No. 2016-0357

State of New Hampshire
Supreme Court

CONDOMINIUMS AT LILAC LANE UNIT OWNERS' ASSOCIATION,
PLAINTIFF-APPELLANT,

v.

MONUMENT GARDEN, LLC, AND EASTERN BANK,
DEFENDANTS-APPELLEES.

RULE 7 APPEAL FROM A DECISION OF THE STRAFFORD COUNTY SUPERIOR COURT

BRIEF OF *AMICUS CURIAE*, COMMUNITY ASSOCIATIONS INSTITUTE SUPPORTING REVERSAL OF THE JUDGMENT OF THE TRIAL COURT

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INTRODUCTION AND STATEMENT OF INTEREST

The *Amicus Curiae*, the Community Associations Institute ("CAI"), is a national non-profit research and education organization formed in 1973 by the Urban Land Institute and the National Association of Home Builders to provide the most effective guidance for the creation and operation of condominiums, co-operatives and homeowner associations. CAI represents more than 17,000 homeowners, community associations, community managers and affiliated professionals and service providers in 57 local chapters. CAI's industry data estimates that there are approximately 68 million Americans living in over 26 million housing units in approximately 350,000 community associations. This number constitutes roughly 21% of the population of the United States, assuming a population of 300 million.

Community associations are property developments in which a developer, or declarant, has willingly submitted an interest in real property to some form of community association regime. The regimes include, among others, condominiums, homeowner associations and co-operatives. The community association presents a unique form of ownership where responsibility for the submitted property is shared, on some level, between the individual owner or member, on the one hand, and an association, trust or corporation, on the other. The properties governed by community associations may be commercial or residential in nature. Community associations are usually governed by not-for-profit incorporated (or sometimes unincorporated) entities pursuant to Articles of Incorporation (or a similar document) and By-laws. CAI is an international organization dedicated to providing information, education, resources and advocacy for community association leaders, members and professionals with the intent of promoting successful communities through effective, responsible governance and management. CAI's more than 33,000 members include homeowners, board members,

association managers, community management firms, and other professionals who provide services to community associations. CAI is the largest organization of its kind, serving more than 68 million homeowners across the United States.

The CAI New England Chapter serves the interests of the approximately 440,000 New Hampshire residents living in between 2,000 to 3,000 community associations. These residents pay on average $500 a year to maintain their communities – costs that would otherwise fall to local government. CAI members either own property in a New Hampshire community association or work with those communities, which include homeowners associations, condominiums, cooperatives and other planned communities.

The case under consideration by this Court is one of substantial import to the body of law regarding the respective rights and obligations of the developer, the condominium board and the individual unit owners, as set forth in the New Hampshire Condominium Act. After careful review of the record in this case, it is CAI's belief that the Trial Court misinterpreted the established statutory methodology for creating phased condominiums, including most significantly, the time limitations imposed upon phased developments under the New Hampshire Condominium Act. The New Hampshire Condominium Act is substantially derived from the 1977 version of the Uniform Condominium Act enacted for adoption in all fifty states by the National Conference of Commissioners for Uniform Laws.

CAI submits that the Trial Court's Decision conflicts with the express terms, meaning and intent of the New Hampshire Condominium Act, as well as the 1977 version of the Uniform Condominium Act, and if allowed to stand renders nugatory or moot substantial portions of the New Hampshire Condominium Act pertaining to phasing, which were enacted and designed to allow developer flexibility, while at the same time protecting consumers from developer abuse.

Approximately twenty (20) States and the District of Columbia have adopted some form of the Uniform Condominium Act, five (5) of which, including New Hampshire utilize the 1977 version of the Uniform Condominium Act and similar and sometimes identical terminology to the New Hampshire Condominium Act. Accordingly, any decision reached by the Court in this case could impact condominium case law significantly, not just in New Hampshire, but in other states that have adopted the Uniform Condominium Act.

In keeping with CAI's long-standing interest in promoting understanding regarding the operation and governance of community associations, CAI submits this brief for the Court's consideration.

STATEMENT OF THE ISSUES AND ERRORS CLAIMED

CAI relies upon, and incorporates herein by reference, the Statement of the Issues contained in the Brief of Appellant, Lilac Lane Condominium Association, Inc. ("Appellant's Brief").

STATEMENT OF THE CASE

CAI relies upon, and incorporates herein by reference, the Statement of the Case contained in the Appellant's Brief.

STATEMENT OF FACTS

CAI relies upon, and incorporates herein by reference, the Statement of Facts contained in the Appellant's Brief.

ARGUMENT

I. THE TRIAL COURT'S DECISION IN THIS CASE IS DIRECTLY CONTRARY TO THE EXPRESS LANGUAGE AND INTENT OF THE NEW HAMPSHIRE CONDOMINIUM ACT AND SEVERELY UNDERMINES THE ACT.

The Lilac Lane Condominium Association sought to establish two primary issues via Declaratory Judgment in this case. First, that Monument Garden's phasing rights and time to develop the Lilac Lane Condominium expired five (5) years from the creation of the Condominium, on March 3, 2015, due to the passage of the five-year time limit for development of a convertible land condominium as set forth in RSA 356-B:23(III). Second, that the construction of two buildings (Buildings 13 and 14) and an alleged additional 48 units within said buildings, are not units in the Condominium, but common area, due to the lack of recording an amendment(s) to the Declaration recognizing said units within the five-year convertible land time limit as well as the failure to record substantial completion certificates within the five-year period, as required by RSA 356-B:23(II) and RSA 356-B:20(III).

The Trial Court disagreed and erred on both points. First, the Trial Court held that the Lilac Lane Condominium, which is a phased condominium, is not subject to the statutory imposed time limits contained in the New Hampshire Condominium Act for phasing. The Trial Court's decision is in direct conflict with the New Hampshire Condominium Act and allows Monument Garden to phase the Lilac Lane Condominium in perpetuity. This renders the statutory proscribed time limits and means and methods for creating phased condominiums under the New Hampshire Condominium Act nugatory counter to established practices of statutory construction.

The Trial Court's attempt to recognize all 120 contemplated units (96 beyond the original 24 properly created) to be phased over the life of the phasing rights at the Condominium as

lawfully existing units from the date of recording the Lilac Lane Condominium Declaration conflicts with the established fact that at the time the Condominium was created, there were only 24 units in one building (Building 12) substantially created and therefore in existence. It is undisputed that no other buildings or units existed on the ground when the Lilac Lane Condominium Declaration was recorded on March 3, 2010. The Trial Court's decision in this respect also conflicts with the New Hampshire Condominium Act's requirement for units to be "substantially completed" prior to legal recognition. See, RSA 356:B:20 (I)(II)(III)(providing for recording of substantial completion certification by a registered or licensed professional, i.e. an architect, engineer or land surveyor). On March 3, 2010, only 24 units in a single building existed. Thus, the Trial Court's decision that 120 units existed as of that date, and that this was not a convertible land condominium, not only defies the reality on the ground, it defies the New Hampshire Condominium Act's requirement for substantial completion certificates, the express purpose and point of which is to prevent a developer from claiming the existence of "phantom units" to circumvent the Act's other requirements.

The Trial Court also incorrectly held that the 48 alleged units contained in Buildings 13 and 14 are validly created units under the Act, despite the fact that they are not recognized in any recorded amendment to the Declaration and despite the fact that no substantial completion certificates for the same were recorded, as required by the New Hampshire Condominium Act, within the five-year phasing time limit set forth in the Act.

These are clear errors of statutory construction. The Trial Court's construction contradicts the plain meaning of the New Hampshire Condominium Act, undermines its intent and effectively renders as meaningless several of its provisions, which were designed to protect New Hampshire condominium purchasers, consumers and unit owners from developer abuses.

Since this is a case of statutory construction, it is worthwhile to examine the history of condominium legislation in New Hampshire and the Uniform Condominium Act from which the current version of the New Hampshire Condominium was derived.

A. Summary of Condominium Legislation in New Hampshire.

Condominiums are a creature of statute. The New Hampshire Condominium Act, RSA 356-B (the "Act") "governs all condominiums and condominium projects" in New Hampshire. Ryan James Realty, LLC v. Villages at Chester Condo. Assoc., 153 N.H. 194, 196 (2006) (citing RSA 356-B:2 and Neumann v. Village of Winnipesaukee Timeshare Owners' Assoc., 147 N.H. 111, 113 (2001). The condominium instruments include a declaration of the condominium, which defines the rights as among the condominium owners, the condominium association, and the developer." Town of Windham v. Lawrence Sav. Bank, 146 N.H. 517, 520 (2001).

"Condominium ownership is based on statutory authority, not on common law concepts." "We recently reaffirmed the principle that the terms of a condominium declaration must be interpreted to be consistent with the Condominium Act, and, if the terms of a declaration conflict with the Act, the Act controls. See, New Hampshire Housing Finance Authority v. Pinewood Estates Condominium Association, __ NH __ (September 20, 2016) [citing] Sanborn v. 428 Lafayette, LLC, 168 N.H. 582 (2016).

The fifty (50) states, the District of Columbia and Puerto Rico each have some form of condominium legislation. Each of these condominium statutes give statutory recognition to the condominium form of ownership of real property and establishes a detailed scheme for the creation, sale, development and operation of condominiums. Each condominium act provides

that a condominium is created by recording a declaration of condominium in the public registry of the county or the town where the land is located.

Condominiums became financially viable in 1961 when the FHA began treating condominiums like single family homes for lending purposes. Stuart Ball, *Division into Horizontal Strata of the Landspace Above the Surface*, 39 YALE L.J. 616 (1930); Donna S. Bennett, *Condominium Homeownership in the United States: A Selected Annotated Bibliography of Legal Sources*, 103 LAW LIBR. J. 249 (2011); Curtis Berger, *Condominium; Shelter on a Statutory Foundation*, 63 COLUM. L. REV. 987 (1963).

New Hampshire enacted a primitive first generation condominium enabling act in 1965. Like most condominium enabling acts, it did little more than create a legal basis for the condominium form of ownership. Condominium enabling acts for the most part leave the details of the condominium operation to the condominium declaration and by-laws, provided that some basic statutory requirements are followed. See, RSA 479-A:1, et seq.[1] Price fluctuations in the mid-1970s revealed shortcomings in the primitive first generation condominium acts generally. Richard J. Kane, *The Financing of Cooperatives and Condominiums: A Retrospective*, 73 ST. JOHN'S L. REV. 101, 110-114 (1999). In response to these shortcomings, in 1977 the National Conference of Commissioners on Uniform State Laws created and adopted the Uniform Condominium Act to deal with the growing condominium industry and to provide a statutory balance between developers and condominium purchasers in the form of greater flexibility for developers by allowing them to legally phase condominium projects over time and to provide a greater level of consumer protection to unit owners from developer abuses. See Prefatory Notes

[1] New Hampshire's first generation condominium act remains on the books for condominiums created under it prior to 1977, which have not adopted the subsequent and current version of the New Hampshire Condominium Act.

to Uniform Condominium Act (1977); see also Henry L. Judy and Robert A. Wittie, Real Property, Probate and Trust Journal, Vol. 13, No. 2, *Uniform Condominium Act: Selected Key Issues*, pages 437-539 (Summer 1978).

New Hampshire, together with several other states, adopted a modified version of the Uniform Condominium Act in 1977. This version of the New Hampshire Condominium Act became effective on September 10, 1977, at RSA 356-B, a little more than one month after the Uniform Condominium Act was approved for enactment in all of the States by the Commissioners of Uniform Laws at their annual conference in Vail, Colorado on August 5, 1977.[2]

The Uniform Condominium Act was amended again in 1980. There are significant differences between the 1977 version and the 1980 version of the Uniform Condominium Act generally and as they relate to phasing. New Hampshire has not yet adopted the 1980 version of the Uniform Condominium Act. Both versions of the Uniform Condominium Act (1977 and 1980) are accompanied by Commissioners' Comments, which sometimes are useful in providing an understanding or interpretation of the Acts meaning and intent.[3]

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[2] The New Hampshire Legislature, like most states, did not adopt the Uniform Condominium Act wholesale. The phasing concepts, which are the subject of this Appeal, are substantially similar and in some respects identical in the Uniform Act and the New Hampshire Condominium Act.

[3] It does not appear that New Hampshire specifically adopted the Commissioners Comments as part of its Condominium Act in 1977. The Rhode Island Supreme Court has relied heavily on said Comments in deciding cases under its (1980) version of the Uniform Condominium Act. Other Courts, including the Rhode Island Supreme Court have relied heavily upon said Comments as interpretative aid. See American Condo. Ass'n, Inc. v. IDC, Inc., 870 A.2d 434, 440 (R.I. 2005).

Fourteen (14) states have adopted the 1980 version of the Uniform Condominium Act, specifically Alabama, Arizona, Kentucky, Maine, Minnesota, Missouri, Nebraska, New Mexico, Pennsylvania, Rhode Island, Texas, Virginia, Washington and West Virginia.

Four (4) states and the District of Columbia utilize condominium statutes adopting substantial portions of the 1977 version Uniform Condominium Act, including Virginia, the District of Columbia, Utah, Kansas and New Hampshire.[4]

The stated purpose of the Uniform Condominium Act bears on the general construct of phasing and the importance of the statutory time limits contained in the New Hampshire Condominium Act. The nomenclature of terms, definitions, statutory time limits and requirements pertaining to phasing, including convertible land and the process for adding additional units to a condominium, are similar (if not identical) in many respects in New Hampshire, the Uniform Condominium Act and some of the other states that have adopted the 1977 version of the Uniform Condominium Act.[5] An overview of the Uniform Condominium Act (1977) and a comparison of the Uniform Act and the New Hampshire Condominium Act shows that the New Hampshire Condominium Act developed a complex statutory scheme for phased condominiums in New Hampshire, which the Trial Court in this case completely ignored.

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[4] Unlike New Hampshire which has adopted a sophisticated uniform act, Massachusetts condominiums to this day continue to be governed by a primitive first generation enabling act. See, Barclay v. DeVeau, 11 Mass. App. Ct. 236, 247, note 4 (1981)(contrasting the Massachusetts act with the "more sophisticated" Uniform Condominium Act).

[5] Virginia has a ten (10) year time limit for phasing on convertible land condominiums. VA Code Ann. § 55-79.61(C). Washington D.C. has a five (5) year time limit for phasing on convertible land condominiums. DC ST § 42-1902.17(C). Kansas has a seven (7) year time limit for phasing on convertible land condominiums. K.S.A. 58-3115a. Utah has a five (5) year time period for phasing on convertible land condominiums. UT.C.A § 57-8-13.2(3). Examination of the condominium acts in Virginia, District of Columbia, Utah and Kansas reveals virtually identical language, nomenclature and timing provisions for phased condominiums set forth in the New Hampshire Condominium Act.

B. The Purpose of the Uniform Condominium Act, circa 1977.

The Uniform Condominium Act was drafted by the National Conference of Commissioners on Uniform State Laws and approved for enactment in all states at its Annual Conference in Vail, Colorado in August, 1977. The prefatory notes to the Uniform Condominium Act indicate that by 1977, a need had developed among the states to modernize the laws governing condominiums, most of which were patterned after the first known condominium act adopted in 1958 by Puerto Rico or the 1962 Federal Housing Administration model condominium statute, both of which were enabling acts. The prefatory notes provide that the Uniform Condominium Act was enacted to address, among other things, a greater need for developer flexibility in the creation of phased condominiums and a perceived need for additional consumer protection. Specifically, the prefatory notes provide that Article 2 of the Uniform Condominium Act, which deals with the creation, alteration and termination of condominiums, "provides great flexibility to a developer in creating a condominium project designed to meet the needs of a modern real estate market, while imposing reasonable restrictions on developers' practices which have a potential for harm to unit purchasers."

These concepts of balanced developer flexibility and consumer protection manifested themselves under the Uniform Act in the construct of statutory recognition and limitation of phased condominiums. The Commissioners' Comments to the Uniform Condominium Act provide:

> The Act is designed to maximize the developers' flexibility in creating condominiums. Thus, the Act significantly differs from "first generation" condominium statutes which, in many instances, require or attempt to require a single phase project with fixed allocations or common element interests, votes, and common expense liability.
>
> Under this Act, as new units are added to a condominium, common element interests, votes in the association, and common expense liabilities will change,

> and may dramatically affect the liability of purchasers in the condominium's early phases. As a result, disclosure of the conditions under which a flexible condominium may be developed is required [omit interior citation], and a maximum limit of 7 years is suggested as the period during which such changes may be made by any declarant….While a time limit on the exercise of declarant's rights and full disclosure of the nature of those rights are important protections to purchasers, flexibility in the Act is highly desirable in order to permit economically viable development of condominiums in a rapidly changing market. See, Uniform Condominium Act (1977), Commissioners Comments to Section 1-103 (definition of flexible condominium), note 9.

Thus, the Uniform Condominium Act specifically included significant provisions governing phased condominiums to provide flexibility to condominium developers that earlier condominium enabling acts did not provide. At the same, the Act also limited the time periods within which phased condominiums could be completed. It struck a measured balance between developer rights and consumer rights, a balance which has manifested itself in the New Hampshire Condominium Act. This balance will be inexorably skewed against consumers in favor of all future New Hampshire condominium developers if the Trial Court's decision is allowed to stand.

C. Phasing Concepts Under the Uniform Condominium Act and the New Hampshire Condominium Act.

Three (3) types of phased or flexible condominiums have been generally recognized by real estate and condominium practitioners. The first kind is called a convertible land condominium, also called an "all in" condominium. In this type of condominium, the developer submits the entire parcel of land (which immediately becomes common area) to condominium status at its creation (hence the term "all in"), creates an initial group of units upon said land and then reserves the right to create additional units upon the submitted ("convertible") common land in the future. The second kind of recognized phased condominium is called an expandable or "additional land" condominium, which allows a declarant to (at some future date) add additional

adjacent land (which is not originally part of the land originally submitted to the condominium) to the condominium and build units upon it. The additional land can either come into the condominium with completed structures or additional units thereon or they can be constructed and added subsequent to the expansion or addition.[6] The third type of condominium is referred to as a contractible or withdrawable condominium, which as its name implies allows a declarant to remove or withdraw a portion of submitted common area land at some future date, provided that there are no structures located on the land to be withdrawn.

Both the Uniform Condominium Act and the New Hampshire Condominium Act recognize these three basic phasing concepts. Both the Uniform Condominium Act and the New Hampshire Condominium Act impose time limits on all three concepts. The Uniform Condominium Act (1977) imposes a seven (7) year time limit on all three types of phased condominiums,[7] whereas New Hampshire imposes a five (5)-year time limit on convertible land condominiums and a seven (7) year time limit on the other two types (expandable and contractible). A comparison of the respective phasing components of both Acts provisions

[6] Technically there is a fourth kind, known as convertible space, which also has its origins in the Uniform Act and is contained in the New Hampshire Condominium Act. This concept allows a developer to submit a building to condominium status and reserve portions of the building as common area, designated as convertible space, which later allows the developer to convert those interior rooms into units or limited common area. Lilac Lane does not have any convertible space provisions in its Declaration and/or site plans and as such that concept is not specifically applicable to this case.

[7] The 1980 version of the Uniform Condominium Act, which has not been adopted by New Hampshire eliminated the seven (7) year time limit, instead requiring the developer to set his own fixed time limit in the declaration. Under the 1980 version of the Uniform Condominium Act, a developer theoretically could impose a 25-year time limit, provided it is stated in the declaration. The reality is that most lending organizations have over the years required a 7-year time limit in order for loans on condominium units to be freely transferred in the secondary market under applicable Fannie Mae and Freddie Mac secondary market guidelines, so 7 years has remained a typical limit. This theoretical exercise is irrelevant in this case as the Lilac Lane Declaration contains no time limit on phasing and the New Hampshire Condominium Act imposes a 5-year time limit.

follows and demonstrates New Hampshire's clear reliance upon and adoption of the same overall basic phasing concept and structure set forth in the Uniform Condominium Act and in turn recognizes the balance between developer flexibility and consumer protection for units owners.

1. **Phasing Definitions**.

The 1977 version of the Uniform Condominium Act uses the following terms to recognize and govern condominium phasing:

(1) Additional Real Estate: real estate that may be added to a flexible condominium. UCA (1977) § 1-103(1).

(2) Convertible Real Estate: a portion of a flexible condominium not within a building containing a unit, within which additional units or limited common elements, or both may be created. UCA (1977) § 1-103(9).

(3) Flexible Condominium: a condominium containing withdrawable or convertible real estate, a condominium to which additional real estate may be added, or a combination thereof. UCA (1977) § 1-103(13).

(4) Withdrawable real estate: real estate that may be withdrawn from a flexible condominium. UCA (1977) § 1-103(24).

The Commissioners' Comments further elucidate the definition convertible real estate as follows:

> [C]onvertible real estate describes real estate which is part of the condominium, rather than outside its boundaries. As a result, convertible real estate, until converted, is a part of the common elements, and the legal ownership of the real estate resides in the unit owners. In that respect it differs from "additional real estate" which is not part of the condominium, and is not owned by the unit owners.
>
> ***
>
> Convertible real estate, like additional real estate, is a device which permits the declarant to build the project in phases, but offers certain advantages which additional real estate may not provide.[8] UCA (1977) § 1-103, comment 6.

[8] The Commissioners' comments go on to provide examples of the advantages a developer may have in utilizing the convertible real estate phasing option in lieu of the additional real estate phasing option. Id.

Notably, the definitions in the Uniform Condominium Act and the Commissioners Comments do not contemplate a fourth method of phasing that is outside of the Act or the Act's requirements, as the Uniform Condominium Act is clearly a departure from the primitive first generation enabling acts, and such a method would also defeat the consumer protection component and purpose of the Uniform Condominium Act. The list, concepts and types of phased condominiums are clearly meant to be exclusive.

The New Hampshire Condominium Act contains the following similar phasing terms and definitions:

(1) Convertible land: is a building site which is a portion of the common area, within which additional units and/or a limited common area may be created in accordance with this chapter. RSA § 356-B:3(X)

(2) Expandable condominium: is a condominium to which additional land may be added in accordance with the provisions of the declaration and of this chapter. RSA § 356-B:3(XV)

(3) Contractible condominium: is a condominium from which one or more portions of the submitted land may be withdrawn in accordance with the provisions of the declaration and of this chapter. If such withdrawal can occur only by the expiration or termination of one or more leases, then the condominium shall not be deemed a contractible condominium within the meaning of this chapter. RSA § 356-B:3(VIII).

Other portions of the New Hampshire Condominium, much like the Commissioners' Comments to the Uniform Condominium Act (1977) provide further elucidation to the above phasing definitions, particularly as it pertains to convertible land. Specifically, RSA 356-B:23(III) provides: "All convertible lands shall be deemed part of the common areas except for portions thereof as are converted in accordance with the provisions of this section." The above cited phasing concepts and definitions are very similar to the phasing concepts identified in the Uniform Condominium Act (1977) and the other jurisdictions that have adopted the same. Furthermore, the New Hampshire Condominium Act provides that these phasing concepts can

only be created, added or carried out "in accordance with this chapter," id., which like the Uniform Condominium Act, means that these are the exclusive methods of condominium phasing allowed by statute. There is no other provision of the New Hampshire Condominium Act that contemplates phased condominiums outside of, separate and free from the requirements, limitations and restrictions of the New Hampshire Condominium Act. Phasing must be done "in accordance with this chapter." Id. To permit otherwise, would defeat the consumer protection objectives of the New Hampshire Condominium Act. Furthermore, RSA 356-B:13 provides that relating to construction of condominium instruments, a construction consistent with the chapter shall control over any construction inconsistent therewith.

