

BANKER & TRADESMAN

THE
WARREN
GROUP
Since 1872
Real Estate & Financial Information

THE FINANCIAL SERVICES AND REAL ESTATE WEEKLY FOR MASSACHUSETTS

COMPLEX CONDOS

Mixed-Use Projects Present Legal Challenges

Court Rulings Expose Parties to Risks

BY SAMUEL MOSKOWITZ
SPECIAL TO BANKER & TRADESMAN



Two decades into the 21st century, developers, municipalities and courts are focusing on opportunities – and risks – generated by the use of centuries-old real estate techniques combined with modern statutory tools in the development of cutting-edge projects.

Mixed-use projects that were once few and far between are now appearing throughout the commonwealth, from downtown hotel/shopping/residential/office behemoths to suburban live-work-play planned mini-communities.

The combination of these forces presents opportunities for both profit and mayhem in 2020 and beyond.

Creative Use of Development Rights

The condominium structure, established in the second half of the 20th century, continues to evolve and expand.

Today, developing multi-level, condominium-within-a-condominium projects where a primary association oversees secondary, use-specific condominiums is a strategy that allows for more efficient use and management of mixed-use projects. Combined with the imaginative assignment of limited common areas to subgroups of office, residential and commercial unit owners, these tools give developers a nearly boundless ability to create multi-use real estate.

Rights and responsibilities can be assigned and allocated in ways that maximize value and minimize conflict. And, while these multi-level condominiums have been fairly simple, the number of levels that can be used to weave together mixed uses is limitless.

Phasing is another development tool, one that preserves financial, construction and marketing flexibility.

Ensuring that all necessary rights and powers are reserved is critical to preserving this flexibility. The right to re-enter and continue construction – while maintaining control over what, how and when the remainder is built – is a foremost concern. So, too, is management of what has been completed and the maximization of profit centers and opportunities.

Courts have shown they will honor clear and reasonable reserved rights, including master deed provisions exempting the developer from use restrictions imposed on sold units.

Courts Won't Excuse Errors and Omissions

Several recent, eye-opening decisions represent a wake-up call that courts will not protect developers, lenders or unit purchasers from their own mistakes. Examples of harsh and unforgiving results include cases where:

- A developer was prevented from unilaterally amending a master deed to extend its expiring development rights;
- A developer's reservation of open-ended phasing rights to add units could not overcome its failure to reserve the right to reenter the condominium and construct those units;
- A court refused to rewrite condominium documents to give a unit owner the right to cross another unit to access a fire escape required by law for the owner's unit; and
- A lender that gave partial releases to unit purchasers found its mortgage was inadvertently made subject to the condominium regime, despite never having agreed to do that.

The Limits of Self-Protection

The Supreme Judicial Court has also limited a developer's ability to protect itself from construction defect claims.

In 2018, it struck down a so-called “poison pill” condominium bylaw that made it practically impossible for unit owners to sue the developer. Subsequent decisions are providing guidance as to how such bylaws may be successfully drafted. One example is a bylaw requiring 50 percent, rather than 80 percent, unit owner approval, and which does not limit the time to obtain that approval or require a special assessment covering anticipated litigation costs.

Developers also learned that even an acceptable poison pill provision will not protect them from association claims over condominium units they continue to own. And, a court recently ruled that the six-year statute of repose, a hard deadline cutting off construction defect claims, does not start to run until the entire complex, rather than each phase, is completed.

Taxing Authorities Take Notice

As developers have taken advantage of their ability to create clear reservations of rights and powers, municipalities have seen their own opportunities.

For two decades, Massachusetts case law has prohibited taxing reserved developer rights, limiting property taxation of condominium common areas to individual units. Yet, as developers have created continuing profit centers through reserved rights, including retained common area parking rights and ownership of some improvements, municipalities have successfully started targeting these interests in their search for new sources of tax revenue. This area is likely to become a fertile ground for both taxation and litigation.

As the interests of developers, purchasers and municipalities continue to intersect in ever-changing ways, we expect to see more issues arise. ◀

Samuel B. Moskowitz is a real estate attorney at Davis Malm who focuses on condominium law, title issues, real estate litigation and development.