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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
NO. 1884-CV-01594

THE 1850 CONDOMINIUM TRUST

v.

EAST BOSTON SAVINGS BANK and ALLIED RESIDENCES, LLC.[1]

MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT (P#s 185 and 186)

The parties to this dispute are battling over which of them holds title to a condominium building currently under construction at Albany and Wareham Streets in the South End, and estimated to be worth $25 million. The plaintiff, The 1850 Condominium Trust (the "Trust"), and the defendant, Allied Residences, LLC ("Allied"), have cross-moved for summary judgment on Counts I, III, IV, and VI of the Trust's First Amended Verified Complaint ("Complaint"), and Counts II and III of Allied's Verified Amended Counterclaim ("Counterclaim"). Cross-motions for summary judgment on Count II of the Complaint and Count I of the Counterclaim were previously decided. After a hearing, and for the reasons set forth below, the Court rules as follows:

Count I of the Complaint and Count II of the Counterclaim: Allied's Motion for Summary Judgment is ALLOWED, and the Trust's Cross-Motion for Summary Judgment is DENIED;

Counts III and VI of the Complaint: Allied's Motion for Summary Judgment is ALLOWED, and the Trust's Cross-Motion for Summary Judgment is DENIED;

Notice sent 08.28.19 C.M.W.
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[1] Consolidated with C.A. No. 1884-03443.

Count IV of the Complaint: Allied's Motion for Summary Judgment is DENIED, the Trust's Cross-Motion for Summary Judgment is DENIED, and any remedy the Trust may have based on Count IV is limited by the doctrine of laches;

Counts V and VIII of the Complaint and Counts III and IV of the Counterclaim are dismissed, *sua sponte*.

MATERIAL FACTS

The following undisputed facts are culled from the parties' Joint Statement of Undisputed Material Facts and the voluminous record submitted with the Cross-Motions for Summary Judgment. Additional relevant facts are included in the Discussion section, below.

In 2008, Allied submitted a Master Deed under G.L. c. 183A, creating a 60-unit residential condominium called The 1850 Condominium ("Condominium").[2] The Trust is the organization of unit owners in the Condominium. Allied is the developer of the Condominium and the declarant under the Master Deed. Allied sold the last unit it owned in the Condominium on August 21, 2009.

The Master Deed reserves to Allied the right to construct a second Phase of the Condominium ("Phase II") on common area of the Condominium, consisting of up to 27 residential units and two commercial units, and to amend the Master Deed to include Phase II without consent of the unit owners. Section 13(g)(i) of the Master Deed provides that the Deed may be amended to include Phase II only when construction of Phase II "has been completed sufficiently for the certification of plans provided for in Section 8(f) of Chapter 183A." Section

[2] Previously, in 2006, Allied submitted a Primary Master Deed under G.L. c. 183A, which created a 3-unit condominium called the Albany 519 Condominium. The 1850 Condominium is a secondary condominium, constructed in one of the units in the Albany 519 Condominium.

13(g)(iii) of the Master Deed provides that the right to amend the Master Deed to include Phase II expires 10 years from the recording of the Master Deed, or June 9, 2018.[3]

The Master Deed is ambiguous as to whether Phase II must be an extension of the Condominium, or may be built (as it is being built) as a separate building. Specifically, Section 3A of the Master Deed provides that Allied reserves the right to construct "additional building(s)," while also stating that "[t]he total number of buildings in all phases of the Condominium shall be one (1)." Section 6.8 of the Primary Master Deed recorded in 2006, see n.2, *supra*, unambiguously provides that an additional phase may be built as a separate building.

In May, 2015, Allied notified the Trust that it was going to construct Phase II, and thereafter an Allied representative met with the Trust to discuss details of the construction. In January, 2017, Allied began constructing Phase II, as a separate building. Over several months in 2018 the two sides negotiated an extension of the deadline for Allied to develop Phase II, before negotiations broke off and the Trust filed this lawsuit on May 24, 2018.

On June 5, 2018, Allied recorded a Phasing Amendment to the Master Deed to create Phase II of the Condominium, along with a set of plans for the units contained in Phase II (the "Plans"). The Plans were prepared by the architect of Phase II, Brian E. Healy, and show the layout, location, unit numbers and dimensions of the units in Phase II. Healy has submitted a sworn statement that all the boundaries and elements of the units in Phase II which he relied upon to generate the Plans existed as of June 1, 2018. The Plans do not show plumbing, finished flooring, ceilings, wall coverings, electrical service, heating or insulation in the units.