2. Time Limitations.

The Uniform Condominium Act (1977) imposes a maximum seven (7)-year time limit on all phased condominiums: convertible, additional land and withdrawable. The seven (7)-year time limit is contained in the body of the Uniform Condominium Act at Section 2-106 [Contents of Declaration: Flexible Condominiums], as follows:

> The declaration for a flexible condominium shall include, in addition to the matters specified in Section 2-105:
>
> (1) An explicit reservation of any options to create units, limited common;
>
> (2) the expiration of the time limit;
>
> (3) Uniform elements, or both, within convertible real estate, or to add additional real estate to or withdraw withdrawable real estate from the condominium;

A statement of the time limit, **not exceeding [7] years after the recording of the declaration**, upon which any option reserved under paragraph 1 will lapse, together with a statement of any circumstances that will terminate the option before Uniform Condominium Act

(1977) § 2-106(1)(2)(emphasis supplied). Under the Uniform Condominium Act any amendment to the declaration affecting the maximum 7-year period requires unanimous 100% unit owner consent. See, Uniform Condominium Act (1977) § 2-117(d)(…no amendment may create or increase special declarant rights….in the absence of unanimous consent of the unit owners).

The New Hampshire Condominium Act sets forth maximum seven (7) year periods for exercise of contractible and expandable rights, which time limit must be stated in the declaration, much like the Uniform Condominium Act. RSA 356-B:16(III)(c) and 356 B:16(IV)(c). Unlike the Uniform Condominium Act, the New Hampshire Condominium Act does not require a developer to state in the declaration the time limit by which he will exercise his convertible land rights. Instead, that right is conferred explicitly by statute, though the developer can provide a shorter time limit in the declaration if it so chooses. See, RSA 356-B:16(II). RSA 356-B:23(III), which describes the methods and means for conversion of convertible lands, provides:

> No such conversion shall occur 5 years from the recordation of the declaration, or such shorter time period as the declaration may specify. Id.[9]

It is unclear why New Hampshire deviated from the 7-year time limit set forth for convertible lands in the Uniform Condominium Act and set a shorter 5-year period. Perhaps it was to provide a greater degree of consumer protection via a shorter time frame for construction in an existing condominium community (perhaps recognizing that a shorter time frame may be more desirable for unit owners who have to effectively live within a construction zone), which of

[9] Thus RSA 356-B:23(III) indirectly says what RSA 356-B:16(II) fails to say. Obviously convertible land rights are governed by a 5-year time limit and it is good practice to state that time limit in the body of the declaration. However, failing to state a time limit is not necessary as the maximum five-year time limit contained in the Act would control regardless. The declaration may not contradict the Act.

course would be a purpose that is within the intent and purpose of the Uniform Condominium Act.

The New Hampshire Condominium Act even provides a greater degree of flexibility for developers than the Uniform Condominium Act (1977) relative to the extension of the phasing time limits. Unlike, the Uniform Condominium Act, which requires unanimous (100%) unit owner consent for extension of the maximum 7 year period, the New Hampshire Condominium Act provides that the seven (7) year time limit for expandable and contractible condominiums and the five (5) year time limit for convertible condominiums may be extended for one additional 7 or 5 year period, respectively, by an amendment to the declaration with the written agreement of 67% of all units owners of substantially completed units[10] prior to the expiration of the applicable time limit or 80% of all unit owners of substantially completed units if the time limit has already expired. See, RSA 356-B:16(III)(c), RSA 356-B:16(IV)(c), RSA 356-B:23(III) all of which incorporate and reference the special amendatory provision found at RSA 356-B:54(V).[11]

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[10] With respect to the possibility of an extension, the New Hampshire Condominium Act importantly requires the vote to be of "substantially completed units," in order to prevent the developer from creating "phantom units" that are not substantially complete, as a device to increase voting rights allowing him to secure an extension. This is another reason why the Trial Court's determination that there are actually 120 existing units in the Lilac Lane Condominium is in conflict with the plain meaning and intent of the New Hampshire Condominium Act.

[11] The special amendment provision allowing extension of phasing rights in the New Hampshire Condominium Act is for extension of the particular phasing right time limit **contained in the declaration**. See, RSA 356-B:16(III)(c), RSA 356-B:16(IV)(c), RSA 356-B:23(III). It is not an extension of the statutory maximum, it is the extension of up to the statutory time limit contained in the declaration for an additional 5 or 7 years. Thus, in order for the extension provision to be applicable the time limit must be stated in the declaration. The Lilac Lane Condominium Declaration does not contain any time limit on phasing rights whatsoever, and thus, cannot be extended even if Monument Garden could somehow satisfy the 67% or 80% thresholds.

While the New Hampshire Condominium Act is more restrictive than the Uniform Condominium Act with respect to time limits on phasing rights with respect to convertible land condominiums (5 years instead of 7 years), and provides greater flexibility with respect to extension of times limits (67% or 80% depending on whether they have already expired as opposed to 100%) that the Uniform Condominium Act, the overall scheme relative to phased condominiums and phasing rights is essentially the same.

3. The Means and Methods for Exercising Phasing Rights and Creating or Adding New Units.

The Uniform Condominium Act and the New Hampshire Condominium Act share nearly identical requirements as to the items that must be stated in the declaration and plats and plans with respect to phased condominiums, i.e. convertible, expandable/additional land or contractible/withdrawable. Among other things, they must identify how many additional units may be built, the time limit, description of the convertible or expandable land, etc. See, Uniform Condominium Act (1977) § 2-105, 2-106, 2-110 and compare with RSA 356-B:16(I), (II), (III), (IV), RSA 356-B:20 and RSA 356-B:23(III).[12]

The obvious purpose of phased condominiums is to allow the developer time and the ability to create and add units in addition to those that were established from inception of the Condominium and to allow for some flexibility due to market and/or financial conditions. The Uniform Condominium Act and the New Hampshire Condominium Act set forth a nearly identical means and method to create and add new units in phased condominiums. The means

[12] While the developer in this case did not identify the Lilac Condominium as convertible and did not specifically comply with all of the requirements on the plats and plans for a convertible land condominium, it does seem to meet the definition and construct of a convertible land condominium, except that the Declaration is missing the time limit, which theoretically is not necessary since it is set by statute, RSA 356-B:23(III). The failure to state a time limit may only preclude the ability to extend that time limit.

and method is for the declarant to prepare, execute and record an amendment to the declaration and submit new plats and plans, identifying units by number and location within the applicable time limit. See, Uniform Condominium Act (1977) § 2-111 (cross referencing § 2-119 [amendments] and § 2-110 [plats and plans] and compare with RSA 356-B:23(II)[conversion of convertible lands] and RSA 356-B:25 [expansion of condominium] and RSA 356-B:26 [contraction of the condominium]).

Simply put, both under the Uniform Condominium Act and the New Hampshire Condominium Act, the sole means to create and add additional units to the Condominium is by recording a declaration amendment, together with an amendment to the plats and plans identifying and locating the newly created units pursuant to the exercise of phasing rights. This makes perfect sense. Units do not come into existence until they are specifically added to the declaration by a recorded amendment recognizing them as such. In this case, Monument Garden never recorded any amendments to the Declaration within the 5-year time limit, thus, there is no way to recognize any of the 48 alleged new units contained in buildings 13 and 14.

There is an additional important requirement under both the Uniform Condominium Act and the New Hampshire Condominium Act. Each time units are created at a condominium, whether as part of the initial declaration or through the declarant's exercise of phasing rights, the Declarant must record either with the plats and plans or the amendment, a certificate prepared by a registered architect, registered engineer or licensed land surveyor certifying that the units have been substantially completed. See, Uniform Condominium Act (1977) § 2-101(b) and 2-111 and compare with RSA 356-B:23(II)[conversion of convertible lands] and RSA 356-B:25 [expansion of condominium] RSA 356-B:20(I), (II), (III) and RSA 356-B:21.

The Commissioners' Comments to the Uniform Condominium Act (1977) emphasize the importance of the certification of substantial completion of units at the time of the recording of the initial declaration and the addition of phased units.

> The purpose of imposing these requirements is to insure that a purchaser will in fact take title to a unit which may be used for its intended purpose. If a condominium were said to consist from the beginning of a certain number of units even though some of those units had not yet been completed, or even begun, serious problems would arise if the remaining units were never construed and if no obligation to complete construction could be enforced against any solvent person. If the insolvent owner of the unbuilt units failed to pay his common expense assessments, for example, the unit owners association might be left with no remedy except a lien of doubtful value against mere cubicles of airspace….This requirement of substantial completion…reduces the possibility that a failure to complete will upset the expectations of purchasers or otherwise harm their interests in case the declarant becomes insolvent and no solvent person has the obligation to complete the unit. UCA (1977) § 2-101, Commissioners comment 3.[13]

The means and methods for the exercise of a developer's phasing rights contained in the Uniform Condominium Act are virtually identical to the means and methods contained in the

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[13] The Commissioners Comments to the Uniform Condominium Act go on to make an excellent distinction about the difference between traditional and phased condominiums in the context of discussion of substantial completion, as follows:

> The requirement of substantial completion does not mean that the declarant must complete all buildings in which all possible units would be located before creating the condominium. If only some of the buildings in which units may ultimately be located have been "structurally" completed, the declarant may create a "flexible condominium" (section 2-106) in which only the completed units are treated as units for the outset, while an option is reserved to create additional units late in "convertible real estate" or "additional real estate." The optional units may never be completed or added to the condominium; however, this will not affect the integrity of the condominium as originally created. UCA (1977) § 2-101, comment 7.

The above comment is useful in this case, as it illustrates from a construction phasing perspective there are two options, convertible condominiums and expandable condominiums, both of which are limited in time. There is no third option that is unlimited in time, as the Trial Court seems to have permitted in this case.

New Hampshire Condominium Act and clearly have been borrowed from the Uniform Condominium Act.

D. **The New Hampshire Condominium Act's Evolution from the Uniform Condominium Act (1977), Establishes a Harmonious Scheme for Phased Condominium Designed to Protect The Reasonable Expectations of Consumers.**

Clearly, the New Hampshire Condominium Act tracks the Uniform Condominium Act's (1977) establishment of a well thought out and harmonious statutory scheme for phased condominiums. Both acts identify and differentiate the type(s) and kinds of phased condominiums, adopt strict statutory requirements for what must be contained in the initial declaration, establish statutory time limits for different types of phased condominiums, set the manner in which those time limits may or may not be extended and the level of consent required and proscribe the means and methods for properly exercising these phasing rights. The New Hampshire Legislatures' near adoption of the Uniform Condominium's Act's phasing scheme (with some modification) is an expression of its recognition of the Uniform Condominium Act's need to establish a scheme that provides greater planning flexibility to condominium developers, while at the same time affording a greater measure of consumer protection to prevent against developer abuses.

The New Hampshire Condominium Act also adopted the optional Administration and Registration Requirements contained in the Uniform Condominium Act to provide consumer protection oversight for condominium purchasers. Compare RSA 356-B:48-65 with Uniform Condominium Act (1977) Section 5-101-5-110. This emphasizes that the New Hampshire Condominium Act is a consumer protection act and should be construed as such, again to allow developer flexibility but to protect against developer abuses. In that vein, the fundamental purpose of the New Hampshire Condominium Act is to protect the reasonable expectations of

unit owners and prospective unit owners, "who are charged with knowing what is in the public records for them to know before they buy." Shepherds Hill Homeowners Assoc., Inc. v. Shepherds Hill Dev. Co., LLC, Hillsborough Sup. Ct. Southern Dist., Docket No. 2013-CV-00241 (N.H. Super. Ct. March 18, 2014), aff'd, 2015 WL 11071128 N.H. S. Ct. Case No. 2014-0306 (N.H. S. Ct. April 2, 2015) (unpublished), (quoting Sunshine Meadows Condo. Assoc. v. Bank One, Dayton, N.A., 599 So.2d 1004, 1009 (Fla. Dist. Ct. App. 1992); [citing] Alessi v. Bowen Court Condo, 44 A.3d 736, 742 (R.I. 2012) (noting that "Rhode Island's Condominium Act, which is modeled on the 1980 version of the Uniform Condominium Act is a consumer protection vehicle").[14]

With that backdrop of the evolution, genesis, intent and meaning of the New Hampshire Condominium Act, it is clear that the Trial Court erred by holding that the Declarant's phasing rights at Lilac Lane Condominium are not governed by the statutory 5-year time limit for convertible land condominiums and that the 48 units contained in Buildings 13 and 14 are lawfully existing units in the absence of a recorded declaration amendment and site and floor plans containing substantial completion certificates as required by the Act. The New Hampshire Condominium Act's provisions, in particular its well-reasoned, balanced approach to phasing borrowed from a model uniform act, must be followed. Inconsistent provisions and/or attempts in a condominium declaration that subvert or attempt to avoid its limitations and restrictions are invalid. See New Hampshire Housing Finance Authority v. Pinewood Estates Condominium

[14] In this regard, the registration form to be filed with the Attorney General's Office requires the developer to identify by checking a box whether it is an expandable, convertible or contractible condominium. There is no fourth or other box to be checked on the registration form (other than convertible space, which is not applicable). See, State of New Hampshire Condominium Act Comprehensive Application for Registration Pursuant to RSA 356-B:51(I), Form CPLC 100 (June, 2014), New Hampshire Attorney General's Office.

Association, __ N.H. __ (Decided September 20, 2016)(holding that provision in condominium declaration allowing a termination of services lien as a priority over a first mortgage sufficient to survive a foreclosure unenforceable as it was contrary to the New Hampshire Condominium Act's provisions relative to priority of first mortgage).

II. THE TRIAL COURT'S DECISION HOLDING THAT THE LILAC LANE CONDOMINIUM'S PHASING PLAN IS NOT SUBJECT TO ANY TIME LIMIT CONTRAVENES THE PLAIN MEANING OF THE NEW HAMPSHIRE CONDOMINIUM ACT.

A. All Phased Condominiums in New Hampshire Are Subject to a Time Limit of Either 5 or 7 Years.

As explained above, the New Hampshire Condominium Act sets forth a specific statutory scheme for phased condominiums. All phased condominiums in New Hampshire, whether convertible, expandable or contractible, have a statutory time limit by which those phasing rights must be exercised. If convertible land rights are not exercised within 5 years, the common area is fully vested in the unit owners and the declarant has no further rights in, to and/or over said area. See Ryan James Realty, LLC v. Villages at Chester Condo. Assoc., 153 N.H. 194, 196 (2006); Shepherds Hill Homeowners Assoc., Inc. v. Shepherds Hill Dev. Co., LLC, Hillsborough Sup. Ct. Southern Dist., Docket No. 2013-CV-00241 (N.H. Super. Ct. March 18, 2014), aff'd, 2015 WL 11071128 N.H. S. Ct. Case No. 2014-0306 (N.H. S. Ct. April 2, 2015) (unpublished).

There are no exceptions to, and no way to avoid, the time limits established by the statutory scheme. See, RSA 356-B:2 (this chapter shall apply to all condominiums and all condominium projects). There are really only two types of phased condominiums involving the ability to construct and add additional units: convertible and expandable. There is no third option that is not contemplated by or excepted from the statutory framework that would permit

Monument Garden to avoid the 5-year time limit for convertible land set forth at RSA 356-B:23(III).

The Lilac Lane Condominium has all of the hallmarks of a convertible land condominium, making it subject to the five-year time limitation on phasing, even though it is not explicitly labeled as a convertible land condominium and all of the requirements contained in the Declaration for convertible land condominiums have not been met.[15]

The Lilac Lane Condominium Declaration was created and recorded more than 5 years ago on March 3, 2010. At that time, only Building 12, containing 24 units, 20 of which are currently owned by third parties other than Monument Garden, existed. The Declaration, as recorded by the original declarant, New Meadows, provides that the land consisting of 7.18 acres, as described in Exhibit "A" to the Declaration, with all buildings and improvements, was submitted to condominium status pursuant to the New Hampshire Condominium Act.

The Declaration provides that the Lilac Lane Condominium shall consist **of up to a maximum of 120 units**[16] located in five buildings designated on a Condominium Plan as Buildings 12, 13, 14, 15 and 16, with each building containing 24 units. See, Lilac Lane Condominium Declaration § 3(d)(1). All 120 units are identified in the original declaration and on the site plans even though only 24 units in Building 12 existed at the time of the recording of the Declaration in 2010. The Declaration does not identify or reference: (1) what type of phased

[15] The Commissioner's Comments are useful in this regard and provide that "a project which meets the definition of condominium is subject to this Act even if this or other sections of the Act have not been complied with." Uniform Condominium Act § 2-101, Comment 1. So while Lilac Lane may contain some of the statutory language relative to convertible land condominiums, it fits the definition of a convertible land condominium and therefore the Act, and its five (5)-year time limit applies.

[16] The use of the term of up to a maximum of 120 units contemplates that additional units may, but need not, be added over time, which is consistent with a phased condominium.

condominium it is, (2) any time limit for the exercise of phasing rights, (3) any of the statutory phasing terms or definitions. However, it clearly is a "phased condominium," as the Declaration contemplates the construction and addition of units over time upon the submitted land. Additionally, just prior to transferring the condominium project to Monument Garden, the original declarant, New Meadows, recorded a so-called "Memorandum of Understanding (Phasing Plan)" with the Registry of Deeds on April 13, 2012, at Book 4009, Page 2 (the "MOU"). The MOU was executed solely by the President of New Meadows and was not agreed to or executed by the unit owners. The MOU generically references New Meadows' "present plans for the construction and sale of the New Units" **in phases**, but like the Declaration fails to reference any of the statutory concepts by name and does not contain a time limit for completion of the phases. The MOU also expressly provides that it "shall not be binding on New Meadows, its successors or assigns, and shall not be deemed to benefit or create any rights in any Unit Owner or third-party."

The MOU clearly references the original developer and declarant's intent that Lilac Lane was in fact a phased condominium, which contradicts the Trial Court's decision that all 120, 96 of which were un-built at the time of recording, were units from inception of the Condominium. Of course, a self-serving MOU is not the statutorily defined method for creating and establishing condominium phasing rights in New Hampshire or any other state. The statute sets forth the mechanism to establish phased condominiums by explicitly setting forth the scheme and concepts in the Declaration of Condominium.

Additionally, the Deed evidencing the transfer of the Condominium development rights from the original declarant, New Meadows, to Monument Garden dated October 3, 2012, recognizes that only 24 units had been created as of that date and that Building 13 was partially

constructed. It also recognized that the conveyance included development rights pursuant to RSA 356-B, et seq., which is the New Hampshire Condominium Act and is clearly the only method for development or phasing rights in New Hampshire. See, **Deed attached as EXHIBIT "3" to Verified Complaint**.

In this case, the Condominium Declaration disclosures and site plans submitted by the original declarant look very much like convertible land. They identify additional buildings and numbers of units to be constructed in the future and show where they are located or to be located on the original 7.18 acres of submitted common area land. The expressed phasing intention (both from the Declaration, the MOU and even the Monument Garden Deed) is an exact fit for the purpose of convertible land, i.e. phased construction of units on submitted land. The Declaration meets the definition of convertible land under the New Hampshire Condominium Act, even though the term is not used, and even though the Declarant failed to record any plans or amend the Declaration when the units in Buildings 13 and 14 were substantially completed (and is now time-barred from doing so). See, RSA 356-B:3(X).

There is no basis for the Trial Court's conclusion that Monument Garden has any further right beyond March 3, 2015, to construct and or add additional units in the contemplated Buildings 15 and 16, or for that matter whatever was built in Buildings 13 and 14. The statutory five-year time limit for convertible land phased condominiums set forth at RSA 356-B:23(III) expired on March 3, 2015, five years after the recording of the Declaration. The New Hampshire Condominium Act does not recognize phased condominiums that are unlimited in time. The inclusion of time limits for all phased condominiums in New Hampshire evidences the statutory intent that phased condominiums that are unlimited in time are excluded from the scheme. Matter of Gamble, 118 N.H. 771, 777 (1978) (citing Vaillancourt v. Gen. Mut. Ins. Co., 117

N.H. 48 (1977), and 2A J. Sutherland, Statutes and Statutory Construction § 47.23-24 (4th ed. C. Sands 1973)(citing the well established rule of statutory construction that "the expression of one thing in a statute implies the exclusion of another"). The Trial Court's determination and decision in this regard are clearly erroneous and if adopted would render as moot the entire phasing scheme, including time limits established in the New Hampshire Condominium Act. If allowed to stand, any developer in New Hampshire could circumvent the time limitations imposed by the Legislature on phased condominiums by following a similar construct to this case. Such a construction is especially repugnant in this case, because here the developer created a phased condominium that clearly meets the definition of a convertible land condominium, yet was able to avoid the time limit simply by failing to use the statutory term. The New Hampshire Condominium Act should not be construed in such a fashion that renders entire concepts, definitions, and numerous provisions meaningless. See New Hampshire Housing Finance Authority v. Pinewood Estates Condominium Association, __ N.H. __ (Decided September 20, 2016)(holding that provision of by-laws that conflicts with the Act is void and requiring the Act to be interpreted in the context of the overall statutory scheme and not in isolation). That would not only undermine the clear purpose and intent of the Uniform Condominium Act (1977) from which it was derived, it would also undermine the consumer protection flavor of the Act. Accordingly, the Trial Court's decision failing to recognize the 5-year time limit for the development and phasing of the Lilac Lane Condominium was in error.

B. Phantom Units Are Prohibited By the Act's Substantial Completion Requirements.

The Trial Court's finding in its Decision that the 120 units, 48 of which have not even been physically constructed as of this date, and only 24 of which existed at the time the Declaration was recorded, are units within the meaning of the New Hampshire Condominium

Act, and therefore are not subject to convertible land requirements or restrictions is contradicted by the Declaration itself, as well as the New Hampshire Condominium Act. The original Declaration recognizes that it is a phased condominium and that only 24 units were created at inception, and that the Condominium could consist of "a maximum of up to 120 units." See Lilac Lane Condominium Declaration at § 3(d)(i). A "maximum of up to 120" is consistent with a phasing right, and there is no requirement to fulfill the maximum. The Declaration even contains a provision that later constructed units would not be recognized and therefore could not be sold until certificates of occupancy were issued post construction. See, **Lilac Lane Condominium Declaration § 3(h)(iv)**. That is not consistent with 120 units from creation. The Condominium Declaration only recognizes 24 existing units, not 120. Again, the Deed to Monument Garden in 2012 also recognizes that 120 units did not exist on the date the Lilac Lane Condominium was created. In fact, it specifically recognizes that Building 13 is only partially completed and recognizes the sale of development rights under the New Hampshire Condominium Act, RSA 356-B, et seq. See **Deed to Monument Garden dated October 12, 2012, Exhibit 3 to Verified Complaint**.

Apart from the obvious fact that 120 units did not exist at the Lilac Lane Condominium on March 3, 2010, and do not exist now, the Trial Court's finding that 120 units do in fact exist runs afoul of the substantial completion requirements of the New Hampshire Condominium Act. RSA 356-B:7 requires all units (except for those located on convertible lands) to be depicted on site and floor plans that comply with RSA 356-B:20, I and II, which require the issuance of certificates of substantial completion, signed by the appropriate professionals.[17] It is undisputed

[17] This is not a new requirement most condominium enabling legislation required units to be depicted on plans verified by appropriate professionals (i.e. architect, land surveyor or engineer) containing certifications that the units have either been substantially completed or are

that at the time of the recording of the Declaration only 24 units were substantially completed and existed. None of the later constructed 48 units in Buildings 13 and 14 existed or were completed, let alone the 48 units in Buildings 15 and 16 (which as of the date of this Appeal have yet to be constructed). The Trial Court's decision that unconstructed units are in fact lawfully existing units flies in the face of the New Hampshire Condominium Act (as well as the Uniform Condominium Act's) substantial completion requirements set forth at RSA 356-B:20, I and II.

