Charles N. Le Ray, who represents developers, agreed.

"If you're a developer, calendar your important dates," he said, adding that while many master deeds with phasing rights set a seven-year limit because it is what Fannie Mae recommends, it is not a requirement.

"People doing condominiums with a lot of phases or where they think it may take a long time to get them built and sold may want to set a longer time limit," he advised.

Austin S. O'Toole of Boston said the only part of the decision that surprised him was that the unit owners were not awarded attorneys' fees on appeal.

"[The condominium statute] is one of those rare statutes that provides for recovery of attorneys' fees, though I cannot see in the underlying trial court decisions that any such claim for those fees may have been made by the trustees," he said.

Still, O'Toole said, the conduct of the developer/condominium owner fits squarely within the statute's provision for fees "[i]f any expense is incurred by the organization of unit owners as a result of [a] unit owner's failure to abide by the requirements of this chapter or the requirements of the master deed."

LENDERS MAINTAIN INTEREST IN COMMON AREAS DESPITE RELEASE

Lenders that financed a developer's creation of a condominium and gave unit owners a partial mortgage release upon purchase did not lose their mortgage interest in undeveloped common areas, the Appeals Court has decided.

The master deed called for phased development of the condominium over seven years. When the phased development period ended, only 53 units had been completed, 48 of which were sold.

Ruling on an action that was consolidated with a dispute between unit owners and the developer over the developer's attempt to unilaterally extend the phased development period, a Land Court judge found that by executing the partial releases, the lenders effectively released their entire interest in the common areas of the condominium, rendering their mortgages subordinate to the master deed.

The Appeals Court reversed, distinguishing the case, Kettle Brook Lofts, LLC, et al. v. Specht, et al. (and a consolidated case), from its 2019 decision in Trustees of the Beechwood Village Condominium Trust v. USAlliance Federal Credit Union, et al.

"In [Beechwood] the first phase of the development included only three units, each of which was sold and held a one-third interest in the common areas," Judge Gregory I. Massing wrote for the Appeals Court panel. "Thus, when the mortgagee 'executed partial discharges of the first three units, he also released each of the three units' appurtenant undivided one-third interest in the common area,' which amounted to the whole common area."

In Kettle Brook Lofts, however, because five units had gone unsold, the lenders never released the entirety of the common areas, which can continue to be encumbered by the mortgages, Massing said.

Thomas O. Moriarty of Boston, who represented the unit owners both in the present case and in Beechwood Village, said the court's subordination analysis regarding the units "misses the mark" in that a mortgage on a condominium unit created by the master deed cannot be superior to the master deed itself.

Lenders' counsel Patrick C. Tinsley of Worcester could not be reached for comment.

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Boston attorney Michael W. Merrill said that as a result of the ruling, developers trying to push the limits of what they have written into the master deed in order to gain an advantage they should not have will be limited in doing so going forward.

"There's now a case with facts on the record that puts parameters on how to evaluate what they can and cannot do," he said.

KETTLE BROOK LOFTS, LLC, ET AL. V. SPECHT, ET AL. (AND A CONSOLIDATED CASE)

THE ISSUE: Could a developer unilaterally extend the phased development of a condominium complex past the period stated in the master deed?
DECISION: No (Appeals Court)
LAWYERS: Henry A. Goodman of Marcus, Errico, Emmer & Brooks, Braintree (plaintiffs) Thomas O. Moriarty of Moriarty, Troyer & Malloy, Quincy (defense)

ATTEMPTED EXTENSION

Between 2004 and 2008, the developer, Kettle Brook Lofts, bought several tracts of land on Main Street in Worcester that included a single structure with six adjoining wings.

The developer, as the declarant, recorded a master deed on July 22, 2008, creating the Kettle Brook Lofts Condominium.

The master deed permitted construction of up to 109 units in phases over seven years. At the time of recording, "Wing C" with 33 units had been completed as Phase I, with contemplated additional wings to be completed as additional phases.

Additionally, Section VIII of the master deed provided that the developer's failure to complete any additional phases within seven years would constitute a waiver of its development rights.

Meanwhile, the developer filed a declaration establishing the Kettle Brook Lofts Condominium Trust, through which unit owners would manage and regulate the condominium. The developer was the originally trustee.

Soon thereafter, the developer added 18 units in "Wing B" as Phase II, and two units in "Wing G" as Phase III, and amended the master deed accordingly.

Over time, 48 units were purchased, for which the lenders executed partial releases. The lender retained title to the five unsold units, and, in 2014, unit owners Stacy Specht and Sudhakar Teegavarapu were duly appointed as trustees of the trust.

No new units were added after that point, and on July 21, 2015, a day before the developer's phasing rights were to expire, the developer purported to amend the master deed to give itself an additional seven years to complete the "Phase IV" development of the last 56 permitted units, invoking the general amendment provision of the master deed as its authority to do so unilaterally.

Through a series of other maneuvers, the developer purported to take control of more than 75 percent of the beneficial interest in the condo and exercised its alleged controlling interest to remove the two trustees and appoint itself successor.

Sixteen days later, the developer brought an action in Superior Court seeking to enjoin the trustees from acting as such and from interfering with development of Phase IV. The trustees immediately brought suit against the developer in Land Court seeking to invalidate the developer's own actions.

The Superior Court case was transferred to the Land Court, where Judge Karyn F. Scheier found that the developer's actions indeed were invalid.

The developer appealed.

INVALID ACTION

Applying its 1986 decision in Suprenant v. First Trade Union Sav. Bank, FSB, the Appeals Court affirmed.

"Suprenant stands for the proposition that the master deed fixes the parties' expectations not only as to the number of units that the declarant may add, but also as to the duration of the phasing period," Massing wrote.

Because unit owners have the right to rely on the scope and phasing rights as expressed in the master deed at the time of its recording, the judge continued, "we reject the developer's contention that the general amendment provision of the master deed … gave it the authority unilaterally to extend its phasing rights — or any suggestion that the unit owners implicitly consented to such a use of the general amendment provision."