[3] The Master Deed also requires that Allied maintain an ownership interest in the Condominium in order to exercise its right to construct Phase II. Whether Allied met that requirement was the subject of the prior Cross-Motions for Summary Judgment, which are discussed below.

Also on June 5, 2018, Allied filed a Second Special Amendment to the Master Deed, which states that Allied may construct Phase II as a separate building.

The Prior Cross-Motions for Summary Judgment

As noted, Cross-Motions for Summary Judgment on Count II of the Trust's Complaint and Count I of Allied's Counterclaim were previously decided. Count II of the Complaint sought a declaration invalidating a Special Amendment to the Master Deed that Allied recorded in 2009, which purported to eliminate a requirement that Allied maintain an ownership interest in the original Condominium in order to exercise its phasing rights. Count I of the Counterclaim sought to quiet title to Phase II in Allied, asserting title was clouded based on the Trust's claim that the Special Amendment is invalid.

In a decision dated June 13, 2019, the Court (Ullmann, J.) held that the Special Amendment is invalid, but that a factfinder must resolve the issue of whether Allied permanently lost its right to develop Phase II when it sold its last unit in the original Condominium on August 21, 2009, or revived its phasing rights by entering into a 99-year lease for one of the units in the original Condominium on May 31, 2018. However, Judge Ullmann further held that the Trust is barred by the doctrine of laches from claiming title to Phase II, because it waited three years to bring suit over the Special Amendment, during which time Allied expended millions of dollars constructing Phase II.

DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate if, when "viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991), citing Mass.R.Civ.P. 56(c). A moving party may satisfy his burden by

demonstrating that proof of an essential element of the plaintiff's case is unlikely to be forthcoming at trial. Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991).

B. The Counts at Issue in the Cross-Motions

Count I of the Trust's Complaint seeks a declaration that the Phasing Amendment to the Master Deed is void, and Allied's rights to develop Phase II have expired, because Allied failed to file plans for Phase II that comply with the requirements of G.L. c. 183A, §8(f) by June 9, 2018, the deadline for filing such plans set forth in the Master Deed. Count II of the Counterclaim seeks to quiet title in Phase II in Allied, on the basis that the Phase II Plans comply with G.L. c. 183A, §8(f).

Count III of the Complaint seeks a declaration that, even if the Plans filed by Allied comply with Section 8(f), Allied's rights to develop Phase II have expired because Phase II was not completed by June 9, 2018.

Count IV seeks a declaration that the Second Special Amendment to the Master Deed is void, and Allied has therefore lost its rights to develop Phase II by building it as a separate building, rather than as an extension of the original Condominium.

Count VI of the Complaint asserts trespass against Allied for continuing to access Phase II.

Count III of the Counterclaim seeks to quiet title in Phase II in Allied, on the basis of a purported claim by the Trust that the Trust has unequivocally stated it is not asserting.

C. Count I of the Complaint and Count II of the Counterclaim: The Meaning of "AsBuilt" in G.L. c. 183A, §8(f)

G.L. c. 183A, §8 states:

> The master deed shall be recorded in the registry of deeds or the land registration office where the real estate is located and shall contain the following particulars:
> ...
> (f) A set of the floor plans of the building or buildings, showing the layout, location, unit numbers and dimensions of the units, stating the name of the building or that it has not a name, and bearing the verified statement of a registered architect, registered professional engineer, or registered land surveyor, certifying that the plans fully and accurately depict the layout, location, unit number and dimensions of the units as built.

The issue before the Court with respect to Count I of the Complaint and Count II of the Counterclaim is the meaning of the phrase "as built" in G.L. c. 183A, §8(f) (hereafter referred to as "Section 8(f)"). The Trust contends that the phrase requires "post-construction" plans, reflecting substantial completion of the units shown thereon. There is no dispute that the Phase II units were not substantially completed when the Plans were recorded. Thus, the Trust asserts, the Plans are not "as built" plans required by Section 8(f), and Allied therefore did not comply with the requirement set forth in Sections 13(g)(i) and 13(g)(iii) of the Master Deed that such plans be recorded by June 9, 2018 in order for Allied to retain its right to develop (and own) Phase II.[4]

Allied argues that Section 8(f) requires only what it has provided: plans showing the layout, location, unit numbers and dimensions of the units in Phase II (and the name of the building) and therefore it has complied with the relevant requirements of Section 13(g) of the Master Deed.