The Rhode Island Condominium Act, which is modeled on the 1980 version of the Uniform Condominium Act, like New Hampshire, has a requirement for substantial completion of buildings and units at the time the condominium declaration is recorded. See R.I. Gen. Laws § 34-36.1-2.09(a). In America Condo. Ass'n v. IDC, Inc., 870 A.2d 434 (R.I. 2005), the declarant of a Rhode Island condominium attempted to work around the substantial completion requirement (to avoid a 7-year time limit lapse on development rights) by identifying un-built buildings and units in the declaration and on site plans that the declarant "intended to construct in the future." 870 A.2d at 439-40. The Rhode Island Supreme Court rejected the declarant's argument that it had satisfied the statutory requirements for lawful recognition of those structures as units, wherein it held:

> [N]o structural components were located on either of the two parcels in 1988 that met the requirements for 'substantial completion' that the Act cites as a prerequisite for recording a declaration of condominium. . . . Therefore, because the [un-built] Units never were validly created units within the meaning of the Act, they were, and remain, common elements." Id. The Court concluded that if a declarant were allowed to construct future buildings and units after the condominium was created, even if they are identified in the declaration and shown on site plans, "the requirement that all structural components and mechanical systems be substantially completed indeed would be irrelevant."

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depicted "as built." In fact, New Hampshire's first generation condominium act contains an as built certification requirement. See, RSA 479-A:12.

Id. at 440-41. Similarly, the Trial Court's holding that all 120 units, 96 of which were un-built when the Lilac Lane Condominium was created, are "units" renders as completely irrelevant the New Hampshire Condominium Act's basic recognition of unit existence and requirements for substantial completion of units, whether phased or traditional. The Trial Court's Decision essentially recognizes "phantom units." This is clearly erroneous. No version of the Uniform Condominium Act and no version of the New Hampshire Condominium Act, old or new, permits or recognizes un-built "phantom units."

If this aspect of the Trial Court's decision is allowed to stand, it would permit developers to effectively end run the entire phasing component of the New Hampshire Condominium Act, and return the Act, which is modeled on a sophisticated uniform law, back to its pre-1977 enabling act. In fact, it would be worse, because it would even undo the substantial completion requirement contained in the enabling act. See, RSA 479-A:12. It cannot be the case that the Legislature enacted a complex scheme for phasing with substantial completion requirements, time limitations and significant consumer protection provisions, simply to allow developers to have greater flexibility than they had pre-1977, without any substantial completion requirement. The Trial Court's decision in this regard leads to an absurd result and is therefore clearly erroneous. This Court should not interpret the Act in such a way that sanctions the very developer abuses it was intended to prevent.

C. Buildings 13 and 14 Are Common Area and Do Not Contain Any Lawful Condominium Units.

At the time the Lilac Lane Condominium Declaration was recorded on March 3, 2010, only Building 12 was completed. Twenty of the twenty-four units in Building 12 were sold and are owned by third parties other than Monument Garden. When Monument Garden became the successor Declarant to the Condominium in October 2012, its own deed acknowledged that

Building 13 was only partially completed and the remainder of the buildings had not been constructed. See **Deed to Monument Garden dated October 12, 2012, Exhibit 3 to Verified Complaint**.

According to the Verified Complaint, Building 13 (allegedly containing 24 units) was completed in June 2013, and Building 14 (allegedly containing 24 units) was completed in July 2014, well after the original Declaration was recorded in 2010. It is undisputed that Monument Garden never recorded any amendments to the Declaration recognizing these units as part of the Condominium. Furthermore, Monument Garden never recorded any substantial completion certificates for said units, certified by appropriate professionals for said units. Monument Garden rents all 48 units in Buildings 13 and 14 to third party tenants and has not sold a single unit in either building. It is indisputable that Buildings 13 and 14 and the units allegedly created therein were constructed on the original 7.18 acres of common area land initially submitted as part of the condominium.

Once again, this violates the New Hampshire Condominium Act. RSA 356-B:23(I) provides that:

> The declarant may convert all or any portion of any convertible land into one or more units….Any such conversion shall be deemed to have occurred at the time of the recordation of appropriate instruments pursuant to paragraph II and RSA 356-B:20(III).

RSA 356-B:20(III), as referenced above, provides for the recording of amended site and floor plans depicting the newly created and added units, together with substantial completion certificates verified by appropriate professionals. See RSA 356-B:20(III). Furthermore, RSA 356-B:23(II) provides:

> Simultaneously with the recoding of site plans and floor plans pursuant to RSA 356-B:20, III, the declarant shall prepare, execute and record an amendment to the declaration describing the conversion.

Monument Garden never recorded site and floor plans, substantial completion certificates, nor did it record an amendment recognizing the 48 allegedly created units contained in Buildings 13 and 14 when it purported to construct them in 2013 and 2014. No amendments or floor plans were recorded then, and they were not recorded prior to the expiration of the 5-year conversion time limit contained at RSA 356-B:23(III). Quite simply, none of the conversion instruments (declaration amendment, site and floor plans and substantial completion certificates) necessary to recognize their legal creation and existence under the New Hampshire Condominium Act have ever been recorded, and Monument Garden is time-barred from doing so now.[18] The so-called units have never been treated as units. Not a single unit in Buildings 13 and 14 has been sold.[19] As such, under the Act, they remain common areas. RSA 356-B:23(III) provides:

> All convertible lands shall be deemed a part of the common areas except for such portions thereof as are converted in accordance with the provisions of this section. RSA 356-B:23(III).

Of course, there is a reason for the recording requirements. It is imperative that purchasers be assured that units exist and are lawfully created before the 5-year time limit. The only way to do this is through the recording of amendments, substantial completion certificates, and site and floor plans. Any purchaser of a unit in Buildings 14 and 15 would want to view these instruments at the applicable registry of deeds and ensure that they were recorded prior to the expiration of the 5-year time limit for convertible land condominiums. The statutory requirement for recordation of these instruments ensures that units are lawfully created within the statutory time limit. It prevents what Monument Garden has attempted here, to wit, the

[18] RSA 356-B:11 requires all amendments and certifications of condominium instruments to be recorded in the appropriate Town and registry of Deeds in order to be valid.

[19] Perhaps Monument Garden has been unable to sell them due to lack of legal creation and/or compliance with the New Hampshire Condominium Act.

creation of "phantom units" by identifying 120 units in the Condominium at the outset, both in the Declaration and original site plans. This is the precise type of developer abuse that the New Hampshire Condominium Act and the Uniform Condominium Act (1977) was intended to prevent.

Monument Garden's conduct is clearly a scheme to attempt to avoid the 5-year convertible land time limit. For example, if a unit owner from Florida purchased unit number 120 at the Lilac Lane Condominium in 2010, the only way he would know that it did not exist is if he visited the site. By contrast, other unit owners who live in New Hampshire, unrepresented by counsel, might buy a unit in Building 13 or 14 because it exists on the ground, despite lack of appropriately recorded condominium instruments and certifications recognizing the addition of those units to the Condominium.

While it might seem harsh, it is the developer and declarant who establishes the condominium and is bound to follow the statutory imposed rules and time limits governing creation of additional units in a phased condominium. Because the declarant failed to record appropriate amendments and site plans and substantial completion certificates prior to March 3, 2015, Buildings 13 and 14 of the Lilac Lane Condominium are condominium common area, not units. This result is not unprecedented. The Rhode Island Supreme Court has held that a regatta club constructed on common area by a developer at a Newport, R.I. condominium following the expiration of development rights constituted common area belonging to the condominium association. Am. Condo. Ass'n, Inc. v. IDC, Inc., 844 A.2d 117, 135 (R.I. 2004), decision clarified on reargument sub nom. Am. Condo. Ass'n, Inc. v. IDC, Inc., 870 A.2d 434 (R.I. 2005). The Massachusetts Land Court similarly held that Phase VII of a condominium, consisting of 6 townhouse style units that were only 50% complete as of the date the development rights expired

constituted common area of the condominium, belonging to the Condominium Association. See Crapser v. Bondsville Partners, Inc., Massachusetts Land Court, 2006 WL 2237667 (2006). The New Hampshire Supreme Court also invalidated a developer's attempt to create "land only units containing convertible space" on the eve of the expiration of the five-year convertible land time limit, as a means to circumvent the 5-year statutory time limit on convertible land. See Shepherds Hill Homeowners Assoc., Inc. v. Shepherds Hill Dev. Co., LLC, Hillsborough Sup. Ct. Southern Dist., Docket No. 2013-CV-00241 (N.H. Super. Ct. March 18, 2014), aff'd, 2015 WL 11071128 N.H. S. Ct. Case No. 2014-0306 (N.H. S. Ct. April 2, 2015) (unpublished). Simply put, Buildings 13 and 14 are unencumbered[20] common area of the Condominium Association due to Monument Garden's failure to comply with the Act.

CONCLUSION

For all of the above reasons, and for the additional reasons set forth in the brief of the Appellant, CAI respectfully requests that this Court reverse the Judgment of the Trial Court.

[20] While Monument Garden purported to mortgage the common areas in 2012 and theoretically that mortgage would have transferred to any validly created units, the Declarant lacks authority to unilaterally mortgage common area, as it does not own it, common area is owned by unit owners in common. The mortgage would be a mortgage on the Declarant's development rights, which clearly expired on March 3, 2015. The Lilac Lane Condominium Association did not join in any mortgage on the common areas. Monument Garden did not validly create any units under its development right, as such the so-called mortgage does not attach to the common area. See, RSA 356-B:8(II)(subsequent to recording the declaration as provided in this chapter, no lien or encumbrance shall thereafter arise against the condominium as a whole, but only against each unit…).

Respectfully submitted,

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Dated: September 27, 2016

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844 A.2d 117
Supreme Court of Rhode Island.

AMERICA CONDOMINIUM ASSOCIATION, INC., et al.
v.
IDC, INC., et al.

No. 2001–469–Appeal.
|
March 23, 2004.

Synopsis
Background: Condominium associations brought action against condominium developer alleging that the voting procedure used to extend development rights on certain common property violated the Rhode Island Condominium Act. The Superior Court, Newport County, Melanie W. Thunberg, J., granted associations partial summary judgment.

Holdings: On cross-appeals, the Supreme Court, Francis X. Flaherty, J., held that:

[1] amendments to condominium declaration that were not unanimously voted for by unit owners were void;

[2] title to common property that developer held rights to develop vested in unit owners;

[3] action was not barred by laches; and

[4] fact that developer constructed regatta club on common land did not preclude transfer of title to associations.

Affirmed in part, reversed in part, and remanded.

Flanders, J., dissented and filed opinion.

West Headnotes (17)

[1] **Appeal and Error**
Cases Triable in Appellate Court

In passing on a grant of summary judgment by a justice of the Superior Court, the Supreme Court conducts a de novo review.

Cases that cite this headnote

[2] **Appeal and Error**
Extent of Review Dependent on Nature of Decision Appealed from
Appeal and Error
Judgment

The Supreme Court will uphold a trial justices' grant of summary judgment only when a review of the admissible evidence viewed in the light most favorable to the nonmoving party reveals no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law.

Cases that cite this headnote

[3] **Judgment**
Presumptions and burden of proof
Judgment
Weight and sufficiency

A party who opposes a motion for summary judgment carries the burden of proving by competent evidence the existence of a disputed material issue of fact and cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions.

Cases that cite this headnote

[4] **Appeal and Error**
Cases Triable in Appellate Court

Supreme Court reviews de novo questions of statutory interpretation.

1 Cases that cite this headnote

[5] **Statutes**
Purpose

When construing a statute, the ultimate goal is to give effect to the purpose of the act as intended by the Legislature.

Cases that cite this headnote

[6] **Statutes**
Language and intent, will, purpose, or policy

In construing statutes, the Supreme Court adheres to the basic proposition of establishing and effectuating the intent of the Legislature, which is accomplished from an examination of the language, nature, and object of the statute.

1 Cases that cite this headnote

[7] **Statutes**
Plain language; plain, ordinary, common, or literal meaning

If the language of a statute is clear on its face, then its plain meaning must generally be given effect.

Cases that cite this headnote

[8] **Statutes**
Unintended or unreasonable results; absurdity

The Supreme Court will not construe a statute to reach an absurd or unintended result.

1 Cases that cite this headnote

[9] **Common Interest Communities**
Nature and Status of Condominium Ownership

The Rhode Island Condominium Act is a consumer protection statute. Gen.Laws 1956, § 34–36.1–1.02.

6 Cases that cite this headnote

[10] **Common Interest Communities**
Amendment
Common Interest Communities
Special rights reserved to declarant or developer and successors

Under the Rhode Island Condominium Act, unanimous consent from condominium unit owners was required to amend condominium declaration to extend time limit on special development rights of declarant, and thus, amendments were void ab initio and declarant's development rights had expired, where, under the condominium declaration, individual unit owners were not entitled to vote, but were represented by sub-condominium association board members. Gen.Laws 1956, §§ 34-36.1-1.03(29), 34-36.1-2.05(a)(8), 34–36.1–2.17(d).

20 Cases that cite this headnote

[11] **Common Interest Communities**
Condominiums and cooperatives

Once condominium developer's rights to develop master unit expired under the condominium declaration, title to the land vested in unit owners as tenants in common in proportion to their respective undivided

interests, where all of the underlying land constituted common property. Gen.Laws 1956, § 34-36.1-1.03(11)(B).

10 Cases that cite this headnote

[12] **Common Interest Communities**
Limitations and laches

When a challenged amendment to a condominium declaration is determined to be void ab initio, the one-year statute of limitations does not apply to any subsequent action taken by an interested party. Gen.Laws 1956, § 34–36.1–2.17(b).

1 Cases that cite this headnote

[13] **Equity**
Grounds and Essentials of Bar
Equity
Prejudice from Delay in General

Laches is an equitable defense that involves not only delay but also a party's detrimental reliance on the status quo; mere delay alone is not enough, the delay must be unreasonable.

Cases that cite this headnote

[14] **Equity**
Prejudice from Delay in General

Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another; so long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law, but when, knowing his rights, he takes no steps to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable and operates as an estoppel against the assertion of the right.

Cases that cite this headnote

[15] **Common Interest Communities**
Limitations and laches

Delay in condominium associations' filing of action against condominium developer was not unreasonable delay upon which the developer detrimentally relied for purposes of invoking the doctrine of laches as an affirmative defense; developer had entered into a tolling agreement with associations that specifically acknowledged and contemplated the possibility that associations might file a lawsuit, and while the agreement was still in effect, the developer knowingly invested substantial sums of money to develop condominium property.

Cases that cite this headnote

[16] **Improvements**
Nature and effect of making in general

One who knows of a claim to land which he or she proposes to use as his or her own, proceeds at his or her peril if he or she goes forward in the face of protest from the claimant and places structures upon the land.

Cases that cite this headnote

[17] **Common Interest Communities**
Special rights reserved to declarant or developer and successors

Condominium developer constructed regatta club on condominium land at his own peril, and thus, he was not entitled to claim that equity prevented condominium associations from prevailing in action that sought title to land due to his expenditures in developing land, where developer voluntarily entered into a tolling

agreement with associations and commenced development with the full knowledge of the associations' claims.

6 Cases that cite this headnote

Attorneys and Law Firms

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Daniel Goldberg, Esq., for Defendant.

Present: WILLIAMS, C.J., FLANDERS, GOLDBERG, FLAHERTY, and SUTTELL, JJ.

OPINION

FLAHERTY, Justice.

In these cross-appeals from partial summary judgment, we are called upon to interpret portions of G.L.1956 chapter 36.1 of title 34, entitled the Rhode Island Condominium Act. At issue is the status of certain condominium property on Goat Island in Newport, Rhode Island.

I

Facts/Procedural History

The plaintiffs, America Condominium Association, Inc., Capella South Condominium Association, Inc., and Harbor Houses Condominium Association, Inc. (collectively, the plaintiffs), filed a seven-count complaint against the defendants, Island Development Corporation, Inc. (IDC, Inc.), IDC Properties, Inc. (IDC Properties), and their president, Thomas R. Roos (Roos) (collectively, the defendants), seeking both compensatory and exemplary damages as well as declaratory and equitable relief.[1] They maintained that the defendants had improperly extended their development rights on certain areas of common property within the condominium complex and that because these development rights actually had expired, title to the common property now vested in the plaintiffs in fee simple. The parties filed cross-motions for partial summary judgment. After a hearing on the motions, the hearing justice ruled in favor of the plaintiffs, precipitating the defendants' appeal.

Although plaintiffs prevailed on their partial summary judgment motion, they contend in their appeal that the subsequently entered judgment did not accurately reflect the hearing justice's bench decision. In addition to appealing the grant of plaintiffs' motion for partial summary judgment, defendants dispute plaintiffs' appellate contentions.

***120** This story begins on January 13, 1988, when Globe Manufacturing Co. (Globe), predecessor in interest of defendants, recorded a declaration of condominium designated as "Goat Island South—A Waterfront Condominium" (GIS Condominium) in the Land Evidence Records of the City of Newport.[2] The condominium area was situated on Goat Island and consisted of approximately twenty-three acres. Included within the legal description of the condominium area were six defined parcels. Three of the parcels contained existing residential buildings. They were: America Condominium (America), which contained a forty-six-unit apartment building, Capella South Condominium (Capella South), which contained an eighty-nine-unit apartment building, and Harbor Houses Condominium (Harbor Houses), which contained nineteen stand-alone waterfront homes. The other three parcels were undeveloped and consisted of: the "Individual Unit" (later designated as the West Development Unit), "Development Unit # 1" (later designated as the South Development Unit), and "Development Unit # 2" (later designated as the Reserved Area or the North Development Unit).[3]

On March 3, 1988, Globe and Goat Island South Condominium Association, Inc. (the master association) amended and restated the original declaration and entitled it the first amended and restated declaration of condominium.[4] It was designated as the master declaration. In the master declaration, a distinction was made between master units, so-called, and sub-condominiums, so-called, and between their respective status and rights within the GIS Condominium. A master unit was defined as "a physical portion of the Goat Island South Condominium designated for separate ownership or occupancy or designated as a Sub–Condominium * * *." A sub-condominium was defined as "any Master Unit of the Goat Island South Condominium that is itself a condominium." Each

sub-condominium had its own specific, individual, declaration of condominium.

"Master Common Elements" included utilities, recreational facilities, all storage areas, grounds, gardens, plantings, walkways, parking areas, and "all other property normally in common use by the Owners and Unit Owners, all areas of the Project that do not fall within a Master Unit itself and are not labeled as part of the Master Unit, and all areas and facilities designated as 'common elements' in the [Condominium] Act." Common elements were defined in the master declaration as "Common Elements of a Sub–Condominium as defined in the Declaration of such Condominium."[5]

Section 3.2 of the master declaration provided that "[t]he land underlying each Master Unit is a Master Limited Common Element allocated to the exclusive use of such Master Unit subject to the easements and rights set forth herein." A master limited common element was defined as:

> ***121** "that portion of the Master Common Elements appurtenant to or associated with or reserved for use by one or more but fewer than all Master Units, and intended for the exclusive use of such Master Units and which are identified as Master Limited Common Elements herein and/or in the Plats and Plans."

Thus, in essence, a master unit consisted of the airspace above a master limited common element, while the master limited common element itself consisted of the physical land beneath the master unit airspace.

The master declaration also defines two types of owners. An "Owner" is defined as "the Declarant or other person or persons owning a Master Unit, which Master Unit is not a Sub–Condominium * * *." A "Unit Owner" is defined as "the Declarant or other person or persons owning a Unit of a Sub–Condominium * * *[,]" where a unit is defined as "a physical portion of a Sub–Condominium designated for separate ownership or occupancy."

The master declaration says that the declarant reserved certain development rights in the original declaration,[6] including the right to convert the land underlying America, Capella South, Harbor Houses and the West and South Development Units into master limited common elements with development rights in the above master unit airspace. It also reserved the right to convert Development Unit # 2, or the Reserved Area, into a master common element with reserved development rights to either further convert the area into a limited master common element, with an associated master unit owning the above airspace and development rights, or to completely withdraw the area from the GIS Condominium. On March 3, 1988, the declarant exercised its rights as allowed in the original declaration. Thus, the declarant converted the land underlying America, Capella South, Harbor Houses, the West and South Development Units into limited master common elements, and converted the Reserved Area into a master common element with reserved development rights in the master declaration.

Accordingly, the airspace above the limited master common elements became master units consisting:

> "of the airspace above and all buildings and improvements now or hereafter located on the land * * *, but excluding said land itself. The lower boundary of such Master Unit is the upper surface of the land under the Master Unit. * * * There is no upper boundary."

Pursuant to the special declarant and development rights section of the master declaration, the declarant reserved certain rights to construct improvements until December 31, 1994.

Furthermore, under the master declaration, each master unit possessed a delineated, fixed percentage of the undivided ownership interest in the master common elements. Such master common elements would be controlled and maintained by a master association, which itself would be controlled by a master executive board consisting of representatives from each master unit. Thus, those representatives would act on behalf of, and make decisions for, the individual sub-condominium unit owners, or residents, at the master executive board meetings. Each sub-condominium also would have its own sub-association controlled by its individual sub-association executive board. These sub-associations ***122** would control and maintain the individual common areas exclusive to each sub-condominium. At the time of the master declaration, only America and Harbor Houses were considered to be sub-condominiums.[7] The undeveloped West and South Development Units were wholly owned and controlled by the declarant.

The master declaration further provided that the

percentage voting rights and financial obligations of each master unit was based upon its undivided, "master allocated interest" in the master common elements of the condominium scheme.[8] The specific master allocated interest of each master unit was delineated in an attached exhibit to the master declaration as follows: (1) Harbor Houses—21.42 percent; (2) America 19.25—percent; (3) Capella South—39.61 percent; (4) South Development Unit—9.6 percent; and, (5) West Development Unit—10.12 percent. The aforementioned percentages represented the relative voting rights that each master unit was entitled to cast at a master association meeting. The exhibit also described the individual percentage master allocated interests of the individual units within America and Harbor houses. Significantly, however, votes at the master association meetings could be cast only by members of the master executive board.

After passage of the 1988 master declaration, Globe's interests were transferred to IDC, Inc., and thereafter to IDC Properties, through a series of sales and assignments.[9] As successor declarant, IDC, Inc., and later IDC Properties, possessed all of the development rights in the undeveloped West Development and the South Development master units, as well as in the Reserved Area. By early 1994, the declarant had not yet exercised the development rights set forth in the master declaration. Realizing that the December 31, 1994 deadline to develop was fast approaching, it attempted to extend the deadline through a series of amendments to the master declaration. These amendments were discussed and purportedly passed at special meetings of the master association conducted by the master executive board between April and December 1994. At the time, the declarant, had a controlling interest in the master executive board.[10]

In a notice dated April 15, 1994, Roos, in his capacity as president of the master association, announced that a meeting of the master association would be conducted ***123** on April 27, 1994, for the purpose of extending:

> "the period for the exercise by the declarant of the Development Rights contained in [the master declaration] until December 31, 1999 plus any additional period as may be approved by the Federal National Mortgage Association, such additional period to terminate by December 31, 2004."

It is important to note that no notice of the meeting was given to the individual unit owners.