[4] The Trust asserts that therefore Phase II remains common area of the Condominium and title to Phase II is in the unit owners.

"[T]he drafters of G. L. c. 183A 'probably did not anticipate phased condominiums.'" DiBiase Corp. v. Jacobowitz, 43 Mass.App.Ct. 361, 366 n.5 (1997) (quoting Barclay v. DeVeau, 11 Mass.App.Ct. 236, 247 (Greaney, J., dissenting)). "Nonetheless, as our appellate decisions have recognized, phased condominiums are a reality notwithstanding statutory silence on the subject." Id. "[W]here the statute does not specifically address the issue in question, a flexible interpretation of the statute, viewed as an enabling act, is to be preferred." Id. (citing Barclay v. DeVeau, 384 Mass. 676, 682 (1981); see also Tosney v. Chelmsford Vill. Condo Ass'n, 397 Mass. 683, 687 (1986)). Section 8 is to be construed in this light. Id.

There appears to be no case which explicitly defines what stage of construction a building must be in at the time a Master Deed is submitted in order for the accompanying plans to satisfy Section 8(f). Those cases that address the issue do so only indirectly, and inconsistently with one another. Compare Benjamin v. Tillery, 16 LCR 448, 452, 2008 Mass. LCR LEXIS 113 (Piper, J.) (citing to Section 8(f) in noting that developer's construction of new units had to be substantially complete before amendatory documents could be recorded) and Crapser v. Bondsville Partners, Inc., 14 LCR 432, 434, 2006 Mass. LCR LEXIS 83 (Sands, J.) (Master Deed for additional phase could not be submitted because as of deadline for doing so, "there are no as-built floor plans because [the phase] has not yet been completed") with Sano v. Tedesco, 84 Mass.App.Ct. 191, 196 (2013) (in holding that balconies were part of units even though not included in boundary description of the units in Master Deed, Court noted that section 8 "requires only unit designations, the numbers of rooms, approximate areas, and floor plans showing, among other things, the layout, location, unit numbers, and dimensions of the units") and Tibbetts v. Rockaway Rocky Neck Corp., 1 LCR 66, 68-69 (1993), 1993 Mass. LCR LEXIS 37 (Kilborn, J.) (additional building which was essentially uninhabitable was sufficiently

complete to allow certification of Section 8(f) plans, though it did not meet explicit requirement in Master Deed that, to exercise phasing rights, building had to be "renovated and completed").[5]

Therefore, the Court turns to the ordinary rules of statutory interpretation to divine the meaning of "as built" in Section 8(f). See Cohen v. Clerk-Magistrate of the Newton Div. of the Dist. Court Dep't, 2012 Mass. App. Unpub. LEXIS 1076 at *6 (*Rule 1:28 decision*) ("we are guided by rules of statutory interpretation to resolve any perceived ambiguity"). Applying these rules here, the Court agrees with Allied that use of the term "as built" in Section 8(f) does not require "post-construction" plans, or plans showing a building that is "substantially complete."

First, as Allied points out, if Section 8(f) required plans showing a building that is substantially complete, then including a requirement that plans show "the layout, location ... and dimensions of the units" would be meaningless, because those elements would necessarily be included in plans showing a building that is substantially complete. "We seek to avoid a construction which would make statutory language meaningless." Commonwealth v. Maher, 408 Mass. 34, 37 (1990); see also Commonwealth v. Super, 431 Mass. 492, 498 (2000) ("[n]one of the words of a statute is to be regarded as superfluous"). The fact the Legislature required that the plans contain particular elements – the layout, location and dimensions of the units – and not others defeats a conclusion that the statute requires plans showing a building for which all elements have been substantially completed. See also CNA Ins. Cos. v. Sliski, 433 Mass. 491, 498-99 (2001) ("it is a familiar principle of statutory interpretation that express mention of one matter excludes other similar matters not mentioned").