The actual specifics of the proposed change were not revealed until the special meeting. Styled as the Third Amendment to the master declaration, the change would extend special declarant rights to December 31, 1999. Until that date, the declarant would have the right to: (a) withdraw the Reserved Area from the GIS Condominium, provided that it has not already been converted into a master unit; (b) convert the Reserved Area into a Master Unit; (c) construct any legally permissible residential and non-residential improvements on the property, including a Sub–Condominium not exceeding 315 units on the property; (d) convert the land in the master units into master limited common elements that then could be excavated or otherwise altered "to the extent necessary or desirable to develop and/or operate and maintain such Master Unit [s] * * *."

The minutes from the special meeting noted that the sub-association representatives expressed reservations about the proposed amendment, stating that their consent "should be conditioned on their review and approval of any proposed development of those areas." Roos indicated that no such proposals existed and that "the exact purpose of the Amendment [was] to provide the Declarant with additional time to develop a proposal for the Reserved Area." After it was observed that "at least 67% in voting interest of all Owners and Sub–Association Board Members" was required in order to amend the master declaration, a vote was taken. The Third Amendment "was approved with 85.29% in allocated interest voting in the affirmative, 4.81% in allocated interest present but withholding its vote * * *, and 9.90% in allocated interest absent and not voting."

Thereafter, in a notice dated November 1, 1994, Roos informed the executive board that a special meeting would be conducted to extend certain development rights until December 31, 1999. Attached to the notice was an exhibit showing that the proposed amendment affected only the South Development Unit and also provided the granting of an easement over the common elements of America so that an access road to the South Development Unit could be built. This would be the Fourth Amendment to the master declaration.

On November 15, 1994, the special meeting was convened. Several individual unit owners attended the meeting, and at least one of them objected to the proposed amendment. However, the individual unit owners were not permitted to vote because that privilege was reserved only for the master executive board members. The Fourth Amendment "was approved with 76.55 percentage in allocated interest voting in the affirmative and 23.45 percent in allocated interest absent and not voting."

In a subsequent notice, dated December 16, 1994, Roos informed the master executive board of yet another special meeting, to be held December 28, 1994. The stated purpose of that meeting was:

> "1) To approve the extension of the period for the exercise by the Declarant of the Development Rights with respect to [the South Development Unit] and the Reserved Area;
>
> ***124** "2) To permit the conversion of the land, excluding the air above, that comprises the Reserved Area into a Master Limited Common Element;
>
> "3) To confirm that the Owner, Sub–Association and Unit Owners with respect to any Master Unit shall have the rights, as the case may be, to create a sub-condominium out of such Master Unit, to execute, amend, terminate and record a declaration with respect to such sub-condominium, and to construct improvements within such Master Unit and the Master Limited Common Elements associated therewith;
>
> "4) To provide for the right of the Declarant to withdraw the Reserved Area Master Unit (when created), including the Master Limited Common Element thereunder from the Goat Island South Condominium;
>
> "5) To provide that Master Common Expenses benefiting fewer than all the Master Units shall be allocated among the Master Units that are benefited by such expenses * * *;
>
> "6) To reallocate the Master Allocated Interests between the [West Development] Unit and the [South Development Unit]. This will not affect the Master Allocated Interest of any other Master Unit;
>
> "7) To permit the Owners of [the South Development Unit] and the [West Development] Unit to reallocate the number of units between the [South Development Unit] and the [West Development] Unit. This will not increase the aggregate number of units permitted to be constructed within these two units * * *.
>
> " * * *
> "10) To make other amendments to clarify, restate or define Declarant's Development Rights * * *."[11]

In addition to the above announcement, a notice dated December 20, 1994, was sent to the individual unit owners inviting them to attend the special meeting. However, the notice specifically informed the residents that although they were welcome to attend, "voting on the amendments is limited to the members of the various condominium boards * * *." Thereafter, notice was given of a special executive board meeting to follow the special meeting on December 28, 1994. The purpose of that additional meeting was "to recalculate the monthly installments for Master Common Expenses against each Master Unit in accordance with the Amendments [being] contemplated * * *."

On December 28, 1994, both of the above-noticed meetings were conducted. The minutes of the first special meeting indicate that the individual unit owners of America, Capella South and Harbor Houses again were informed that they would not be permitted to vote because they were represented at the meeting by "the Unit Owners Executive Board Members elected by them at the Sub–Association level by the Sub–Association Board Members." The minutes further reflect that Dr. Philip Schub, one of the executive board members for Harbor Houses, stated at the meeting that any "vote was academic because the percentage as explained by the Chair was in favor of the declarant." Another executive board member, who represented America, Dr. Frank D'Allesandro, objected to either amending the declaration or extending the development rights, believing that it did not conform with Rhode Island condominium law. ***125** Thereafter, he abstained from what he deemed to be an illegal proceeding.

During the meeting, a Sixth Amendment to the master declaration also was discussed. That amendment would convert the Reserved Area into a master limited common element whose above airspace would constitute a master unit with associated development rights.[12] The converted area would be known as the North Development Unit. Thereafter, a vote was taken on the proposed amendments and "[a] calculation of the votes resulted in the necessary percentage to approve the Amendments of the Declaration and Bylaws."

The parties continued to disagree over the disputed amendments to the master declaration and how those amendments were effectuated. The record reflects that on January 5, 1998, a tolling agreement was executed. The accord provided that, for purposes of the agreement, any legal action filed by the parties on or before June 30, 1998, concerning the creation of, amendments to, and operation of the condominium property would be deemed to "have been commenced, filed and served, for purposes of statute of limitations, laches, waiver, estoppel or similar defenses, on December 1, 1997." This tolling agreement was extended three times thereafter. The final document indicated that any action filed on or before May 31, 1999, would be deemed to have been filed on

December 1, 1997. Significantly, in 1998, well after the execution of the tolling agreement, IDC constructed a function center known as the Newport Regatta Club on the North Development Unit/Reserved Area.

On May 29, 1999, plaintiffs filed a seven-count legal and equitable action.[13] Their complaint alleged that the voting procedure employed to extend the development rights did not conform with the Rhode Island Condominium Act; consequently, they averred, the amendments extending those rights were invalid. They further contended that when defendants failed to exercise their development rights on or before December 31, 1994, their reserved interest in the undeveloped units ceased to exist, thus implying that fee simple title then vested in plaintiffs.

On January 18, 2000, plaintiffs filed a motion for partial summary judgment on counts 1, 2, 3, 4 and 7 of the complaint. The defendants filed a counter-motion for partial summary judgment seeking the Superior Court to declare: (a) that IDC Properties, as owner of the North West and South Development Units, has the right to construct buildings and improvements on those areas at any time; (b) that IDC Properties, as successor declarant, may exercise its right to develop either or ***126** both of the North and West Development Units into condominiums, to convert the West Development Unit into a master common element, and to withdraw the North development Unit from the GIS Condominium until December 31, 2015; and (c) "that plaintiffs' challenges to the aforementioned rights of IDC are without merit and are further barred by the applicable statute of limitations and by the doctrine of laches."

After reviewing the parties' cross-motions for partial summary judgment, the hearing justice granted plaintiffs' motion and denied defendants' motion. She determined that G.L.1956 § 34–36.1–2.17, governing the voting procedures required to implement amendments involving the creation or increase of special declarant rights, was applicable to the amendments in dispute. She found that the master declaration violated this provision because it permitted the disputed amendments to be implemented with a mere 67 percent vote, rather than by the unanimous consent of the unit owners, as specifically required by the statute. She then determined that because the amendments did not conform with the legislation, the one-year statute of limitations was inapplicable. Instead, the hearing justice found that the suit was timely within the ten-year period of limitations for civil suits enunciated in G.L.1956 § 9–1–13. The hearing justice also found that the tolling agreement, which was voluntarily entered into by the parties, precluded defendants' affirmative defense of laches.

In concluding her decision, the hearing justice declared that:

> "(1) the Defendant's [*sic*] right to develop Goat Island has expired.
>
> "(2) the alleged voting rights are null and void, and
>
> "(3) the Master Association is without legal authority to act on behalf of the unit owners."

Subsequently, each side submitted proposed partial judgments. The court accepted the partial judgment submitted by defendants and entered it pursuant to Rules 54(b) and 57 of the Superior Court Rules of Civil Procedure. The partial judgment declared that "defendants' purported extensions of its development rights are annulled" and that because the Third, Fourth and Fifth Amendments were improperly adopted, they were "void *ab initio* and have been recorded *ultra vires.*" The partial judgment also provided that:

> "a) Defendants' developments rights on Goat Island have expired.
>
> "b) Defendants' alleged voting rights as exercised are null and void.
>
> "c) The Master Association is without legal authority to act on behalf of the unit owners, as it did in adopting the Third, Fourth and Fifth Amendments."

On appeal, plaintiffs contend that the partial judgment, as entered, did not accurately reflect the decision of the court because it did not state that fee simple title was now vested in plaintiffs. Although defendants dispute the inaccuracy of the judgment, they also maintain that the hearing justice erred in granting plaintiffs' motion for partial summary judgment.

II

Standard of Review

[1] [2] [3] "In passing on a grant of summary judgment by a justice of the Superior Court, this [C]ourt conducts a *de novo* review." *United Lending Corp. v. City of Providence,* 827 A.2d 626, 631 (R.I.2003). This court will uphold a trial justices' grant of summary judgment "[o]nly when a review of the admissible evidence viewed

***127** in the light most favorable to the nonmoving party reveals no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law." *Id.* (quoting *Carlson v. Town of Smithfield,* 723 A.2d 1129, 1131 (R.I.1999) (per curiam)). "[A] party who opposes a motion for summary judgment carries the burden of proving by competent evidence the existence of a disputed material issue of fact and cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions." *Id.* (quoting *Accent Store Design, Inc. v. Marathon House, Inc.,* 674 A.2d 1223, 1225 (R.I.1996)). Consequently, we shall proceed to conduct our *de novo* review of the record to determine whether plaintiffs were entitled to judgment as a matter of law.

III

The Condominium Act

In 1982, the Legislature adopted chapter 36.1 of title 34, entitled the Rhode Island Condominium Act (the act). The act essentially incorporated the language contained in the Uniform Condominium Act and was made applicable to any condominium created in Rhode Island after July 1, 1982. *See* § 34–36.1–1.02(a)(1). The condominium presently at issue was created in 1988; accordingly, the master declaration and its purported amendments are controlled by the act. The resolution of the issues raised in this appeal depends, for the most part, upon our statutory interpretation of the act, and whether the disputed master declaration and its amendments conform with that interpretation. First, we must address whether, as plaintiffs assert in their brief, "the Uniform Condominium Act is a consumer statute that regulates the terms under which condominiums are established and managed."

[4] [5] [6] [7] [8] "We review *de novo* questions of statutory interpretation." *Interstate Navigation Co. v. Division of Public Utilities and Carrieres of the State of Rhode Island,* 824 A.2d 1282, 1287 (R.I.2003) (citing *Stebbins v. Wells,* 818 A.2d 711, 715 (R.I.2003)). "When construing a statute 'our ultimate goal is to give effect to the purpose of the act as intended by the Legislature.' " *Id.* (quoting *Oliveira v. Lombardi,* 794 A.2d 453, 457 (R.I.2002)). "In construing statutes, this Court 'adhere[s] to the basic proposition of establishing and effectuating the intent of the Legislature [, * * * which] is accomplished from an examination of the language, nature, and object of the statute.' " *In re Estate of Gervais,* 770 A.2d 877, 880 (R.I.2001) (per curiam) (quoting *State v. Pelz,* 765 A.2d 824, 829–30 (R.I.2001)). "If the language of a statute is clear on its face, then its plain meaning must generally be given effect." *Id.* (quoting *Skaling v. Aetna Insurance Co.,* 742 A.2d 282, 290 (R.I.1999)). Nonetheless, "[i]t is a well-known maxim of statutory interpretation that this Court 'will not construe a statute to reach an absurd [or unintended] result.' " *Id.* (quoting *Hargreaves v. Jack,* 750 A.2d 430, 435 (R.I.2000)).

When it enacted the act, the Legislature authorized and directed the secretary of state to insert the official comments to the Uniform Condominium Act (1980). Unless the statutory language clearly and expressly states otherwise, those comments are to be used as guidance concerning the legislative intent in adopting the chapter. *See* Compiler's Notes to § 34–36.1–1.01 (citing P.L.1982, ch. 329, § 3).[14] In addition, ***128** "any right or obligation declared by this chapter is enforceable by judicial proceeding" and the remedies "shall be liberally administered * * *." Section 34–36.1–1.12.

"The Act as a whole contains a strong consumer protection flavor * * *." *One Pacific Towers Homeowner's Association v. HAL Real Estate Investments, Inc.,* 148 Wash.2d 319, 61 P.3d 1094, 1100 (2002) (observing that the Washington Condominium Act significantly corresponds to the Uniform Condominium Act). That is because, "[o]ne of the reasons the Uniform Act was created was that there was a perceived need for additional consumer protection." *Id.* Furthermore, "[w]hen there exists a dominance of control by one owner, it becomes more important to allow minority owners greater participation in the administration of the commonly owned property, and increases the need for the majority owner to follow all the statutes and the declaration." *Artesani v. Glenwood Park Condominium Association,* 750 A.2d 961, 963 (R.I.2000) (per curiam).

[9] Section 34–36.1–1.04 states that, "[e]xcept as expressly provided in this chapter," any agreements to vary the provisions or waive the rights conferred by the statute are prohibited. *See also* Commissioners' Comment to § 34–36.1–1.04 (stating that "this section adopts the approach of prohibiting variation by agreement except in those cases where it is expressly permitted by the terms of the Act itself"). Consequently, "[i]n many instances * * * provisions of the Act may not be varied, because of the need to protect purchasers, lenders, and declarants." *Id.* "One of the consumer protections in this Act is the requirement for consent by specified percentages of unit owners to particular actions or changes in the declaration." *Id.* Accordingly, "[i]n order to prevent declarants from evading these requirements by obtaining powers of attorney from all unit owners, or in some other

fashion controlling the votes of unit owners, *this section forbids the use by a declarant of any device to evade the limitations or prohibitions of the Act or of the declaration.*" *Id.* (Emphasis added.) The Rhode Island Condominium Act is a consumer protection statute.

IV

The Third, Fourth and Fifth Amendments

[10] The defendants appeal the hearing justice's determination that the Third, Fourth and Fifth Amendments were void *ab initio.* These amendments purportedly extended IDC's deadline to develop the South and West Development Units and to exercise its rights to the Reserved Area from December 31, 1994, to December 31, 1999. The defendants maintain that the amendments were approved validly through unanimous votes by the six master condominium unit owners in accordance with the act, and that the hearing justice erred in finding that statute required the unanimous consent of the sub-condominium unit owners. We disagree.

Section 34–36.1–2.17(d) provides:

> "Except to the extent expressly permitted or required by other provisions of this chapter, no amendment may create or increase special declarant rights, increase the number of units, change the boundaries of any unit, the allocated interests of a unit, or the uses to which ***129** any unit is restricted, in the absence of unanimous consent of the unit owners."[15]

Section 34–36.1–2.05(a)(8) provides that condominium declarations must contain:

> "A description of any development rights and other special declarant rights * * * reserved by the declarant, together with a legally sufficient description of the real estate to which each of those rights applies, and *a time limit within which each of those rights must be exercised* [.]" (Emphasis added).

Special declarant rights are defined as:

> "rights reserved for the benefit of a declarant to:
>
> " * * *
>
> "(ii) To exercise any development right (§ 34–36.1–2.10),
>
> " * * *
>
> "(vi) To make the condominium subject to a master association, (§ 34–36.1–2.20) * * *." Section 34–36.1–1.03(26).

The reserved right to develop both the South and West Development Units therefore constituted special declarant rights under the act. Consequently, any amendment to increase these special declarant rights, such as an extension of the time limit to exercise declarant's development rights, was subject to the unanimity requirements mandated by § 34–36.1–2.17(d).

According to the master declaration, the successor declarant (IDC Properties), retained development rights in the South and West Development Units, as well as its rights in the Reserved Area, until December 31, 1994. Since development rights are special declarant rights, it follows that any attempt to extend development rights was subject to the statutory requirement that unanimous consent of the owners be obtained pursuant to § 34–36.1–2.17(d).[16]

The defendants maintain that this unanimous consent requirement was fulfilled when the amendments were passed by a unanimous vote of the master condominium unit owners. They argue that the sub-condominium unit owners were represented at the relevant meetings by their sub-condominium board members. As previously noted, the master declaration defines a "unit owner" as "the Declarant or other person or persons owning a Unit of a Sub–Condominium * * *." Unlike the master declaration, however, the act makes no distinction between master condominium ***130** unit owners and sub-condominium unit owners. Instead, a "unit owner" is defined in the act as:

> "a declarant or other person who owns a unit, or a lessee of a unit in a leasehold condominium whose lease expires simultaneously with any lease, the expiration or termination of which will remove the unit from the condominium, but does not include a person having an interest in a unit solely as security for an obligation." Section 34–36.1–1.03(29).

It is clear from the foregoing language that the owner of a sub-condominium unit constitutes a unit owner for purposes of the act. Under the act, unit owners are given the right to vote upon any amendments to special declarant rights; however, under the master declaration's definition of owners and unit owners, owners of a sub-condominium unit are prohibited from casting such votes except through the declarant-controlled master association. Considering the clear and unequivocal

language of § 34–36.1–2.17(d) requiring unanimous consent to any increase of special declarant rights, coupled with the strong consumer protection aspect of that section, there is no doubt that the Legislature intended to protect plaintiffs, as unit owners, from amendments favoring the declarant made without their consent. Thus, we hold that the master declaration prohibition on voting is precisely the type of artifice or device that the statute proscribes and that the voting scheme at issue is inconsistent with the act.

The record reveals that even the master declaration itself contravened § 34–36.1–2.17(d) by permitting amendments to the special declarant rights through a vote of only 67 percent of the master condominium unit owners and sub-association board members rather than through the unanimous consent of the individual unit owners required by the statute. More importantly, however, the Third, Fourth and Fifth Amendments were passed without any votes from the individual unit owners because only the master condominium unit owners and the sub-association board members were permitted to vote to extend IDC Properties' special declarant rights. Furthermore, the record reveals that the individual unit owners did not even receive notice of the special meetings for purposes of discussing and voting upon the Third and Fourth Amendments.

Thus, we conclude that the voting procedure employed at the special meetings improperly deprived the individual unit owners of their statutory right to give consent. Consequently, the hearing justice did not err in declaring that the Third, Fourth and Fifth Amendments were void *ab initio* and that the declarant's development rights had expired after December 31, 1994.[17]

***131 V**

The Reserved Area

Under the terms of the master declaration, the land underlying the Reserved Area was converted into a master common element subject either to conversion into a limited master common element or to complete withdrawal from the GIS Condominium on or before December 31, 1994. Conversion into a limited master common element would transform the airspace above the land into a declarant-owned master unit with associated development rights. On December 29, 1994, the declarant recorded the Sixth Amendment making such a conversion.[18]

The plaintiffs do not challenge the propriety of the Sixth Amendment, maintaining that defendants had a unilateral right to convert the Reserved Area from a master common element into a limited master common element with associated development rights. However, as with the development rights in the South and West Development Units, we believe that those rights automatically expired when the declarant failed to exercise them on or before December 31, 1994.

VI

Ownership of the Disputed Parcels

Now that it has been determined that IDC's development rights expired after December 31, 1994, the next issue to be addressed is the ownership of the disputed parcels of land. The plaintiffs maintain that because all of the parcels were common elements in the GIS Condominium, title to the parcels had always vested in the unit owners subject to divestment by the declarant through the proper exercise of its development rights. They contend that when the declarant's development rights expired, its interests in the parcels ceased to exist and that, consequently, the hearing justice erred in failing to declare that title to the parcels was vested in the unit owners in fee simple.

The defendants contest these claims. They assert that the disputed parcels of land were, and still are, limited master common elements allocated for the exclusive use of the declarant-owned master units that occupy the above airspace.[19] They maintain that such master units constitute real estate under the act and that even if the declarant's development rights expired after December 31, 1994, its improvement rights in its master units did not, and could not, expire. In other words, even if its rights to develop had ceased, it ***132** maintained its right to improve the real estate in its capacity as owner.

Development rights are defined as:

> "any right or combination of rights reserved by a declarant in the declaration to:
>
> "(A) Add real estate to a condominium,
>
> "(B) Create units, common elements, or limited common elements within a condominium,

"(C) Subdivide units or convert units into common elements, or

"(D) Withdraw real estate from a condominium." Section 34–36.1–1.03(11).

Under the act, "real estate" is:

"any leasehold or other estate or interest in, over, or under land, including structures, fixtures, and other improvements and interests which by custom, usage, or law pass with a conveyance of land though not described in the contract of sale or instrument of conveyance. 'Real estate' includes parcels with or without upper or lower boundaries, and spaces that may be filled with air or water." Section 34–36.1–1.03(24).

The defendants contend that, according to the act, ownership of a master unit necessarily is ownership of real estate because it constitutes an interest in the airspace over the land. They maintain that the construction of a building within a master unit merely represents an improvement to the real estate and does not, therefore, fit within the statutory definition of a development right.

Even if we were to accept defendants' assertion that a master unit in the airspace above a third-party owned unimproved lot with development rights is, in fact, real estate for purposes of the Act,[20] we do not accept their tortured conclusion that the construction of a building upon that lot is merely an improvement, rather than the exercise of a development right. Indeed, such an "improvement" constitutes one of the specific development rights reserved in the master agreement. Because the declarant's proposed construction effectively would subdivide the so-called master unit into smaller residential units, it falls squarely within § 34–36.1–1.03(11)(B)'s definition of development rights. As discussed above, those rights expired after December 31, 1994.

[11] Under the master declaration, the GIS Condominium consists of one large tract of land. Although defendants assert that the condominium is composed of separate lots, nothing in the record suggests that the parcel is divisible or contains more than one legal lot. *See Dibiase v. Jacovowitz,* 43 Mass.App.Ct. 361, 682 N.E.2d 1382, 1383 (1997). The master declaration granted the declarant a limited period to develop certain parcels of land within the condominium, but it could not convey title to the airspace if the development rights were not exercised. Because the master declaration "described the entire parcel of land from the outset, * * * the entire parcel * * * was common area from the time the master [declaration] was recorded * * *." *Id.* at 1385.[21] Thereafter, the land never was subdivided and when the development rights expired, the disputed portions vested in fee simple in "the unit owners as tenants in common in proportion to their respective undivided ***133** interests." *Id.* Considering that all the underlying land constituted common property, we conclude that when the associated development rights expired, so also did all of the declarant's rights in the master units. Accordingly, the hearing justice should have declared that title to the disputed property vested in the individual unit owners in fee simple.[22]

VII

The Statute of Limitations

The defendants maintain that plaintiffs' challenge to the amendments was not timely filed pursuant to § 34–36.1–2.17(b); accordingly, they assert that the claim should have been dismissed for failure to comply with the one-year statute of limitation.

In her decision, the hearing justice rejected this claim. She noted that section 34–36.1–2.17(b) prohibited any increase in special declarant's rights without the unanimous consent of the unit owners and that because "the challenged amendment was not adopted in conformance with the procedures" set out by the statute, the statute of limitations did not apply. Instead, she found plaintiffs' action to be timely pursuant to § 9–1–13(a), which has a ten-year limitation period for civil actions. Although we affirm the hearing justice on this issue, we do so on a ground different to that enunciated by the hearing justice. *See United Lending Corp.,* 827 A.2d at 634.

[12] Section 34–36.1–2.17(b) provides that:

"No action to challenge the validity of an amendment adopted by the association pursuant to this section may be brought more than one year after the amendment is recorded."

However, when, as here, the amendment being challenged is determined to be void *ab initio,* the one-year statute of limitations does not apply to any subsequent action taken by an interested party. *See Theta Properties v. Ronci Realty Co.,* 814 A.2d 907 (R.I.2003). Consequently, the hearing justice did not err in rejecting defendants' statute of limitations defense.

VIII

The Laches Defense

The defendants have also raised the affirmative defense of laches in the proceedings below, contending that this doctrine should bar plaintiffs' challenge to the Reserved Area because the plaintiffs sat on their rights while defendants invested heavily in developing the parcel into a function center known as the Newport Regatta Club. The hearing justice rejected defendants' assertions, finding that the claim was precluded by the tolling agreement that was willingly entered into by the parties. The defendants assert that the hearing justice erred in denying their laches defense because it was not waived by the tolling agreement.

[13] [14] "Laches is an equitable defense that involves not only delay but also a party's detrimental reliance on the status quo." *Adam v. Adam,* 624 A.2d 1093, 1096 (R.I.1993) (citing *Grissom v. Pawtucket Trust Co.,* 559 A.2d 1065 (R.I.1989)). "Mere delay alone is not enough, the delay must be unreasonable." *Adam,* 624 A.2d at 1096. That is because,

> ***134** "Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no steps to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable and operates as an estoppel against the assertion of the right. The disadvantage may come from loss of evidence, change of title, intervention of equities and other causes, but when a court sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief." Id. (quoting *Chase v. Chase,* 20 R.I. 202, 203–04, 37 A. 804, 805 (1897)).

[15] Although defendants correctly assert that they did not waive laches as an affirmative defense when they signed the tolling agreement, they cannot avail themselves of that defense under the circumstances in this case. The record reveals that defendants knowingly and willingly entered into the tolling agreement and thereafter agreed to extend it on three separate occasions. The original tolling agreement provided that any legal action filed by the parties on or before June 30, 1998, with respect to the creation of, amendment to, and operation of the condominium property, would be deemed to "have been commenced, filed and served, for purposes of statute of limitations, laches, waiver, estoppel or similar defenses, on December 1, 1997." The final agreement continued the applicability of the presumed December 1, 1997 filing date to all actions filed on or before May 31, 1999.

Despite the fact that the tolling agreement specifically acknowledged and contemplated the possibility that plaintiffs might file the instant civil suit, and while the agreement was still in full force and effect, defendants knowingly invested substantial sums of money in the Reserved Area by constructing the Newport Regatta Club in 1998. Given that fact, defendants cannot now contend that the present action, filed on May 28, 1999, constituted an unreasonable delay upon which they detrimentally relied for purposes of invoking the laches doctrine as an affirmative defense. Consequently, the hearing justice properly rejected defendants' argument on this issue.

IX

Accounting

The defendants contend that they continued to pay common expenses on the disputed parcels after the December 31, 1994 development rights deadline had passed and the property vested in the unit owners in fee simple.[23] Furthermore, they assert that they made a considerable investment in developing the Newport Regatta Club. The defendants now maintain that these financial considerations should weigh heavily in their favor because, otherwise, plaintiffs would benefit from a considerable and inequitable windfall should they prevail upon appeal.

[16] [17] We have stated previously that "[o]ne who knows of a claim to land which he [or she] proposes to use as his [or her] own, proceeds at his [or her] peril if he [or she] goes forward in the face of protest from the claimant and places structures ***135** upon the land." *Renaissance Development Corp. v. Universal Properties Group, Inc.,* 821 A.2d 233, 238 (R.I.2003) (citing *Ariola v. Nigro,* 16 Ill.2d 46, 156 N.E.2d 536, 540 (1959)). That is because "the duty of the courts is to protect rights, and innocent complainants cannot be required to suffer the loss of their rights because of the expense to the wrongdoer." *Id.* In

reviewing defendants' assertions that plaintiffs should not benefit from defendants' development of the Newport Regatta Club, we observe that defendants commenced such development with full knowledge of plaintiffs' claims and after they voluntarily entered into the tolling agreement. Considering that they developed the Reserved Area at a time when they were on notice that their right to do so was in dispute, we conclude that they constructed the parcel at their peril and cannot now contend that equity should prevent plaintiffs from prevailing because of their expenditures.

However, with respect to the defendants' payments of common expenses on the disputed parcels after the declarant's development rights had expired, we concur that to permit the plaintiffs to enjoy the benefits of such expenditures would constitute an inequitable windfall. However, we do not agree that this should form the basis for denying the plaintiffs' appeal and, instead, we remand the matter to the Superior Court for an accounting on this issue.[24]

X

Conclusion

Consequently, and for the foregoing reasons, the plaintiffs' cross-appeal is granted and the defendants' cross-appeal is denied. The papers are remanded for the entry of a partial judgment consistent with this opinion and for a trial on the remaining issues.

FLANDERS, Justice, dissenting.

Most respectfully, and with the utmost regret for having to say so, I am of the opinion that the majority's decision in this case repeatedly misinterprets the Rhode Island Condominium Act (act), G.L.1956 chapter 36.1 of title 34. It does so:

(1) By allowing the plaintiff condominium associations to maintain this lawsuit challenging the validity of amendments to a condominium declaration even though they failed to file this action until long after the one-year period for doing so expired under the applicable statute of limitations;

(2) By holding that individual unit owners—whose condominium associations were part of a master condominium association, but who were not entitled to elect the executive board of that master association or to vote on other master association matters—nevertheless were entitled to vote on proposed amendments to the condominium declaration for the master association, even though the act expressly provides that "[t]he rights and responsibilities of unit owners * * * apply in the conduct of the affairs of a master association only to those persons who elect the board of a master association." Section 34–36.1–2.20(d); and

(3) By unjustifiably divesting defendants (collectively, IDC), of the three condominium units that they own in the GIS master condominium, and by judicially converting those units—including a unit ***136** containing a multimillion-dollar commercial banquet facility and regatta club located on prime waterfront property—into property owned by individual condominium unit owners in other condominiums, merely because in 1994 IDC supposedly failed to exercise or extend its development rights in a technically proper manner when acting in its capacity as the declarant of the GIS condominium.

As amplified below, I believe that the majority's erroneous holdings in this case stem from its efforts to advance what it believes to be the interests of "consumer protection" in connection with condominium developments such as this one. Proclaiming that the voting procedures used by the GIS master condominium association to adopt the challenged amendments to the GIS condominium declaration were "precisely the type of artifice or device that the [condominium] statute proscribes," the majority overlooks the fact that the applicable condominium law expressly allowed the GIS master association to use such voting procedures and for IDC to acquire, develop, operate, and improve the GIS condominium exactly as it has proceeded to do in this case.

I

The Act's One–Year Statute of Limitations Barred the Plaintiffs' Claims Challenging the Validity of the 1994 Amendments to the GIS Condominium Declaration

IDC recorded the Fifth Amendment to the GIS declaration on December 29, 1994. The plaintiffs did not file this action challenging its validity until May 29, 1999,

approximately four years and five months after the applicable one-year statute of limitations period expired. *See* § 34–36.1–2.17(b) ("No action to challenge the validity of an amendment adopted by the association pursuant to this section may be brought more than one year after the amendment is recorded.").

Assuming, *arguendo,* that the parties' tolling agreement—deeming this action to have been filed on December 1, 1997—was valid and enforceable, it still would avail plaintiffs nothing because the stipulated filing date of December 1, 1997, occurred more than one year after IDC publicly filed the last of the challenged 1994 amendments to the GIS condominium declaration.

The majority's opinion simply disposes of this one-year statute of limitations by declaring that actions challenging the validity of amendments that are alleged to be invalid *ab initio* are not subject to the one-year limitation period specified in the act for challenging the validity of amendments. As legal authority for this remarkable conclusion, the majority cites to our recent decision in *Theta Properties v. Ronci Realty Co.,* 814 A.2d 907 (R.I.2003) (*Theta*), even though that case provides no support whatsoever for such a proposition.

Theta holds that service of process on a dissolved corporation after the statutory period for doing so had expired is void *ab initio* and that the period to accomplish such service of process cannot be extended by retroactive legislation enacted after the statutory period for initiating such service has expired. *Theta,* 814 A.2d at 913. But *Theta* provides no support whatsoever for the proposition that claims challenging the validity of amendments to a condominium declaration, which are alleged to be void *ab initio*, are exempt from the applicable statute of limitations. Indeed, if *Theta* has any application whatsoever to this case—and it has none—it would be that, after a statutory period for suing a party has expired, any attempt to do so should be declared void *ab initio* and deemed of no legal consequence whatsoever—at least ***137** when, as here, defendants have invoked this defense in their answer and vigorously argued it to the trial court and to this Court. Thus, based on *Theta* and on other cases holding that the expiration of an applicable statute of limitations is a valuable property right that cannot be revived on an *ex post facto* basis, plaintiffs' attempt to sue IDC based on the alleged invalidity of the 1994 amendments should have been declared void *ab initio*.

I have great difficulty with the majority's holding to the contrary on this point. Is not a claim alleging that an amendment to a condominium declaration is void *ab initio* a claim that challenges the validity of the amendment? Is not a claim alleging that an amendment is void because it was adopted in a procedurally invalid manner a claim challenging the validity of the amendment? If a claim that an amendment is void *ab initio* is not subject to the one-year period for filing claims challenging the validity of an amendment, then what type of claim challenging the validity of an amendment is subject to the one-year period?

Just to pose such questions is to expose the underlying problem with the Court's holding that plaintiffs' claims challenging the validity of amendments that are alleged to be void *ab initio* are exempt from the act's one-year period for challenging the validity of amendments to condominium declarations.

But this is not simply a matter of logic and of interpreting statutes according to their plain meaning. The interests of basic fairness also argue in favor of applying the one-year statute of limitations period to bar these claims. Although plaintiffs were fully aware in 1994 of the fact that they needed to attack the validity of these amendments within one year of their recording, their board representatives voted in favor of the amendments while the associations sat on their hands until May 1999 without taking any legal action to invalidate them. In the interim, while they dawdled and while they obtained the benefit of the many thousands of dollars in condominium fees paid by IDC as the owner of three of these master GIS condominium units, IDC justifiably acted in reliance for years on the validity of the amendments in question. In its separate capacities as the declarant of the GIS condominium and as the owner of various condominium units on Goat Island, IDC sold condominium units, acquired ownership interests in units, approved budgets, maintained common areas, paid assessments, granted mortgages to banks, and committed millions of dollars toward building, opening, and operating the Newport Regatta Club on the premises of the north, or reserved, master unit of the GIS condominium.

Thus, even if the applicable statute of limitations had not expired many years before plaintiffs filed this lawsuit, the doctrine of laches would appear to estop them from challenging the validity of these amendments. So many changes in position have occurred—affecting so many people and so many financial institutions and so much invested capital—that it is grossly unfair and unjust for plaintiffs to be allowed to undo all that has happened at this project with respect to the property involved so long after their representatives voted in favor of the amendments and the GIS master association lawfully adopted them.

"So long as parties are in the same condition, it matters

little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no steps to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to ***138** his former state, if the right be then enforced, delay becomes inequitable and operates as an estoppel against the assertion of the right." *Pukas v. Pukas,* 104 R.I. 542, 546, 247 A.2d 427, 429 (1968) (quoting *Chase v. Chase,* 20 R.I. 202, 204, 37 A. 804, 805 (1897)).

The majority counters this suggestion of laches by referring to the fact that IDC proceeded to build the Regatta Club on the north unit in 1998—knowing that plaintiffs still might file a lawsuit at some later date that would challenge IDC's right to do so as of December 1, 1997. But even December 1, 1997 was more than two years after the one-year statute of limitations for filing such an action had expired and more than three years after the GIS master association adopted the amendments in question! Moreover, plaintiffs have not challenged the validity of the amendment that created the unit on which the Regatta Club sits and that vested IDC with ownership of that unit. Thus, even if the one-year statute of limitations did not bar plaintiffs' claims, which it clearly did, I still would reverse and remand this case for trial to decide whether IDC so changed its position in reliance on the validity of the amendments that it would be inequitable to allow plaintiffs to maintain this lawsuit as if it had been filed on December 1, 1997.

II

Because the Voting Procedures Used to Adopt the 1994 Amendments to the GIS Condominium Declaration Were Valid, IDC Lawfully Extended Its Development Rights to December 31, 2015

In 1994, representatives of the five master units comprising the GIS condominium association attended GIS master association meetings at which they voted on and unanimously approved, *inter alia*, the Third, Fourth, and Fifth Amendments to the GIS condominium declaration. Three of these units were multi-unit condominiums governed by executive boards of the plaintiff condominium associations. Each of the plaintiff condominium associations, through its board representatives, received notice of the GIS master association meetings and voted in favor of the proposed amendments. Nevertheless, the majority holds that these amendments were invalid and void *ab initio* because the owners of individual sub-condominium units in the America, Capella, and Harbor Houses condominiums were not given any direct notice of or opportunity to vote on such amendments. Consequently, says the majority, IDC never lawfully extended its development rights for the GIS condominium beyond December 31, 1994, the date when they were scheduled to expire under the First Amended and Restated Declaration of Condominium, GIS.

The majority's rationale for this holding is that each of the more than 150 individual owners of the condominium units located in the America, Capella, and Harbor House condominiums (the so-called sub-condominium owners) failed to receive individual notice or the individual opportunity to cast a direct vote on whether to adopt the challenged amendments to the GIS condominium declaration. But given the undisputable fact that none of these individual owners of sub-condominium units owned or controlled any of the GIS master units, and given that they were not entitled to elect the board of the GIS master association when those votes occurred—much less to vote on amendments to a different condominium declaration from the one in which they owned one or more units—this was scarcely remarkable, let alone an actionable violation of the act. What the majority chooses to ignore in its analysis of the votes on the 1994 amendments ***139** to the GIS condominium declaration is that the GIS condominium was organized as a master association, as § 34–36.1–2.20 of the act expressly authorized. As such, its five master condominium units composed a master condominium association whose representatives elected a master condominium executive board and held master association meetings at which, *inter alia*, they voted on and adopted amendments to the GIS condominium declaration. Thus, pursuant to § 34–36.1–2.20(d),

> "[t]he rights and responsibilities of unit owners with respect to the unit owners' association set forth in §§ 34–36.1–3.03 [executive board members], 34–36.1–3.08—34–36.1–3.10 [meetings, quorums, and voting] and 34–36.1–3.12 [conveyance or encumbrance of common elements] apply in the conduct of the affairs of a master association *only to those persons who elect the board of a master association, whether or not those persons are otherwise unit owners within the meaning of this [act]*." (Emphasis added.)

In other words, in master associations such as the one created for the GIS condominium, "the rights of notice, voting, and other rights enumerated in the [a]ct are available only to the persons who actually elect the

[master association] board." Commissioners' Comment 5 to § 34–36.1–2.20(d) of the act. With respect to the GIS master association, those persons were IDC, the owner of two of the GIS condominium master units, and, in the case of the GIS master units consisting of the America, Capella, and Harbor House condominiums, a representative of each condominium association's executive board, with each master unit's representative being entitled to cast one undivided vote, weighted according to the size of the land area that each master unit encompassed. Such a representative voting arrangement for the GIS master condominium association and GIS master units is entirely consistent with and permitted by the act—especially given the fact that three of the GIS master units were themselves condominiums owned by multiple individual owners of units in these condominiums. Thus, § 34–36.1–3.10(a), entitled "Voting," provides:

> "If only one of the multiple owners of a unit is present at a meeting of the [condominium] association, that person is entitled to cast all *the votes allocated to that unit.* If more than one of the multiple owners are present, the votes allocated to that unit may be cast only in accordance with the agreement of a majority in interest of the multiple owners, *unless the declaration expressly provides otherwise.*" (Emphases added.)

Several points should be noted with respect to this provision. First, it expressly acknowledges the fact that voting does not have to proceed on a one-vote-per-unit basis, which the majority deems to be required. Rather, it contemplates that the condominium declaration may provide for the manner in which "votes [are] allocated to that unit." Second, the act speaks to *who* is entitled to cast the votes allocated to multi-owner units in a given condominium, such as the three master units in the GIS condominium, (namely, the America, Capella, and Harbor Houses condominiums). Multiple sub-condominium unit owners owned these three master units of the GIS condominium when the votes in question were cast in 1994 at the GIS master association meetings in favor of the various amendments to the GIS declaration. Most significantly, given that more than one of the multiple unit owners of the America, Capella, and Harbor Houses master units were present at the challenged meetings of the GIS condominium association, "the votes allocated to that unit [by the declaration] may be cast only in accordance with the agreement of a ***140** majority in interest of the multiple owners, *unless the declaration expressly provides otherwise.*" Section 34–36.1–3.10(a). (Emphasis added.) Here, the declaration expressly provided otherwise, stating that each master unit in the GIS condominium would be entitled to cast one undivided vote weighted according to the land area covered by each unit.

Thus, far from "evad[ing] the limitations or prohibitions of [the act]," which § 34–36.1–1.04 forbids declarants from doing, Globe Manufacturing, the original declarant of the GIS condominium declaration, was entitled by the act to prescribe a representative voting procedure for multiple unit owners of a single master unit in the GIS master condominium association. Indeed, the Commissioners' Comments to § 34–36.1–1.04 specifically describe the voting requirements in § 34–36.1–2.20 (master associations) as one of the provisions in the act that can be varied by the declaration. Even § 34–36.1–2.17(d), providing that amendments to declarations that enlarge special declarant rights require the unanimous consent of the unit owners, contains an exception allowing contrary voting arrangements "to the extent expressly permitted or required by other provisions of this [act]." Section 34–36.1–2.20, pertaining to the voting requirements for master associations, is one such provision.

For these reasons, the individual sub-unit owners of the plaintiff condominium associations were not entitled to cast individual votes on amendments to the GIS declaration. What the majority fails to acknowledge is that, even though

> "[a] variety of sections [of the act] enumerated in subsection [§ 34–36.1–2.20](d) provide certain rights and powers to unit owners in their dealings with their [condominium] association[,][*i]n the affairs of the master association,* however, *it would be incongruous for the unit owners to maintain those same rights if those unit owners were not in fact electing the master board.* Thus, for example, the question of election of directors, meetings, notice of meetings, quorums, and other matters enumerated in those sections would have little meaning if those sections were read literally when applied to a master board which was not elected by all members of the condominiums subject to the master board. For that reason, *the rights of notice, voting, and other rights enumerated in the [a]ct are available only to the persons who actually elect the [master] board.*" Commissioners' Comment 5 to § 34–36.1–2.20(d). (Emphases added.)

Apparently finding the above-described incongruity no bar to extending such rights to other persons, the majority proceeds to accord voting rights in master associations such as GIS not just to the persons who elect the GIS master board, but also to each and every sub-condominium unit owner on Goat Island. In sum, then, the majority's opinion pays no heed to the fact that, under the act, special voting rules apply to master

condominium associations such as the one created for the GIS condominium. Sinking into the quicksand of voting provisions that are simply inapplicable under the act to master associations, the majority fails to acknowledge the existence of these master-association provisions and their related commentary, let alone the dispositive fact that the GIS condominium was organized as a master association. Instead, it proceeds to affirm the Superior Court's invalidation of votes that were taken in complete accord with the act and with its voting provisions dealing with master condominium associations such as this one.

***141** In the end, only by ignoring the fact that, when the votes in question occurred in 1994, the GIS condominium was in fact organized as a master condominium association, comprising five different master units (three existing condominiums owned by multiple owners of individual units in these condominiums and two undeveloped parcels owned by IDC), can the majority conclude that the votes in question were void *ab initio*—even though the owners of individual units in different condominiums from the GIS condominium were not entitled by law to vote on these amendments to the GIS master declaration and even though the boards of the plaintiff associations cast their votes in favor of the amendments.[25]

The trouble I have with the majority's holding becomes clear with just a moment's reflection upon the factual circumstances of this case:

> • Under the provisions of the act and the relevant condominium documents, the owners of sub-condominium units within the America, Capella, and Harbor Houses condominiums never were entitled to cast individual votes on matters pertaining to the GIS condominium and its master association. Therefore, by what rationale or authority can they possibly be entitled to individual votes at master association meetings in connection with amendments to the declaration for the GIS condominium?
>
> • The GIS condominium declaration did not create the units in the America, Capella, and Harbor Houses condominiums; rather, the declarations for plaintiffs' separate condominium associations created them.
>
> • Neither the act nor any condominium declaration ever afforded the sub-condominium unit owners any individual voting rights with respect to the GIS condominium, the GIS master condominium association, or the GIS condominium declaration. On the contrary, the relevant condominium documents and applicable provisions of the act always informed plaintiffs and any sub-condominium unit owners that they were not entitled to cast individual votes on GIS condominium and master association matters.
>
> • Sub-condominium unit owners paid no condominium fees with respect to any such privileges that belonged to the persons who were entitled to vote on GIS master association matters.

If the majority were correct in its conclusion that the 1994 votes to amend the GIS declaration were void *ab initio* because more than 150 sub-condominium unit owners were entitled to a direct individual ***142** vote thereon, then every vote taken by the GIS master condominium association for the last fourteen years—including every election that has been conducted, every budget that has been approved, and every amendment to the GIS declaration from day one—is also void *ab initio*. Ironically, because (according to the majority) the one-year statute of limitations does not apply to lawsuits asserting that amendments to condominium declarations were void *ab initio*, this means that only the original declaration for the GIS condominium—providing for the declarant's development rights to expire in 2037—remains intact, thereby mooting plaintiffs' efforts to stymie IDC from developing the property it owns on Goat Island.

In sum, I would hold that IDC duly extended its development rights to the year 2015 with respect to the master units it owns in the GIS condominium because the 1994 amendments that extended those rights received the unanimous consent of the representatives of the GIS master unit owners, including the plaintiffs who were among "those persons who elect the board of [the GIS] master association." Section 34–36.1–2.20(d). Thus, I would reverse the Superior Court judgment finding that their votes were void *ab initio*.

III

Even If Defendants' Development Rights Had Expired in 1994, They Still Were Entitled to Construct Improvements on Their Three Units; In Any Event, There Is No Justification for Holding That the Expiration of a Declarant's Development Rights Means That the Declarant Forfeits Its Ownership in Any Units That Were Subject to Such Rights to Other Unit Owners in the Condominium

Even if IDC's development rights had expired in 1994, it

was still entitled under the act to construct improvements within the three GIS condominium units that it owned. *See* § 34–36.1–2.11 (allowing unit owners to construct improvements to their units). In any event, there is no justification whatsoever for the majority's holding that the expiration of IDC's development rights means that it forfeited its fee simple ownership of those units that were the subject of such development rights and that legal title to such units should be transferred to the individual unit owners of plaintiffs' condominium associations.

As unjustified and as bewildering as are the majority's rulings on the validity of the amendments to the GIS declaration and on the timeliness of plaintiffs' claims challenging their validity, by far the most egregious and unsupportable portion of the majority's opinion concerns the draconian consequences it visits on defendants for not properly extending or exercising their development rights before they supposedly expired (as the majority now decrees in 2004) on December 31, 1994. Here we are, ten years down the road from the date when the majority says that IDC's development rights expired. The majority now holds that, because these rights expired in 1994, IDC—per the majority's *ipse dixit*—no longer owns the north, south, and west master units, much less any improvements it constructed thereon, that are part of the GIS master condominium. In summarily divesting IDC of its Goat Island property, including the Regatta Club, one of Newport's crown-jewel properties, without awarding it any just compensation—an action that can only be described as unwarranted—the majority has bestowed this award on litigants who are not entitled to such a remedy.

Even the trial justice could not bring herself to order the confiscatory relief that the majority now decrees. Moreover, the ***143** explanations the Court proffers have no basis in the act.