Second, Allied argues persuasively that, if the Legislature had meant construction to be "substantially complete" for purposes of Section 8(f), it would have said so explicitly, as it has in

[5] The Trust's citation to Diabiase Corp., 43 Mass.App.Ct. 361, *supra* is addressed below.

several other statutes. See G.L. c. 260, §2B (actions arising from improvements to real property must be brought no more than six years after "substantial completion of the improvement"); G.L. c. 254, §2A (requiring a notice of substantial completion in order to assert a mechanic's lien); G.L. c. 30, §39G (requiring certification of "substantial completion" in public works projects); G.L. c. 149, §29F (same, for private construction projects). The Court should "not read into [Section 8(f)] a provision which the Legislature did not see fit to put there." In re Adoption of Daisy, 460 Mass. 72, 76 (2011).

Finally, as noted, Section 8(f) should be construed mindful of the fact that, where G.L. c. 183A "does not specifically address the issue in question, a flexible interpretation of the statute, viewed as an enabling act, is to be preferred." DiBiase Corp., 43 Mass.App.Ct. at 366 n.5; see also Commercial Wharf E. Condo Association v. Waterfront Parking Corp., 407 Mass. 123, 128 (1990) (G.L. c. 183A "provides planning flexibility to developers and unit owners"). "Such flexibility is particularly important with respect to phased condominium developments, where long–term financial and market conditions may be uncertain." Queler v. Skowron, 438 Mass. 304, 312 (2002). Interpreting Section 8(f) to require plans showing a building that is substantially complete is inconsistent with the Legislature's intent to preserve flexibility for developers and unit owners with respect to the construction of units in phased condominiums. Interpreting Section 8(f) to require only that which is specifically enumerated in the statute – the layout, location, unit number and dimensions of the units – promotes the flexibility that is intended. See Commonwealth v. Raposo, 453 Mass. 739, 745 (2009) (a "statute's terms must be read harmoniously to effectuate the intent of the Legislature").

Conversely, the Trust's contentions as to why Section 8(f) should be interpreted as requiring plans reflecting construction that is substantially complete are not persuasive.

The Trust primarily argues that interpreting Section 8(f) as not requiring a building to be substantially complete would permit a developer to "build a house of cards," in order to meet phasing deadlines, "and then knock it all down," thus rendering those deadlines, which are meant to protect the rights of unit owners, meaningless. However, as Allied points out, the recording of a Section 8(f) plan fixes the layout, location and dimensions of the units within the structure containing the units. The Trust does not point to any part of G.L. c. 183A, or anything else, from which a declarant would derive authority, after recording Section 8(f) plans, to change the location, layout and dimensions of the units as shown on the plans. Moreover, as Allied also points out, once a building is submitted to condominium status, a declarant no longer owns or controls the common areas of the building (excepting any phasing rights that have been reserved) and therefore cannot "knock it all down." The Trust's concern is therefore speculative and cannot serve as a basis for interpreting Section 8(f) so strictly.[6]

The Trust also refers to certain industry publications which define "as built drawings" as drawings that show how a building has actually been constructed. However, these publications speak to how the term "as built" is defined generally, rather than how it is defined in Section 8(f), specifically. Moreover, these publications are inconsistent. As Allied points out, the Mass. Conveyancers' Handbook, §17.5 (4th Ed), referring to condominiums specifically, states that a unit "need not be completed, or even substantially completed in the customary architect's term" at the time it is submitted under G.L. c. 183A.

Finally, the Court does not find that statements in DiBiase Corp., 43 Mass.App.Ct. 361, *supra,* cited to by the Trust, support the Trust's interpretation of Section 8(f). In DiBiase, the

[6] Further, the Trust's assertion that Allied's Plans describe unit boundaries that are "non-existent" is contradicted by the record, which contains the sworn statements of Allied's architect that all of the boundaries and elements which he relied upon to generate the Plans existed as of June 1, 2018.

Court rejected the developer's contention that its failure to timely submit Section 8(f) plans (among other amendatory documents) for partially completed buildings affected the status of the *land* under the buildings, so that the land could not be considered common area belonging to the unit owners of the original condominium. The Court held that Section 8(f) plans were not required to submit just the land to the condominium, since the land was already included in the common area described in the Master Deed. It was in this context that the Court stated: "[t]he descriptive and 'as built' plan requirements of §8, sensibly construed, pertain only to existing buildings and improvements submitted to the statute. As the words connote, 'as built' plans, in particular, contemplate edifices already in being." Id., 43 Mass.App.Ct. at 365. DiBiase thus does not answer the question of what stage of "being" an edifice must be in to enable the developer to submit "as built" plans under Section 8(f) – other than, perhaps, to say that the edifice must be more than merely contemplated, a point that Allied concedes.

Indeed, DiBiase arguably detracts from the Trust's argument, since in that case, the Master Deed explicitly provided that the developer could amend the Deed to submit additional phases only if the amendment contained "all of the particulars required by Chapter 183A," and only when "construction of such buildings has been substantially completed." Id., 43 Mass.App.Ct. at 362 n.4. Clearly, the drafters of the Master Deed in that case did not interpret Section 8(f) as requiring substantial completion of the building.

The Court has considered the Trust's remaining arguments, and declines to adopt them. The plans required by G.L. c. 183A, §8(f) must show that which is specifically enumerated in the statute: the layout, location, unit number and dimensions of the units, along with the name of the building. As the Trust does not dispute that the Plans contain these elements, Allied filed compliant plans by the deadline set forth in the Master Deed. Therefore, Allied's Motion for

Summary Judgment on Count I of the Complaint and Count II of the Counterclaim is allowed, and the Trust's Cross-Motion for Summary Judgment on Count I of the Complaint and Count II of the Counterclaim is denied.[7]

D. Counts III and VI of the Complaint: Allied's Right to Continue Construction of Phase II

As noted, Count III of the Trust's Complaint seeks a declaration that, even if the Plans filed by Allied comply with Section 8(f), Allied's rights to continue developing Phase II have expired because Phase II was not completed by June 9, 2018, the deadline set forth in Section 13(g)(iii) of the Master Deed. Count VI of the Complaint asserts that Allied is committing a trespass due to its continued construction of Phase II.

The Trust's theory underlying Count III is not supported by the language of the Master Deed. Specifically, Section 13(g) provides that Allied (so long as it owns or controls title to any unit in the Condominium, an issue that has been reserved for trial) may "amend this Master Deed to add one additional Phase," without consent of the unit owners. Further, with respect to any such additional Phase, Section 13(g)(iii) provides that "[t]he right ... to amend this Master Deed to add one or more additional Phases to the Condominium shall expire" 10 years from the recording of the Master Deed, or June 9, 2018. Accordingly, by its explicit terms, the Master Deed requires only that it be amended to add Phase II by June 9, 2018; it does not require that Phase II construction be completed by June 9, 2018. While the Trust has argued that amending the Master Deed required the building to be substantially complete pursuant to G.L. c. 183A, §8(f), the Court has determined, as discussed above, that the statute does not require substantial

[7] The Trust filed a Motion to Strike the Affidavit of Edward Rainen, Esq., to the extent Allied sought to use the Affidavit as expert testimony on the issue of whether the Plans comply with Section 8(f). The Court did not consider Attorney Rainen's statements in its decision regarding Section 8(f) (or otherwise). Therefore, the Motion to Strike is denied as moot.

completion. Accordingly, Allied's Motion for Summary Judgment on Counts III and VI of the Trust's Complaint is allowed, and the Trust's Cross-Motion for Summary Judgment on Counts III and VI of its Complaint is denied.

E. Count IV of the Complaint: The Second Special Amendment

Count IV of the Trust's Complaint alleges that the Second Special Amendment to the Master Deed recorded by Allied on June 5, 2018, purportedly giving Allied the right to construct Phase II as a separate building, is invalid because it exceeded Allied's right to amend the Master Deed.

Section 12 of the Master Deed speaks to Allied's right to amend the Deed. It provides that, so long as Allied owns at least one unit in the Condominium or has the right to add an additional phase to the Condominium, it may amend the deed without consent of the unit owners in order to, *inter alia*, "cure any ambiguity, inconsistency, formal defect or omission" in the Master Deed. The right to amend is further limited in that the amendment may not "materially adversely affect rights and interests of the unit owners."

The Trust argues that the Second Special Amendment exceeds both these limitations. Allied responds that the issue is a red herring, because Section 6.8 of the Primary Master Deed unambiguously gives it the right to construct Phase II as a separate building, and the Second Special Amendment was recorded merely as a prophylactic measure when this lawsuit was filed, due to ambiguities in the Master Deed. Allied further argues that the amendment could not have adversely affected the rights of the unit owners, since documents which have been on record for several years indicate that Allied may build a separate second building in the Condominium.