The declaration is the fundamental legal document that establishes who owns what in a condominium. Even without the challenged amendments, the GIS condominium declaration always has provided that the master units in that condominium would be individually and privately owned and that this private ownership would be of a "permanent character" and not part of the condominium's common elements. Indeed, the GIS declaration expressly excluded the GIS master units from its definition of what constitutes the master-common elements. Moreover, nothing in the act or in the GIS declaration permits one or more of the multiple owners of a master unit to confiscate another master unit owner's property or units and convert them into master common elements at the condominium, let alone convert them into the private property of the other unit or sub-unit owners.

In this case, when IDC purchased Globe's rights in the GIS condominium in 1994, it acquired not only the ownership of its two master units in that condominium, but also Globe's contractual development rights as the declarant. Thus, even if IDC had lost all its contractual development rights because it failed either to exercise or extend them in a proper fashion, it still retained its ownership of the two master units that it purchased from Globe in 1994, plus the one it acquired in 1994 via the unchallenged Sixth Amendment to the GIS condominium declaration (namely, the north development unit). Consequently, it still possessed, under the act, the same right to construct improvements within the boundaries of those units that any other unit owner possessed. *See* § 34–36.1–2.11 (allowing unit owners to make "any improvements or alterations to * * * [the] unit that do not impair the structural integrity or mechanical systems or lessen the support of any portion of the condominium"). In this case, IDC's three master units cover over 56 percent of the land within the GIS condominium.

The majority's opinion conflates a declarant's development right of "[a]dd [ing] real estate to a condominium," § 34–36.1–1.03(11)(A), with a condominium unit owner's right under § 34–36.1–2.11 to construct improvements or build any structures wholly within the boundaries of a single condominium unit. First of all, even if such improvements or alterations to the unit constituted the addition of real estate to the condominium, § 34–36.1–2.11 still allows a unit owner to do so. The fact that the unit owner may also be a declarant whose development rights have expired is irrelevant. Under the act, a unit owner is defined as "a declarant or other person who owns a unit." Section 34–36.1–1.03(29). Thus, there can be no question that a declarant such as IDC can also be a unit owner under the act. Here, the GIS declaration defined an "owner" as "the Declarant or other person or persons owning a master unit." Thus, in its capacity as a unit owner and pursuant to § 34–36.1–2.11 and the GIS declaration, IDC was entitled to construct improvements on the units it owned even if it never had the right to exercise any development rights whatsoever.

Second, improving a unit by building on and within the unit does not add real estate to the condominium. Unlike most physical improvement projects, to exercise a development right a declarant must amend the declaration for the condominium because the exercise of such a right changes the legal rights and ownership interests of the other condominium-unit owners. *See* § 34–36.1–2.10. But an individual unit owner does not add real estate to the condominium itself merely by constructing ***144** a building, a retaining wall, or other physical improvements

within that unit's existing real estate.

Thus, even though any existing buildings when a unit is created are part of the unit's real estate, constructed additions, buildings, and improvements to a vacant parcel of property or to an existing structure do not constitute the addition of real estate to the condominium. The real estate area comprising the unit remains the same both before and after the improvements are constructed. Thus, the mere construction of a building or other improvements within a unit does not constitute the exercise of a development right because they do not add real estate to the condominium within the meaning of the act. Otherwise, every time a condominium unit owner remodeled a kitchen, put up a dividing wall, or enlarged a patio, he or she would be adding real estate to the condominium and therefore exercising a development right.

Significantly, the act grants to unit owners such as IDC the broad power to "make any improvements or alterations to his or her unit that do not impair the structural integrity or mechanical systems or lessen the support of any portion of the condominium." Section 34–36.1–2.11(1). Although this unquestioned right to "make any improvements or alterations to his or her unit" is subject to the provisions of the condominium's declaration and to other provisions of law (such as zoning and other municipal land-use requirements), in this case the GIS declaration expressly afforded to IDC and to every other owner of a master-condominium unit the right to "construct buildings and other improvements * * * within the boundaries of [their units]." In addition, the GIS public offering statement provided that "[a]ny * * * Owner of a Master Unit may make alterations or construct improvements within the boundaries of its Master Unit." Thus, plaintiffs and the individual sub-condominium owners were notified in no uncertain terms that IDC, in its capacity as the existing and potential owner of several GIS condominium master units, reserved the right to construct "buildings and other improvements on any master unit * * * so long as the Declarant owns the Master Unit."

In short, development rights are entirely separate and distinct from the rights of unit owners to build on and improve their individually owned units. Nevertheless, the majority confuses the right of a declarant to exercise reserved development rights in connection with a condominium—for example, by constructing improvements on land it does not own, by adding or taking away real estate from a condominium, or by creating additional units—with the right of a unit owner (who can also be a declarant) to build upon and improve his, her, or its own individual and preexisting condominium units. Thus, the fact that a declarant's development rights have expired—or, indeed, even if such rights never existed—has no bearing upon the fundamental right of individual condominium unit owners, including a declarant, to improve and build on their separately owned units.

In sum, an individual unit owner's right to construct upon and improve that owner's condominium unit does not constitute the addition of real estate to a condominium that would fall within the statutory definition of a development right. *See* § 34–36.1–1.03(ii)(A) (development rights defined, in part, as "any right or combination of rights reserved by a declarant * * * to * * * [a]dd real estate to a condominium"). The improvement to the interior of a particular existing condominium unit does not alter any common areas or affect the other unit owners' ownership ***145** interests in the condominium. Thus, subject to any limitations in the declaration and to applicable zoning and land-use laws, individual condominium unit owners possess the right to improve their property exclusively within the boundaries of the unit without reference to the existence or expiration of any statutorily defined or contractual development rights.

In this case, IDC's construction of the Newport Regatta Club totally within the reserved area (that is, within the north master condominium unit) had no effect whatsoever on the voting rights, condominium fees, ownership interests, or any other legal rights of plaintiffs or any sub-condominium unit owners. It did not "add real estate" to the GIS condominium because the improvement was constructed entirely within the existing real estate of IDC's north development unit. Similarly, construction of the Regatta Club did not create additional units, did not subdivide units, and it did not add or withdraw real estate from the GIS condominium. Rather, the number of units, the amount of land, and the area comprising the master and limited common elements within the GIS condominium remained the same after the construction of the Regatta Club as before. In any event, even if such an improvement could be construed to "add real estate" to the GIS condominium, in doing so IDC was not acting as a declarant but as the owner of the unit and thereby was entitled to improve its property as allowed by law and by the declaration.

Moreover, the rights of IDC to improve its master units were no different from the rights other condominium unit owners enjoy with respect to their units. Thus, for example, the owners of the units in the Harbor Houses condominiums have continually expanded, upgraded, and altered a majority of the buildings within their master

condominium unit. They did so not by exercising any reserved development rights, but simply by acting in their capacity as owners of units that can be improved as the owners may desire, subject to the declaration and to other applicable land-use laws. Indeed, this is the very reason why Globe Manufacturing, in its capacity as the original declarant, structured the GIS condominium to require the owners of the unimproved condominium units to pay substantial taxes and condominium fees in perpetuity—way beyond the term of any development rights—because the owners of these units were entitled to improve them as they saw fit, subject to applicable land-use law. Such a provision begs the question of why would any unit owner pay substantial condominium fees, based on land area, merely to hold title to unbuildable vacant land?

Furthermore, it is hardly inconsistent with the act for a declarant such as Globe to have reserved development rights with respect to the individual condominium units that it owned and then sold to IDC. Thus, § 34–36.1–1.03(11)(C) clearly indicates that a condominium unit in itself can be subject to development rights because such rights include the right to "[s]ubdivide units or convert units into common elements." Indeed, the development right for a declarant/owner to subdivide units or convert them into common elements can only be applied to a declarant who also owns existing condominium units. (It would be impossible to subdivide or convert a unit into a common element if the unit did not already exist). In any event, no provision in the act barred a declarant such as Globe and its successor, IDC, from reserving development rights with respect to an existing or newly created condominium unit.

For these reasons, I would hold that IDC possessed the right to alter and improve the master units it owned, including ***146** the right to construct and operate the Regatta Club on the north master condominium unit, regardless of whether its development rights as a declarant expired in 1994.

But the majority decrees that "when the associated development rights expired, so also did all of the declarant's rights in the master units." This is simply not so, however, because, even if the development rights expired, IDC still owned the units in fee simple.[26] Yet the fact of IDC's ownership gives the majority no pause. Accordingly, having declared that IDC has no development rights with respect to the units it owns, it then decrees that, "the hearing justice should have declared that title to the disputed property vested in the individual unit owners in fee simple."

What could be the possible justification for this divestiture of defendants' property, taking from them the condominium units they own at the GIS condominium and transferring them to non-parties; to wit: the individual sub-condominium unit owners in the America, Capella, and Harbor Houses condominiums? Does all this follow, as night follows day, merely because IDC's development rights expired in 1994? The majority suggests that "defendants assert that the condominium is composed of separate lots." But defendants make no such assertion. Rather, they assert only that which is true: namely, that, after the 1994 amendments, the GIS condominium was comprised of six separate condominiums units, of which they indisputably owned three of them. Thus, even though, for title purposes, the GIS condominium may only contain "one legal lot," as the majority suggests, in reality and under law the property comprising the GIS condominiums was divided into separate condominium units, and these separate units have been the legal and factual reality on this Goat Island property since Globe Manufacturing first created the GIS condominium.

The majority then simply asserts that although "[t]he master declaration granted the declarant a limited period to develop certain parcels of land within the condominium, * * * it could not convey title to the air space if the development rights were not exercised." Why not? Since a declarant can also be an owner of the unit, and since units can consist of air spaces,[27] why cannot a declarant also own such units within the condominium, with or without associated development rights? And why cannot the master declaration convey title to such units to the declarant, regardless of whether development rights ever existed and irrespective of whether they were or were not exercised? Even plaintiffs did not challenge the Sixth Amendment to the GIS declaration, pursuant to which IDC became the owner of the north development unit.

***147** Although it acknowledges that the unchallenged Sixth Amendment to the GIS condominium declaration converted the land under the reserved area or north unit into a limited common element and vested ownership of the unit itself in IDC, the majority, paradoxically, concludes that "the entire parcel * * * was common area from the time the master [declaration] was recorded." *See DiBiase v. Jacobowitz,* 43 Mass.App.Ct. 361, 682 N.E.2d 1382, 1385 (1997). But *DiBiase* is totally inapplicable to this situation because, here, the development rights were not attached to a master common area, as was the case in *DiBiase,* 682 N.E.2d at 1384, but to separate, privately owned condominium units; to wit: the south, west, and north development units. Thus, even if IDC's development rights expired, its ownership of these

condominium units continued without interruption or abatement—at least until the majority's decision in this case. In *DiBiase,* 682 N.E.2d at 1383, when the development rights expired, all that remained was a common element. Here, however, what remains are undeveloped privately owned units that are still owned by IDC on top of land that was exclusively reserved for IDC's use. Unlike *DiBiase,* these areas constitute privately owned condominium units and *not* common areas. Indeed, even the land beneath these units is a limited common area reserved exclusively for IDC's use. Thus, contrary to the majority's conclusion, even if IDC's development rights with respect to those units had expired, its ownership rights in the master units, including its right to improve and alter them under § 34–36.1–2.11, never expired. Thus, the Court has no basis in law or equity to transfer these units to other individual unit owners without awarding any just compensation to IDC for such a massive taking of its private property.

In sum, there is no justification whatsoever for the majority to confiscate the real estate constituting these units from IDC and then to order that its ownership and title to these units must be transferred to the individual owners of sub-condominium units in the America, Capella, and Harbor Houses condominiums. Given the multimillion-dollar value of the Newport Regatta Club alone, this unprecedented judicially mandated forfeiture, condemnation, and transfer of property to people who are not entitled to it, and without payment of any just compensation to IDC, the rightful owner, was not an appropriate remedy in this case.

Conclusion

The interests of consumers of condominium units and other goods and property are not protected or advanced when the law in a given jurisdiction is construed in such a way that developers stand to lose all their invested capital if, many years after the fact, some court misinterprets the law and declares that they failed to comply with a technical legal requirement before they began to build on the property.

And consumers are not protected by interpreting a jurisdiction's laws in such a way that producers and developers of consumer goods, services, and property are punished for their good-faith attempts to comply with applicable law when they attempt to deliver such products to consumers. The worst way to protect consumers is to deprive them of opportunities to consume products that otherwise would be available to them, but for a misguided and investment-killing interpretation of a jurisdiction's applicable laws.

With respect to real estate development projects involving condominiums, developers and consumers alike are now cast adrift on a dark and stormy ocean of doubt and uncertainty. After this decision, what real-estate developer in its right mind ***148** would proceed to build a condominium project, create a master association, and offer units for sale to consumers when, ten years later, a court can take its property away with one stroke of its pen merely because the developer allegedly failed to comply with voting procedures that a court later rules were required?

For these reasons, I would reverse, vacate the summary judgment entered in favor of the plaintiffs, and remand this case to the Superior Court with instructions for it to enter judgment in favor of the defendants dismissing the plaintiffs' claims with prejudice.

All Citations

844 A.2d 117

Footnotes

1 After joining plaintiffs' motion for partial summary judgment, Harbor Houses Condominium Association, Inc., moved to voluntarily dismiss itself from the case. The Superior Court granted the motion and dismissed its claims for compensatory and exemplary damages without prejudice; however, its declaratory and equitable claims for relief were dismissed with prejudice. Pursuant to Rule 19 of the Superior Court Rules of Civil Procedure, Harbor Houses was then realigned as an involuntary plaintiff with respect to its declaratory and equitable claims.

2 At the time, defendant Roos was Globe's director.

3 For the sake of simplicity, the Individual Unit and Development Unit # 1 will be referred to as the West Development Unit and the South Development Unit, respectively.

4 The master declaration, or First Amendment to the original declaration, has not been challenged.

5 The Capella South declaration of condominium states that common elements include "without limitation, all elements of the Building and Property not included in any Unit" and lists examples such as improvements on the land, foundations, lobbies, hallways, utility services and "[a]ll other property normally in common use by the Unit Owners[.]"

6 A copy of the original declaration was not available in the file; consequently, we have had to rely upon the representations made in the master declaration concerning that document.

7 The declarant later converted the Capella South master unit into a sub-condominium on May 12, 1988, pursuant to its special declarant and development rights under the master declaration.

8 Specifically, a "master allocated interest":

> "shall mean: (i) With respect to a Master Unit that is not a Sub–Condominium, the undivided interest in the Master Common Elements allocated to such Master Unit, which shall equal the percentage liability for the Master Common Expenses, and which shall equal the percentage vote in the Master Association associated with such Master Unit as set forth in Exhibit Y; (ii) with respect to a Sub–Association, the percentage liability for the Master Common Expenses, which shall equal the percentage vote in the Master Association associated with such Sub–Association as set forth in Exhibit Y; and (iii) with respect to a Unit Owner in a Sub–Condominium, the percentage of undivided interest in the Master Common Elements allocated to such Unit Owner's Unit as set forth in Exhibit Y."

9 IDC, Inc., transferred its interests to IDC Properties on October 19, 1994.

10 As previously mentioned, the executive board of the master association is composed of master unit owners and sub-association representatives. IDC, Inc. controlled the majority of the board's votes by virtue of its outright ownership of the West and South Development Units and as the owner of the majority of the individual residential units in America, Capella South and Harbor Houses.

11 At the meeting, the declarant's development rights were extended until December 15, 2015. The extension was reflected in the Fifth Amendment.

12 The plaintiffs do not challenge the validity of the Sixth Amendment to the master declaration, conceding that the master declaration granted the declarant the right to make such a conversion on or before December 31, 1994.

13 In counts 1 and 2, plaintiffs petitioned the Superior Court to declare that the voting procedures were statutorily invalid and that the amendments were void *ab initio,* respectively. Count 3 asked the court to declare that the declarant no longer had any ownership interest or voting rights in the disputed master units because said rights had expired on December 31, 1994, and to estop declarant from exercising development rights in those units. Alternatively, they sought compensatory damages in count 3. In count 4, plaintiffs challenged the allocation of the master common expenses as prescribed by the Fifth Amendment and sought injunctive and compensatory relief. Count 5 involved a compensatory claim for breach of fiduciary duty and count 6 sought injunctive relief from an alleged interference with an easement. Finally, in count 7, plaintiffs sought punitive damages and attorney's fees against declarant under counts 1, 2, 3 and 4, and against Roos under count 5 of the complaint, for their willful failure to comply with the Condominium Act, the master declaration and the master bylaws.

14 Specifically, P.L.1982, ch. 329, § 3 provides:

> "The secretary of state is hereby authorized and directed to print in the [G]eneral [L]aws following each section of this act, the corresponding official comments as defined in the Uniform Condominium Act (1980) which *shall be used as guidance as to the intent of the [L]egislature in adopting this chapter unless the statutory language shall clearly express otherwise* in which case the statutory language shall *prevail.*" (Emphases added.)

15 The Commissioners' Comment to G.L.1956 § 34–36.1–2.17(d) provides that:

> "Section [34–36.1–1.04] does not permit the declarant to use any device, such as powers of attorney executed by purchasers at closings, to circumvent subsection (d)'s requirement of unanimous consent."

16 The dissent contends that this conclusion was erroneous because § 34–36.1–2.20(d) "expressly provides that 'the

rights and responsibilities of unit owners [with respect to the unit owners' association set forth in §§ 34–36.1–3.03, 34–36.1–3.08—34–36.1–3.10, and 34–36.1–3.12] apply in the conduct of the affairs of a master association only to those persons who elect the board of a master association.' "

We note, however, that although § 34–36.1–3.03 does permit the executive board to "act in all instances on behalf of the association[,]" it also provides for certain exceptions. One of those exceptions is that "[t]he executive board may not act on behalf of the association to amend the declaration (§ 34–36.1–2.17) * * *." Section 34–36.1–3.03(b). Considering that § 34–36.1–2.17(d) states that "no amendment may create or increase special declarant rights * * * in the absence of unanimous consent of the unit owners[,]" and considering that the actions taken here by the master association did, in fact, increase special declarant rights, the dissent's reliance upon § 34–36.1–2.20(d) to support the conclusion that the master association validly extended IDC's development rights is misplaced.

17 Another possible basis for declaring the Third and Fourth Amendments to be void would be the failure to provide notice of the relevant meetings to the individual unit owners. Section 34–36.1–3.08 provides that:

> "Not less than ten (10) nor more that sixty (60) days in advance of any meeting, the secretary or other officer specified in the bylaws shall cause notice to be hand delivered or sent prepaid by United States mail to the mailing address of each unit or to any other mailing address designated in writing by the unit owner. The notice of any meeting must state the time and place of the meeting and the items on the agenda, including the general nature of any proposed amendment to the declaration or bylaws, any budget changes, and any proposal to remove a director or officer."

We observe that in the zoning context, "action taken by a board that has not satisfied the notice requirements is a nullity." *Ryan v. Zoning Board of Review of New Shoreham,* 656 A.2d 612, 615–16 (R.I.1995). *See also Gardner v. Cumberland Town Council,* 826 A.2d 972 (R.I.2003). Likewise, failure to give notice to a necessary party invalidates a tax sale. *See Kildeer Realty v. Brewster Realty Corp.,* 826 A.2d 961, 966 (R.I.2003).

18 The amendment also redistributed the percentage master allocated interests of each existing master unit. The changes are reflected as follows:

	Pre-Sixth Amendment	Post Sixth Amendment
(1) Harbor Houses	21.42 percent	11.55 percent
(2) America	19.25 percent	10.39 percent
(3) Capella South	39.61 percent	21.35 percent
(4) South Development Unit	9.6 percent	7.31 percent
(5) West Development Unit	10.12 percent	3.31 percent
(6) North Development Unit	-	46.09 percent
(Reserved Area)		

19 We are puzzled by the dissent's statement that "even if the development rights expired, IDC still owned these units in fee simple." At no time have defendants ever asserted that they own the land underlying the master units in fee simple.

20 We have recognized that, under appropriate circumstances, a condominium may be developed in the airspace above land pursuant to the Condominium Act. *See McConnell v. Wilson,* 543 A.2d 249 (R.I.1988).

21 According to the master declaration, the Reserved Area also consisted of common area. The Sixth Amendment merely converted the parcel from a master common element into a limited master common element.

22 By individual unit owners, we include all the individuals who own sub-condominiums, so-called, not unit owners, as defendants restrict that term. Such individuals include plaintiffs in this case, as well as IDC in its capacity as the owner of several sub-condominiums.

23 Before the declarant's development rights expired, the declarant was liable under the act for all the expenses associated with the parcels that were subject to said development rights. *See* § 34–36.1–3.07(b).

24 This accounting is confined to the common expenses paid by defendants on the master units after the expiration of their development rights on December 31, 1994. It does not include any profits that the defendants may have earned from its operation of the Newport Regatta Club.

25 The majority points to G.L.1956 § 34–36.1–3.03(b), which provides that "[t]he executive board may not act on behalf of the association to amend the declaration." In this case, however, the executive board of the GIS condominium did not

act on behalf of the GIS master association to amend the GIS condominium declaration. Rather, as provided in § 34–36.1–2.20(d), the persons entitled to elect the executive board of the GIS master association did so when they unanimously approved the amendments in question. Most importantly, § 34–36.1–2.20(d) expressly provides that "[t]he rights and responsibilities of unit owners with respect to the unit owners' association set forth in § 34–36.1–3.03 * * * apply in the conduct of the affairs of the master association only to those persons who elect the board of a master association." Thus, § 34–36.1–3.03(b) (providing that the executive board may not act on behalf of the association to amend the declaration) was inapplicable to the unit owners of the plaintiff condominium associations because they were not entitled to elect the board of the GIS master association and the voting on the 1994 amendments to the GIS declaration occurred in connection with "the conduct of the affairs of the master association." Section 34–36.1–2.20(d).

26 The majority says that it is "puzzled" by this statement, indicating that "at no time have defendants ever asserted that they own the land underlying the master units in fee simple." Although this statement is correct, what the majority apparently does not understand is that the units themselves, apart from the land, constitute "real estate" under the act. The defendants own this real estate in "fee simple"—even though they do not assert, nor have they ever asserted, that they own the land underlying their GIS master units in fee simple. Rather, the land underlying these units is owned by the GIS condominium, but as a limited common element, it is reserved for IDC's exclusive use. In short, the land underlying the units and the units above the land are discrete portions of the real estate at these Goat Island condominiums. As such, they can be and have been separately owned "in fee simple" by different entities.

27 *See McConnell v. Wilson,* 543 A.2d 249, 250 (R.I.1988) (recognizing existence of air space units).

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870 A.2d 434
Supreme Court of Rhode Island.

AMERICA CONDOMINIUM ASSOCIATION, INC., et al.
v.
IDC, INC., et al.

No. 2001-469-Appeal.
|
April 8, 2005.

Synopsis
Background: Condominium associations brought action against condominium developer alleging that the voting procedure used to extend development rights on certain common property violated the Rhode Island Condominium Act. The Superior Court, Newport County, Melanie W. Thunberg, J., granted associations partial summary judgment. On cross-appeals, the Supreme Court, 844 A.2d 117, affirmed in part, reversed in part, and remanded.

Holdings: On grant of reargument, the Supreme Court, Suttell, J., held that:

[1] two parcels that lacked substantial completion were not validly created master units;

[2] airspace units were not exempt from substantial completion requirements under land-use only exception;

[3] land reserved for development was not validly created master unit;

[4] land and airspace of so-called master units were common elements; and

[5] title to land and airspace in which developer's development rights had lapsed was owned by unit owners in common ownership.

Affirmed.