The Master Deed is ambiguous as to whether Phase II may be a separate building (stating both that Allied reserves the right to construct "additional building(s)" and that "[t]he total

number of buildings in all phases of the Condominium shall be one (1)"), and it conflicts with Section 6.8 of the Master Deed. Thus, the Court finds that the Second Special Amendment did cure an "ambiguity [or] inconsistency" in the Master Deed. But whether the Second Special Amendment materially adversely affects the rights and interests of the unit owners – or, whether, as Allied argues, the owners have always known Phase II could be constructed as a separate building – is a matter of fact that cannot be resolved on summary judgment. Accordingly, the Cross-Motions for Summary Judgment on Count IV of the Complaint are denied.

However, the Court agrees with Judge Ullmann, in that the doctrine of laches precludes the Trust from claiming title to Phase II based on its claim that the Second Special Amendment is invalid. Allied made its intent to construct Phase II known as early as May, 2015 and thereafter shared construction plans with the Trust. Construction on Phase II as a separate building began in January, 2017. Yet the Trust did nothing to stop the construction until it brought suit in May, 2018, after Allied had spent some $10 million on construction. Laches defeats a claim where, as here, a party knows of its rights, has ample opportunity to enforce them, and takes no action while a change in circumstance occurs. See Clark v. Boston–Continental National Bank, 9 F.Supp. 81, 88 (D. Mass. 1934). Therefore, if a trier of fact were to determine that Allied exceeded its authority under Section 12 of the Master Deed by recording the Second Special Amendment and constructing Phase II as a separate building, the Trust might have some remedy.[8] However, the doctrine of laches will preclude the Trust from recovering

[8] As noted, Section 12 also requires that, to amend the Master Deed, Allied must own a unit in the Condominium. Thus its right to record the Second Special Amendment also turns on the issue of whether it permanently lost that right when it sold its last unit in the Condominium on August 21, 2009, or the right was revived when it entered into a 99-year lease for a unit on May 31, 2018 – the issue that was left to be tried by Judge Ullmann's earlier summary judgment decision.

any substantial percent of the total economic value created by Allied while the Trust stood by and failed to take action.

F. Counts V and VIII of the Complaint, and Counts III and IV of the Counterclaim

Count V of the Trust's Complaint seeks a declaration against the bank that holds a mortgage on Allied's development rights in Phase II, based on the Trust's assertion that Allied has lost its ownership rights in Phase II. Because the Trust cannot assert title to Phase II, the Court *sua sponte* will dismiss Count V of the Complaint.

Count VIII of the Trust's Complaint sought injunctive relief to prevent Allied from continuing construction on Phase II. Preliminary injunctive relief was denied earlier in the case. Further, a claim may not be based on a claim for injunctive relief alone. I

Therefore, the Court *sua sponte* will dismiss Count VIII of the Complaint.

Count III of Allied's Counterclaim sought to quiet title in Phase II based on the Trust's purported claim that the Phasing Amendment to the Master Deed is void because the plans filed therewith do not contain a verified statement of a registered architect. The Trust has unequivocally stated that it does not assert such a claim in this matter. Therefore, the Court *sua sponte* will dismiss Count III of the Counterclaim.

Finally, Count IV of the Counterclaim sought to quiet title in Allied in the original Condominium, asserting that, if the Phasing Amendment is void because the plans filed therewith do not include a verified statement of a registered architect, then the plans for the original Condominium are similarly deficient, and therefore the original Condominium was never created, leaving title to that property in Allied. Because, as noted, the Trust does not assert that the Phase II plans are void for this reason, the Court *sua sponte* will dismiss Count IV of the Counterclaim.

ORDER

Accordingly, it is hereby ORDERED that:

Allied's Motion for Summary Judgment on Count I of the Complaint and Count II of the Counterclaim is ALLOWED, and the Trust's Cross-Motion for Summary Judgment is DENIED;

Allied's Motion for Summary Judgment on Counts III and VI of the Complaint is ALLOWED, and the Trust's Cross-Motion for Summary Judgment is DENIED;

Allied's Motion for Summary Judgment on Count IV of the Complaint is DENIED, and the Trust's Cross-Motion for Summary Judgment is DENIED, and any remedy the Trust may have based on Count IV is limited by the doctrine of laches;

Counts V and VIII of the Complaint and Counts III and IV of the Counterclaim are dismissed.

The Trust's Motion to Strike the Affidavit of Edward Rainen, Esq. is denied as moot.

Jackie Cowin
Associate Justice of the Superior Court

August 27, 2019