West Headnotes (9)

[1] **Appeal and Error**
Reargument

The Supreme Court may at its discretion reexamine its own decision within a reasonable time after rendition.

Cases that cite this headnote

[2] **Appeal and Error**
Reargument

The purpose of reargument is to afford a petitioner an opportunity to point out matters presented in the briefs and relied upon in the original argument which he believes were overlooked or misapprehended by the appellate court in reviewing the case.

Cases that cite this headnote

[3] **Appeal and Error**
Reargument

The burden is on the petitioner for reargument to demonstrate error in the reviewing court's opinion.

Cases that cite this headnote

[4] **Common Interest Communities**
Nature and Status of Condominium Ownership

The Rhode Island Condominium Act, as a whole, contains a strong consumer protection flavor, because of a perceived need for additional consumer protection. Gen.Laws 1956,

§ 34-36.1-1.01.

6 Cases that cite this headnote

[5] **Common Interest Communities**
Special rights reserved to declarant or developer and successors
Common Interest Communities
Condominiums and cooperatives

Two parcels described in master condominium declaration as master units were common elements of condominium; developer failed to substantially complete master units of either parcel as required to create master units under the Rhode Island Condominium Act, and developer failed to exercise development rights in one parcel and failed to reserve development rights in the other parcel prior to development expiration date. Gen.Laws 1956, § 34-36.1-2.01.

12 Cases that cite this headnote

[6] **Common Interest Communities**
Creation, Modification, and Termination

Developer's purported airspace condominium units were not exempt from requirements for substantial completion under the Rhode Island Condominium Act, under the land-only unit exception, and thus, units were never validly created; developer failed to substantially complete all structural components and mechanical systems, and exception applied to uses such as campsites and parking spaces that did not require structural components and mechanical systems. Gen.Laws 1956, § 34-36.1-2.01.

2 Cases that cite this headnote

[7] **Common Interest Communities**
Special rights reserved to declarant or developer and successors

Developer failed to create a valid master condominium unit on parcel that was formerly reserved by creating airspace unit above the land while the land itself was termed a master limited common element; amendment to declaration creating such unit failed to comply with the substantial completion requirement under the Rhode Island Condominium Act or the amendment providing for land-only units. Gen.Laws 1956, § 34-36.1-2.01.

9 Cases that cite this headnote

[8] **Common Interest Communities**
Condominiums and cooperatives

Land and airspace above land on parcels in which developer attempted to create master condominium units were common elements; developer failed to create valid master units, and underlying land, although designated as master limited common elements appurtenant to master units, was simply common element in absence of master units. Gen.Laws 1956, § 34-36.1-2.01.

1 Cases that cite this headnote

[9] **Common Interest Communities**
Condominiums and cooperatives

Title to so-called master condominium units rested with unit owner in common ownership for creation of condominium; developer failed to create valid master units by not complying with substantial completion requirements of Rhode Island Condominium Act. Gen.Laws 1956, § 34-36.1-2.01.

10 Cases that cite this headnote

Attorneys and Law Firms

***435** Michael P. DeFanti, Providence, for Plaintiff.

Sandra A. Lanni, Warwick, Daniel Goldberg, for Defendant.

Present: WILLIAMS, C.J., GOLDBERG, FLAHERTY, and SUTTELL, JJ.

OPINION

SUTTELL, Justice.

This case came before the Supreme Court on defendants' petition for reargument of our opinion issued on March 23, 2004 in *America Condominium Association, Inc. v. IDC, Inc.,* 844 A.2d 117 (R.I.2004) (*America Condominium I*). By order entered on June 3, 2004, we granted reargument "in light of the importance of [the] title/ownership issue to the bar generally, as well as to the parties in this case." We further directed that reargument be "limited to the title/ownership issue raised in the petition and addressed by this Court in Section VI of the * * * [o]pinion---entitled 'Ownership of the Disputed Parcels'---and found at [844 A.2d at 131-33]." *America Condominium Association, Inc. v. IDC, Inc.,* No.2001-469-A (R.I., filed June 3, 2004) (mem.).

***436** After considering the oral submissions of the parties at reargument and examining their memoranda, we wish to clarify certain aspects of our earlier opinion. Nevertheless, we reaffirm our holdings in their entirety.

Standard of Review

[1] [2] [3] "The Supreme Court may at its discretion reexamine its own decision within a reasonable time after rendition." *Brimbau v. Ausdale Equipment Rental Corp.,* 120 R.I. 670, 671-72, 389 A.2d 1254, 1255 (1978) (citing *Sklaroff v. Stevens,* 84 R.I. 1, 9, 120 A.2d 694, 698 (1956)). "The purpose of reargument is to afford a petitioner an opportunity to point out matters presented in the briefs and relied upon in the original argument which he believes were overlooked or misapprehended by the appellate court in reviewing the case." *Id.* at 672, 389 A.2d at 1255. "The burden is on the petitioner to demonstrate error in the court's opinion." *Id.* We conclude that in this case defendants have not met that burden.

Discussion

A full recitation of the facts underlying this dispute is set forth in *America Condominium I,* 844 A.2d at 120-26, and need not be repeated here. Briefly stated, defendants are the successors in interest to Globe Manufacturing Co., the declarant of a condominium in Newport designated as "Goat Island South-A Waterfront Condominium." On March 3, 1988, the original declaration of condominium was amended by a document entitled, "FIRST AMENDED AND RESTATED DECLARATION OF CONDOMINIUM GOAT ISLAND SOUTH-A WATERFRONT CONDOMINIUM" (master declaration).

By the terms of the master declaration, the condominium consisted of six defined parcels: three of which contained existing residential buildings (designated as America Condominium, Capella Unit, and Harbor Houses Condominium), and three of which were undeveloped (herein referred to as the South, West, and North Units). The master declaration also purported to create master units, so-called, in five of the parcels. These "master units" were described as "the airspace above and all buildings and improvements now or hereafter located on the land * * * but excluding said land itself." The land underlying each "master unit" was designated as a master limited common element.

The master declaration also provided for "SPECIAL DECLARANT AND DEVELOPMENT RIGHTS." Specifically, it reserved to the declarant through December 31, 1994, the right to convert "the Capella Unit into a condominium containing not more than 89 Units"; the right "to construct improvements on [the West Unit] and submit [it] to a declaration of condominium, thereby creating a condominium containing not more than 8 units," or to convert the West Unit to a master common element; and the right "to withdraw the [North Unit] from the Goat Island South Condominium," the right to convert the North Unit to a master unit, and, if so converted to a master unit, "the right, through December 31, 1994, to construct improvements on the [North Unit] and submit the [North Unit] to a Declaration of Condominium, thereby creating a condominium containing not more than 315 units."

We also note that under the terms of the master declaration "the Declarant reserves the right to change the interior design and arrangement of all Master Units, to construct additional buildings and other improvements on

any Master Unit and/or to alter the boundaries between Master Units by subdivision of a Master Unit into one or more Master Units or by merger of two or ***437** more Master Units into one Master Unit * * *.”

Globe Manufacturing eventually transferred its interest in Goat Island South to IDC, Inc., which, in turn, transferred its interest to IDC Properties, Inc. on October 19, 1994. Both IDC and IDC Properties, together with their president, Thomas Roos, are defendants in the case now before us. The plaintiffs are the condominium associations of America Condominium, Capella South Condominium, and Harbor Houses Condominium.

On December 29, 1994, two days before the development rights expired, IDC Properties executed and recorded a “SIXTH AMENDMENT TO FIRST AMENDED AND RESTATED DECLARATION OF CONDOMINIUM” (sixth amendment), which, by its terms, exercised declarant’s development rights by “add[ing] to the Condominium” as a master unit the airspace over the land described as the North Unit.

[4] As we recognized in *America Condominium I,* the Rhode Island Condominium Act, G.L.1956 § 34-36.1-1.01 (Act), “as a whole contains a strong consumer protection flavor,” because of “a perceived need for additional consumer protection.” *America Condominium I,* 844 A.2d at 128 (quoting *One Pacific Towers Homeowners’ Association v. HAL Real Estate Investments, Inc.,* 148 Wash.2d 319, 61 P.3d 1094, 1100 (2002)). We also note the statute’s clear direction that “[e]xcept as expressly provided in this chapter, provisions of this chapter may not be varied by agreement, and rights conferred by this chapter may not be waived.” Section 34-36.1-1.04. The Commissioners’ Comments[1] explain with respect to this section that the Act seeks “to provide great flexibility in the creation of condominiums and, to that end, * * * permits the parties to vary many of its provisions.” Section 34-36.1-1.04, Commissioners’ Comment 1. “In many instances, however, provisions of the Act may not be varied, because of the need to protect purchasers, lenders, and declarants.” *Id.*

Development and Improvement Rights

The Rhode Island Condominium Act draws a distinction between “development rights” and the right to make improvements or alterations to a unit. *See* §§ 34-36.1-1.03(11) and 34-36.1-2.11.

> “ ‘Development rights’ means any right or combination of rights reserved by a declarant in the declaration to:
>
> (A) Add real estate to a condominium,
>
> (B) Create units, common elements, or limited common elements within a condominium,
>
> (C) Subdivide units or convert units into common elements, or
>
> (D) Withdraw real estate from a condominium.” Section 34-36.1-1.03(11).

As the Commissioners’ Comments explicate, development rights permit a declarant to retain a high degree of flexibility to respond to changing economic opportunities, or to meet the space requirements of prospective purchasers. For example, they allow a declarant to commit more land to the condominium in the event of success. On the other hand, they allow a declarant to withdraw real estate from the project and devote it to other uses should original expectations not be realized. Section ***438** 34-36.1-1.03, Commissioners’ Comment 8. Also, because they allow for the creation of units, common elements, or limited common elements, development rights permit the developer a certain degree of flexibility with respect to the division of the real estate included in the condominium. *Id.* To respond to customer needs, for example, a developer can change the number and size of units within the original condominium. *Id.* In the case before us, Globe Manufacturing, defendants’ predecessor in interest, clearly reserved development rights in the master declaration. These rights, however, expired on December 31, 1994.

Distinct from development rights is the right to make improvements or alterations to units. Section 34-36.1-2.11 provides:

> “Subject to the provisions of the declaration and other provisions of law, a unit owner:
>
> (1) May make any improvements or alterations to his or her unit that do not impair the structural integrity or mechanical systems or lessen the support of any portion of the condominium;
>
> (2) May not change the appearance of the common elements, or the exterior appearance of a unit or any other portion of the condominium, without permission of the association;
>
> (3) After acquiring an adjoining unit or an adjoining part of an adjoining unit, may remove or alter any intervening partition or create apertures therein, even if the partition in whole or in part is a common element, if

those acts do not impair the structural integrity or mechanical systems or lessen the support of any portion of the condominium. Removal of partitions or creation of apertures under this subdivision is not an alteration of boundaries."

Here, again, the Commissioners' Comments provide helpful guidance. As the comments point out, the drafters principally were contemplating improvements that would affect the inside of already completed units to allow unit owners the flexibility to make alterations according to their needs as long as the structural integrity, mechanical systems, and support of the condominium are not jeopardized. *See* § 34-36.1-2.11, Commissioners' Comments. This section emphasizes, however, that the scope and extent of these alterations are subject to the provisions of the condominium declaration. Section 34-36.1-2.11. They can, therefore, be varied by agreement.

One important distinction between development rights and the right to make improvements or alterations is that development rights are limited in time, *see* § 34-36.1-2.05(8), whereas improvement rights, subject to the provisions of the declaration, have no such temporal restraints. *See* § 34-36.1-2.11.

Units

The core concept underlying development rights and the right to make improvements or alterations is the unit. Improvement or alteration rights can be exercised only with respect to a unit. One important development right, on the other hand, is the right to create units within an existing condominium. The Rhode Island Condominium Act provides for very limited and specific ways of creating units in a condominium, and the statute does not indicate that this process may be changed by agreement. *See* § 34-36.1-1.04.

Because of this critical connection between development rights, the right to make improvements or alterations, and the concept of the unit, we now turn to the question of whether valid units were created by the master declaration or through ***439** IDC Properties' "exercise" of its development rights in 1994.

A condominium is created "by recording a declaration in the municipal land evidence records." Section 34-36.1-2.01. Among other things, the declaration must contain "[a] statement of the maximum number of units which the declarant reserves the right to create"; and "[a] description of the boundaries of each unit created by the declaration, including the unit's identifying number." Section 34-36.1-2.05(a)(4)(5). Section 34-36.1-2.09(a) provides further that "[p]lats and plans are part of the declaration." Moreover:

"To the extent not shown or projected on the plats, plans of the units must show or project:

(1) The location and dimensions of the vertical boundaries of each unit, and that unit's identifying number, provided, that if two (2) or more units have the same vertical boundaries one plan may be used for such units if so designated;

(2) Any horizontal unit boundaries, with reference to an established datum, and that unit's identifying number; and

(3) Any units in which the declarant has reserved the right to create additional units or common elements * * *, identified appropriately." Section 34-36.1-2.09(d).

Furthermore:

"A declaration or an amendment to a declaration adding units to a condominium, may not be recorded unless all structural components and mechanical systems of the building containing or comprising any units thereby created are substantially completed in accordance with the plans of that building, as evidenced by a certificate of completion executed by an independent registered engineer or architect which shall be recorded in the local land evidence records." Section 34-36.1-2.01(b).[2]

This was the state of the law in 1988, when defendants' predecessor in interest recorded the master declaration, which serves as the constituting document for this condominium project.

Our review of this document shows that the declarant purported to create five "Master Units" in the condominium. These are the "America Condominium" Unit, the "Capella Unit," "Development Unit # 1" ("West Unit"), the "Harbor Houses Condominium" Unit, and the "Individual Unit" ("South Unit").[3] In addition, the declarant reserved the right to exercise development rights with respect to the "Reserved Area" ("North Unit"), including the right to withdraw real estate, the right to convert the area to a "Master Unit," and the right to construct improvements on this unit, if it were created.

Only the South, West, and North Units are subject to the current dispute. Because of their different status at the time the condominium was created, we will discuss the South and West Units separately from the North Unit.

this Act would require any residence to be built before the lots could be treated as units."

South and West Units

[5] With respect to the South and West Units, the master declaration referred to these parcels as "Master Units." It further included as an exhibit a metes ***440** and bounds description of the parcels in question. Only with respect to the West Unit did the master declaration go into more detail about future development plans. The declarant reserved certain development rights with respect to this parcel, stating in the master declaration that "not more than 8 units" would be created therein. However, no structural components were located on either of the two parcels in 1988 that met the requirements for "substantial completion" that the Act cites as a prerequisite for recording a declaration of condominium.[4] Therefore, with respect to the South and West Units, the declarant failed to meet the conditions necessary to create units in the master declaration. Furthermore, at no time before the development rights expired on December 31, 1994, did IDC Properties or its predecessors attempt to exercise these rights with respect to the West Unit, nor did the declarant reserve any development rights in the South Unit. Therefore, because the South and West Units never were validly created units within the meaning of the Act, they were, and remain, common elements.

Airspace Units

[6] The defendants argue that Commissioners' Comment 11 to § 34-36.1-2.01 provides for the creation of units without the need to have substantially completed structures in place before a unit can be declared. Commissioners' Comment 11 to § 34-36.1-2.01 provides as follows:

> "The requirement of completion would be irrelevant in some types of condominiums, such as campsite condominiums or some subdivision condominiums where the units might consist of unimproved lots, and the airspace above them, within which each purchaser would be free to construct or not construct a residence. Any residence actually constructed would ordinarily become part of the 'unit' by the doctrine of fixtures, but nothing in

The defendants urge us to consider our decision in *McConnell v. Wilson,* 543 A.2d 249 (R.I.1988), in conjunction with Commissioners' Comment 11. In *McConnell* we were called upon to decide whether the town clerk of South Kingstown could be directed by writ of mandamus to record a condominium declaration for a parking lot condominium. *Id.* at 249. By implication we recognized in *McConnell* that the plaintiffs had created valid "airspace units" in the proposed parking lot. *Id.* at 250. The defendants now assert that, therefore, they should have been able to declare units in the undeveloped airspaces above the land referred to as the South and West Units.

We decline to follow defendants' broad interpretation of *McConnell* and Commissioners' Comment 11 to allow for the declaration ***441** of undeveloped units. The units in question in *McConnell* involved parking spaces. The example given in Commissioners' Comment 11 concerns campsite condominiums. Whether a parking space or a campsite area, generally no structures will be erected in these units because their purpose is to provide temporary space for automobiles or tents and recreational vehicles, respectively. Such units essentially are complete as undeveloped, airspace units. Thus, the requirement that all structural components and mechanical systems be substantially completed indeed would be irrelevant.

In addition, as P.L. 1982, ch. 329, § 3 makes clear, the statutory language prevails over the Commissioners' Comments. Therefore, we conclude that, except in limited circumstances and except as permitted after 1991 with respect to land-only units, units in a condominium can be created only if they meet the requirements for substantial completion.[5]

North Unit

[7] With respect to the North Unit, the situation presents itself somewhat differently. In the master declaration, the declarant did not attempt to create a unit on the parcel now referred to as the North Unit. Instead, it reserved development rights with respect to what then was called the Reserved Area. IDC Properties attempted to exercise these development rights on December 29, 1994, two days before they expired, by executing and recording the sixth amendment to the declaration of condominium. In this amendment, IDC Properties attempted to create a unit

in the airspace above the land described as the North Unit, while the land itself became a master limited common element. The amendment, however, complied with neither the substantial completion requirement of the Act in effect in 1988 nor the 1991 amendment providing for land-only units. Thus, IDC Properties ***442** again failed to establish a valid unit in the North Unit. Its development rights since have expired and, without a valid unit, it cannot exercise any rights to make improvements or alterations.

Current Status of the Property

Having established that IDC Properties and its predecessors failed to create units in the South, West, and North areas of the Goat Island South Condominium, we now review the current status of the property. Article 3.1 of the master declaration provides that the Condominium's "Master Common Elements consist of all portions of the Project [ ]other than the Master Units[ ]." In addition, the master common elements include "[t]he grounds * * * not within a Master Unit, and not designated as Master Limited Common Elements herein or on the Plats and Plans."

[8] When the declarant attempted to create master units in the South, West, and North areas, these units were intended only to comprise the airspace above the land defined in these parcels. The land underneath each master unit, on the other hand, was designated as master limited common elements "allocated to the exclusive use of such Master Unit." In addition, the master declaration says that the master limited common elements are "appurtenant to, associated with or reserved for each Master Unit." The master limited common elements are thus clearly subordinate to the master units that the declarant intended to create.

We conclude, therefore, that those portions of airspace in the South, West, and North parcels that defendants and their predecessors intended to be master units are common elements because no units were created therein. The land underlying these "units" likewise is part of the common elements. Because no units were validly created, no master limited common elements appurtenant to them could be created. Consequently, these portions of the condominium always were, and remain, common elements.[6]

A unit is not created simply by describing a parcel of real estate, whether or not it be airspace only, and designating it as a unit (or a master unit) in a declaration of condominium. There also must be compliance with the Act. To hold otherwise would negate the remedial purposes of its consumer protection provisions.

We perceive the Rhode Island Condominium Act to be a careful attempt by the Legislature to strike a balance between a declarant's need for flexibility in creating a condominium and the interests of each individual unit owner in the enjoyment of his or her particular parcel of real estate. To that end, a declarant is permitted to reserve certain rights for future development, yet the unit purchaser is secured by the knowledge of what such rights are and the prescribed time limit within which they must be exercised. To adopt defendants' reasoning would thwart these salutary purposes. A declarant, by simply ascribing the status of "unit" to an undeveloped parcel of real estate, without complying with the Act's requirement of substantial completion, thereby would claim unto itself the right in perpetuity to construct any type of "improvement" consistent with applicable land use laws. Such a construction ***443** of the Act runs counter to the concept of common ownership that is the fundamental principle of a condominium.[7] We do not believe that to be the intent of the Legislature, and we decline to so interpret the Act.

[9] With the benefit of hindsight, we reconsider our statement in *America Condominium I* that title to the disputed parcels vested in the individual unit owners upon expiration of the defendants' development rights. These master units, so-called, always were common elements, subject to the exercise of said development rights, and title rested with the unit owners in common ownership from the creation of the condominium.

For the reasons set forth herein, the relief sought in the defendants' petition for reargument is denied. The papers in this case are remanded to the Superior Court for proceedings in accordance with our opinion in *America Condominium I.*

Justice ROBINSON did not participate.

All Citations

870 A.2d 434

Footnotes

1 The official comments or Commissioners' Comments to the Uniform Condominium Act have been inserted following the corresponding sections of this chapter to provide "guidance as to the intent of the [L]egislature in adopting this chapter unless the statutory language shall clearly express otherwise in which case the statutory language shall prevail." Public Laws, 1982, ch. 329, § 3.

2 The Commissioners' Comments to this section underscore that the terms "structural components" and "mechanical systems," as well as "substantial completion," are terms of art that are well understood in the construction industry. *See* § 34-36.1-2.01, Commissioners' Comments 6 and 7.

3 We note that our earlier opinion mistakenly identified the "West Unit" as the former "Individual Unit" and the "South Unit" as the former "Development Unit # 1."

4 As § 34-36.1-2.01 Commissioners' Comment 9 explains:

> "The requirement of 'substantial completion' does not mean that the declarant must complete all buildings in which all possible units would be located before creating the condominium. If only some of the buildings in which units which may ultimately be located have been 'structurally' completed, the declarant may create a condominium in which he reserves particular development rights (Section [34-36.1-2.05(a)(8)]). In such a project, only the completed units might be treated as units from the outset, and the development rights would be reserved to create additional units, either by adding additional real estate and units to the condominium, by creating new units on common elements, or by subdividing units previously created. The optional units may never be completed or added to the condominium; however, this will not affect the integrity of the condominium as originally created."

5 In 1991, the Rhode Island Condominium Act was amended to provide for the creation of land-only units. Section 34-36.1-2.01(b)(c), as amended by P.L. 1991, ch. 369, § 2. The statute now provides:

"(b) * * * No provision of this chapter shall be construed as prohibiting the recording of a declaration or amendment to a declaration which creates a condominium containing land only units or adds land only units to an existing condominium.

"(c) A declaration or an amendment to a declaration creating land only units shall set forth restrictions on the development of such land only units which address at a minimum the following items:

(1) Floor area square footage,

(2) Lot coverage,

(3) Height,

(4) Set backs from unit boundaries,

(5) Use, and

(6) Architectural and design standards."

Land-only units are further defined as follows:

" 'Land only units' shall mean units designated as land only units on the plats and plans which units may be comprised entirely or partially of unimproved real property and the air space above the real property. The boundaries of a land only unit are to be described pursuant to § 34-36.1-2.05(a)(5). Land only units may, but need not, contain a physical structure. The declaration may provide for the conversion of land only units to other types of units and/or common elements provided the conversion shall be effective only upon the recording of an amendment to the declaration which amendment will include new plats and plans identifying any portion of the land only unit converted to another type of unit and/or common element." Section 34-36.1-1.03(17).

If this new section allowing for land-only units applied to IDC Properties at the time it exercised its development rights for the North Unit in 1994, it would have provided defendants with a novel opportunity to create units without having commenced the construction of any buildings. The requirements set out by the statute, however, are quite strict and require detailed planning on behalf of the developer before any unit can be declared as a land-only unit.

6 Commissioners' Comment 2 to § 34-36.1-3.07 explains:

> "Under Section [34-36.1-2.10], a declarant may reserve the right to create units in portions of the condominium originally designated as common elements. Prior to creation of the units, title to those portions of the condominium is in the unit owners. However, under Section [34-36.1-3.07(b)], the developer is obligated to pay all of the expenses of (including real estate taxes properly apportionable to) that real estate."

7 Commissioners' Comment 5 to § 34-36.1-1.03 provides:

> "Definition (7), 'condominium,' makes clear that, unless the ownership interest in the common elements is vested in the owners of the units, the project is not a condominium. Thus, for example, if the common elements were owned by an association in which each unit owner was a member, the project would not be a condominium. Similarly, if a declarant sold units in a building but retained title to the common areas, granting easements over them to unit owners, no condominium would have been created. Such projects have many of the attributes of condominiums, but they are not covered by this Act."

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Massachusetts Land Court.
Department of the Trial Court.

Brian CRAPSER, Elizabeth Zuckiewicz, Phillip A. Sterner, Herbert A. Bacon, and John W. Corcoran, as they are Trustees of the Riverbend at Bondsville Condominium Trust, Plaintiffs,
v.
BONDSVILLE PARTNERS, INC., and Wilfred L. Lemieux, John Vartanian and Julien Gaudreau, Defendants,
v.
Bank of Western Massachusetts, Intervenor-Defendant.

No. 300634.
|
Aug. 4, 2006.

DECISION

ALEXANDER H. SANDS, III, Justice.

***1** Plaintiffs filed their verified Complaint for Declaratory Judgment pursuant to G.L. c. 231A, on July 20, 2004, seeking (Count I) a declaration that Defendants' phasing and development rights, as developers, in a condominium titled the Riverbend at Bondsville (the "Condominium") located on 6.33 acres of land in Palmer, MA (the "Property"), had expired, and (Count II) damages for Defendants' breach of their fiduciary duty to the condominium owners.[1] The parties filed a Stipulation and Order dated July 22, 2004 (the "Stipulation"), whereby Defendants were restrained from accessing the Condominium pending a hearing on Plaintiffs' Motion for Preliminary Injunction. On September 3, 2004, Defendants Bondsville Partners, Inc. ("BPI") and Wilfred L. Lemieux ("Lemieux")(together, "Bondsville") filed their Answer and Counterclaims, seeking (Count I) judgment pursuant to G.L. c. 237, § 16 for valuation for buildings and improvements which they made in the Condominium, (Count II) a monetary award for unjust enrichment, and (Count III) declaratory judgment relative to a lien for $254,147 placed by Plaintiffs on Unit 22 in the Condominium owned by Lemieux.[2] On the same day, Bondsville filed a Motion to Dismiss Count II of the Complaint pursuant to Mass. R. Civ. P. 12(b)(1), together with supporting memorandum. On September 9, 2004, Plaintiffs' Motion for Approval and Endorsement of Memorandum of Lis Pendens was heard and allowed, and Plaintiffs' Motion for Preliminary Injunction was heard and taken under advisement.[3] The Motion for Preliminary Injunction was denied on September 17, 2004.[4] The Bank of Western Massachusetts ("Intervenor") filed a Motion to Intervene and a Complaint for Intervention on September 9, 2004, which was heard and allowed by consent of the parties on September 30, 2004. On September 22, 2004, Defendants John Vartanian ("Vartanian") and Julien Gaudreau ("Gaudreau") were defaulted pursuant to Mass. R. Civ. P. 55(a). On October 15, 2004, Plaintiffs filed a Motion to Dismiss Count I of Bondsville's Counterclaims, together with supporting memorandum. Plaintiffs filed an Answer to Intervenor's Complaint on February 25, 2005, together with Counterclaim and Crossclaim for declaratory judgment and to quiet title. On March 1, 2005, Bondsville filed an Answer to Plaintiffs' Counterclaim and Crossclaim. Intervenor filed an Answer to Plaintiffs' Counterclaim on March 14, 2005.

On June 30, 2005, Plaintiffs filed their Motion for Partial Summary Judgment relative to Count I of the Complaint and Count II of the Counterclaim, together with supporting memorandum. Bondsville filed its Opposition on July 29, 2005, and on August 5, 2005, Plaintiffs filed their Reply. A hearing was held on Plaintiffs' Motion for Partial Summary Judgment on August 10, 2005, and the motion was taken under advisement.[5] On that day, Plaintiffs filed Affidavit of Counsel containing the deposition transcript of Lemieux.

The following facts are not in dispute:

***2** 1. Plaintiffs are unit owners of the Condominium and were elected Trustees of the Riverbend at Bondsville Condominium Trust (the "Condominium Trust"), on May 28, 2004.[6]

2. The Condominium was created by Master Deed dated March 10, 1989 (the "Master Deed"). BPI was the Declarant of the Condominium (the "Declarant"). Lemieux, Vartanian and Gaudreau were officers, directors and shareholders of BPI, and were Trustees of the Condominium Trust until May 28, 2004. Pursuant to the Master Deed, the Property was submitted to condominium status.

3. Pursuant to Paragraph 5 of the Master Deed, the

Condominium could be developed in six phases containing a maximum of eighty-four units, such phases to be completed by March 10, 1994. Pursuant to Paragraph 13 of the Master Deed, the common areas and facilities of the Condominium consisted of, among other things, the Property (exclusive of the condominium units).

4. Phase 1 of the Condominium was created by the Master Deed and included three buildings and eighteen units.

5. On April 17, 1990, the Declarant recorded a phasing amendment to the Master Deed adding Phase 2 of the Condominium, which consisted of three buildings and eighteen units.

6. On February 22, 1994, the Declarant executed and recorded a Second Amendment to the Master Deed which extended the Declarant's development and phasing rights five years to March 10, 1999.[7]

7. BPI had financial difficulties between 1994 and 1999.

8. On August 23, 1999, the Trustees of the Condominium Trust (Lemieux, Vartanian and Gaudreau) executed a document titled "Master Deed Amendment Reviving Development Rights," which extended the development rights an additional five years to March 10, 2004. On the same day, the Trustees assigned the development rights to the Declarant.[8]

9. Between January 3, 2001 and March 5, 2003, the Declarant added Phases III through VI to the Condominium, consisting of thirty townhouse style condominium units.[9] This increased the total number of units in the Condominium to sixty-six. All of these units have been sold by the Declarant to third parties.

10. On September 16, 2002, the Declarant, in connection with the development of units in Phases VI and VII, gave a Mortgage, Promissory Note and Security Agreement to Intervenor covering all common areas of the Condominium.

11. On August 29, 2003, the Town of Palmer granted Bondsville a building permit for Phase VII. By March 10, 2004, the Declarant had completed approximately 50% of Phase VII of the Condominium, which included six units.[10] Subsequent to March 10, 2004, neither Plaintiffs nor any other unit owners objected to the ongoing construction of Phase VII.

12. Plaintiffs commenced this action in Land Court on July 20, 2004. As of that date, approximately $450,000 had been spent by the Declarant on construction of Phase VII, and an additional $150,000 had been spent on materials needed to complete the units.

13. Plaintiffs commenced an action in Hampden Superior Court on August 26, 2004, seeking to establish a lien in the amount of $254,147 against Unit 22 in the Condominium which was owned by Lemieux. The lien was for all unpaid common charges for all units in the Condominium.

***3** All issues before this court on summary judgment relate to the validity of Phase VII of the Condominium under the Master Deed. Plaintiffs argue that Phase VII was not timely executed and recorded by BPI under the terms of the Master Deed, and therefore, such phase is a part of the common areas of the Condominium, owned by all unit owners. Plaintiffs also argue that they do not owe BPI any money damages for the value of Phase VII. Finally, Plaintiffs argue that the Mortgage to the Intervenor is not valid.[11] Bondsville argues that Phase VII is valid under the Master Deed; that even if Phase VII is not valid Plaintiffs have waived the right to enforce the timeliness of such phase; that BPI is entitled to reform the Master Deed to include Phase VII because of mutual mistake; and that BPI is entitled to the value of all improvements constructed in Phase VII based on unjust enrichment. Bondsville also argues that there are material factual issues in dispute as to all matters which precludes summary judgment. I shall address each of these issues.

Validity of Phase VII under the Master Deed.

Plaintiffs assert that BPI submitted the Property to condominium status on March 10, 1989, subject to the Master Deed and G.L. c. 183A. Plaintiffs argue that pursuant to the express terms of Paragraphs 5 and 15(c)(5) of the Master Deed, all of the Property, except completed and properly recorded units as of March 10, 2004 (i .e., Phases 1-6), are common areas, that Phase VII was never properly completed or recorded, and that all condominium owners own the common areas (including Phase VII) as tenants in common, based on their percentage interests in the condominium. Bondsville argues to the contrary that Phase VII is valid under the provisions of Paragraphs 15(a) and 15(c) of the Master Deed. Under Paragraph 15(a), Bondsville states that BPI's original right to amend the Master Deed expired on March 10, 1994, but that the Master Deed was properly amended on February 22, 1994, to extend the amendment right for another five years until March 10, 1999, and was properly amended on August 23, 1999, to extend the right to amend until March 10, 2004.

There is no dispute that the Condominium is a phased

development. The dispute, however, is over the implementation of the development rights. The Paragraphs of the Master Deed at issue between the parties are as follows. Paragraph 15, titled "Amendment of Master Deed," subparagraph (a) of the Master Deed, provides that

> [u]ntil the first to occur of: (1) four (4) months after seventy-five (75%) percent of the possible units have been conveyed by the Declarant to Unit Owners; (2) the Declarant waives the amendment right herein reserved by a recorded instrument; or (3) five (5) years from the date of the recording of this Master Deed, the Master Deed may be amended only by the Declarant. Thereafter this Master Deed may be amended, subject to the restrictions of Chapter 183A of the General Laws of Massachusetts, and except as provided otherwise in this instrument or the By-laws of the Association, by a vote of at least 67% in the interest of the unit owners and written consent of the holders of at least 51% of the first mortgagees on mortgaged Units.[12]

***4** Paragraph 15(c) of the Master Deed provides as follows:

> Notwithstanding the foregoing, Declarant, or its assigns or its successors in title to all or any portion of the Condominium may, at any time, without the consent of any unit owner, or any mortgagee, unilaterally amend this Master Deed so as to submit to the provisions of Chapter 183A of the Massachusetts General Laws all or any combination of Units not to exceed 66 in number....

Paragraph 15(c)(5) of the Master Deed provides as follows:

> In the event that the Declarant, its successors and assigns shall not include any or shall include some but not all of the Additions subsequent to Phase 1 in the Condominium by a date five (5) years from the date of recording of this Master Deed, then the right reserved in this Paragraph shall terminate and be of no effect with respect to any Addition no [sic] so included. Any area which has been reserved for future Additions shall thereupon become part of the Common Elements of this Condominium already completed.

For purpose of Plaintiffs' Motion for Partial Summary Judgment, the parties agree that the phasing rights were extended to March 10, 2004.[13] The parties divergent view arises because BPI did not extend the amendment rights beyond March 10, 2004, and Phase VII had not been completed as of that date. Bondsville argues that as of March 10, 2004, the building permit for Phase VII had been issued and Phase VII was more than 50% completed, and thus Phase VII was a part of the Condominium. The provisions of G.L. c. 183A, § 5(b)(2)(iii), grant the organization of unit owners the right to add additional units to a condominium, provided that such addition is authorized by the master deed. The provisions of G.L. c. 183A, § 8(f) provide that a recorded master deed requires a set of the as-built floor plans of the building. Even though the Master Deed had authorized the addition of Phase VII, as of March 10, 2004, Phase VII was only approximately 50% completed and the Master Deed had not been amended with an as-built set of floor plans for Phase VII.[14] In fact, as of today there are no as-built floor plans because Phase VII has not yet been completed. As a result, the provisions of Paragraph 15(a) of the Master Deed did not authorize Phase VII.

Bondsville also argues that Paragraph 15(c) of the Master Deed allows it to amend the Master Deed to include Phase VII. That Paragraph authorized BPI at any time to unilaterally amend the Master Deed to include up to sixty-six units. As of March 10, 2004, however, there already existed sixty-six units without the addition of Phase VII. Phase VII authorized the construction of units 67-72.[15] As a result, the provisions of Paragraph 15(c) do not authorize Phase VII.

Additionally, Bondsville argues that, notwithstanding the foregoing, there are other provisions of the Master Deed which protect Phase VII. Such arguments are not persuasive. Bondsville references Paragraphs 15(c)(7)[16] and 15(e),[17] but such paragraphs authorize changes of a technical nature, not substantive changes related to additional phases of a condominium.

***5** Finally, Bondsville argues that the meaning of the Master Deed is uncertain and equivocal and should be

interpreted to support the intent of the Declarant, and that BPI intended that the Master Deed be amended in order to vest its development rights in Phase VII. Bondsville contends that the intent of BPI is to be determined at trial. The intent of a declarant, however, is to be gleaned first from the terms of the Master Deed interpreted in light of the factual circumstances at the time of the execution of the Master Deed. *See Queler v. Skowron,* 438 Mass. 304, 311, 780 N.E.2d 71 (2002); *Commercial Wharf East Condo. Ass'n v. Waterfront Parking Corp.,* 407 Mass. 123, 131, 552 N.E.2d 66 (1990); *The Tudor Press, Inc. v. Univ. Distrib. Co.,* 292 Mass. 339, 341, 198 N.E. 244 (1935). Where such terms are not ambiguous, as is the case at bar, no further inquiry shall be made. *See Seaco Ins. Co. v. Barbosa,* 435 Mass. 772, 779, 761 N.E.2d 946 (2002). Bondsville did not present any facts that bear on the interpretation of the Master Deed, much less disputed facts, for determination at trial. As a result of the foregoing, I find Phase VII is not authorized by the Master Deed. Phase VII is therefore common area. As such, the mortgage granted by BPI to Intervenor on Phase VII is invalid.

Waiver.

Bondsville also argues that Plaintiffs waived their right to enforce the termination of phasing rights as of March 10, 2004, as specified in the Master Deed, because they took no action to stop the development of Phase VII. Bondsville contends that summary judgment is not appropriate because waiver is a question of fact for trial. Plaintiffs argue that Bondsville has not raised a material factual issue regarding its defense of waiver and that summary judgment in favor of Plaintiffs is appropriate.

Waiver is an intentional relinquishment of a known right. *Roseman v. Day,* 345 Mass. 93, 185 N.E.2d 650 (1962). "A waiver may be manifested by either words or acts," *Boyden v. Hill,* 198 Mass. 477, 484, 85 N.E. 413 (1908), "and may arise out of inferences from all attendant facts as well as from more express manifestations of purpose," *Suburban Land Co., Inc. v. Brown,* 237 Mass. 166, 168, 129 N.E. 291 (1921). *See Owen v. Kessler,* 56 Mass.App.Ct. 466, 470, 778 N.E.2d 953 (2000). Such words or acts must be assessed objectively and show a "clear, decisive, and *unequivocal* " waiver. *Dunkin Donuts, Inc. v. Panagakos,* 5 F.Supp.2d 57, 60 (D.Mass.1998) ("Massachusetts standard for waiver is an uncompromising one."); *Prozinski v. Northeast Real Estate Services, LLC,* 59 Mass.App.Ct. 599, 608, 797 N.E.2d 415 (2003). *See also Grubb & Ellis Co. v. Bello,* 19 Cal.App.4th 231, 1993 Cal.App. LEXIS 1002, *4, 1993 WL 390023 (1993) ("Waiver must be proven by clear and convincing evidence that does not leave the matter to speculation, and doubtful cases should be decided against waiver."). Bondsville carries the burden of proving waiver. *See Dunkin Donuts, Inc.,* 5 F.Supp.2d at 61.

Bondsville asserts that it has submitted affidavit evidence in support of its waiver defense and that Plaintiffs have not submitted contravening evidence. None of the facts presented by Bondsville, however, indicate that Plaintiffs intended to relinquish any right. Construction by Bondsville from August of 2003 to March 10, 2004, was in pursuance of a possible valid creation of Phase VII. Even though Plaintiffs knew of the construction continuing after such date, there is nothing to indicate that Plaintiffs acquiesced in the construction. They knew that BPI had created the phasing language in the Master Deed and were bound by it. It would be unreasonable to assume that Bondsville could rely on a document BPI had created and which was unambiguous as a basis for arguing Plaintiffs had waived their right to object to Phase VII. In addition, Plaintiffs did not become Trustees of the Condominium Trust with authority to act until May 28, 2004. They brought this action within two months after becoming Trustees. Since Plaintiffs do not dispute Bondsville's evidence on waiver, summary judgment is appropriate.[18] *See McCarthy v. Tobin,* 429 Mass. 84, 88-89 & n. 5, 706 N.E.2d 629 (1999) ("The issue of waiver is ordinarily one for the fact finder. If the facts are undisputed, however, waiver is a question of law."); *Weston Forest and Trail Ass'n v. Fishman,* Misc. Case No. 301928, 13 LCR 285 (Land Ct., June 3, 2005) (Lombardi, J.).

***6** As a result, I find that Plaintiffs did not waive their right to enforce the Master Deed.

Mutual Mistake.

Bondsville argues that BPI is entitled to reform the Master Deed because of mutual mistake. "It is well established that legal instruments, including deeds, may be reformed on the ground of mutual mistake." *Lhu v. Dignoti,* 431 Mass. 292, 294, 727 N.E.2d 73 (2000). *Ritson v. Atlas Assurance Co., Ltd.,* 279 Mass. 385, 390, 181 N.E. 393 (1932); Restatement (Second) of Contracts § 155 (1981). The doctrine of mutual mistake requires a mistake of fact shared by both parties which is related to an essential element of the agreement. *See Ritson,* 279 Mass. at 390, 181 N.E. 393; *Davis v. Dawson, Inc.,* 15 F.Supp.2d 64 (1997).

BPI, however, is the entity that created the Master Deed. Even though Plaintiffs are bound by the Master Deed, they had no part in the drafting of the document, nor are

they signatories to the Master Deed, and as a result there can be no mutual mistake. In addition, as discussed, *supra,* there is no ambiguity in the interpretation of the phasing rights specified in the Master Deed. Bondsville also presents no mistaken fact related to the phasing rights in which to apply the doctrine of mutual mistake. As a result, Plaintiffs, in enforcing the Master Deed, are not relying on a mistake and are not intending, as Bondsville states, "to reap the harvest of a bargain [it] never intended to make."

Bondsville cites several cases to support its position that the Master Deed should be reformed, see *Mickelson v. Barnet,* 390 Mass. 786, 460 N.E.2d 566 (1984); *Franz v. Franz,* 308 Mass. 262, 32 N.E.2d 205 (1940); *Anderson v. Monaghan,* 7 LCR 224 (1999) and *Galiher v. Johnson,* 1 LCR 18 (1993). These cases, however, do not present facts similar to those in the case at bar.

As a result, I find that there is no mutual mistake relative to Phase VII.

Unjust enrichment.

Count II of Bondsville's Counterclaim contends that in the event that Phase VII is found to be invalid, Plaintiffs owe it quantum meruit recovery for the improvements it has put into Phase VII based on the principle of unjust enrichment and theories of quasi-contract or implied-in-law contract. Plaintiffs argue that summary judgment should be granted in their favor because quantum meruit is not appropriate where they never requested the work on Phase VII, the Master Deed made it clear that the phasing rights had expired, BPI drafted the Master Deed, and BPI operated at its own risk in doing the work.

Since Bondsville has raised this issue in its counterclaim, it has the burden of proof to show unjust enrichment.[19] Plaintiffs point out that Massachusetts courts treat unjust enrichment, quantum meruit, quasi contract and implied contract in a similar fashion. *See JML Care Center, Inc. v. Bishop,* 2004 Mass.App. Div. LEXIS 20, *8 n. 4, 2004 WL 692164 (2004), *aff'd,* 64 Mass.App.Ct. 1104 (2005), *further appellate review denied,* 445 Mass. 1104 (2005) (citing *Bolen v. Paragon Plastics, Inc.,* 747 F.Supp. 103, 107 (D.Mass.1999)); *Mass Cash Register, Inc. v. Comtrex Sys. Corp.,* 901 F.Supp. 404,422-24 (1995). The theory of unjust enrichment provides that "[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other." *Salamon v. Terra,* 394 Mass. 857, 859, 477 N.E.2d 1029 (1985) (quoting Restatement of Restitution § 1 (1937)).[20] "Even where a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it." Restatement of Restitution § 1 cmt. c. *See Keller v. O'Brien,* 425 Mass. 774, 778, 683 N.E.2d 1026 (1997). In Massachusetts there is no requirement for a showing of wrongdoing, only that the retention of the benefit is unjust. *See Brandt v. Wand Partners,* 242 F.3d 6, 16 (1st Cir.2001), and cases cited. Whether the retention is unjust is "a quality that turns on the reasonable expectations of the parties." *The Cmty. Builders, Inc. v. Indian Motorcycle Assoc., Inc.,* 44 Mass.App.Ct. 537, 560, 692 N.E.2d 964 (1998).

***7** The evidence in the summary judgment record does not establish whether Bondsville has conferred a benefit to Plaintiffs. Plaintiffs argue that they never requested that Phase VII be built, but there is no sworn evidence as to their intent for the portion of Phase VII that BPI completed. Plaintiffs do not specify in their Verified Complaint the type of relief they are looking for concerning the status of Phase VII other than this court's declaration that BPI has no property interest of development rights in Phase VII. If Plaintiffs do not want Phase VII developed, and request its removal, there would be no benefit. If Plaintiffs wish to complete Phase VII, then the value of the services and materials BPI provided in Phase VII could, but would not necessarily, be a benefit to Plaintiffs.[21] Nonetheless, assuming that Phase VII, as developed by BPI, is a benefit to Plaintiffs, Plaintiffs may be entitled to summary judgment if they demonstrate that there are no material facts at issue and as a matter of law their retention of such benefit is not unjust. Under Massachusetts law, I must evaluate the expectation of the parties to determine whether the retention is unjust. As discussed, *supra,* the Master Deed is clear that BPI's phasing rights had expired before Phase VII was complete. Plaintiffs were not initial parties to the drafting of the Master Deed and were not in control of the Condominium Trust for this phase of development of the Condominium. Lemieux's statements of what he intended the condominium documents to say are irrelevant for interpreting the Master Deed. It is clear from the Master Deed that BPI as the Declarant was to develop the Condominium and sell the individual condominium units. The language in the Master Deed does not indicate that the Condominium Trust would be financially responsible for development of any phases of the Condominium. There is no other conduct of the parties that would indicate that Plaintiffs would pay for the portion of Phase VII completed by BPI. Therefore, neither Plaintiffs nor BPI had any reasonable expectation that Plaintiffs would pay BPI for its costs for development of Phase VII.[22]

Bondsville argues that the theories of quantum meruit,

unjust enrichment, quasi contract and implied contract present issues of fact requiring a trial, and the determination of the reasonable expectation of the parties and all equitable and moral considerations in the case at bar are rife with factual issues. Bondsville also states that Plaintiffs' arguments for summary judgment are not supported by affidavit evidence, especially on the issue of the benefit of Phase VII to Plaintiffs. As with the defense of waiver, Bondsville argues that it should be entitled to complete discovery before summary judgment is ruled on. Although Bondsville is correct that the nature of its theory of recovery in Count II of its Counterclaim is factual and often requires a trial, if there is no dispute of facts summary judgment may be appropriate. Such is the case here. Bondsville has not alleged specific facts establishing a genuine issue of material fact to necessitate a trial. *See Pederson v. Time, Inc.,* 404 Mass. 14, 16-17, 532 N.E.2d 1211 (1989). As for Plaintiffs' submission of evidence, I shall assume a benefit to Plaintiffs. However, notwithstanding the fact that Plaintiffs brought the motion for summary judgment and as a result all inferences must be drawn against them, it is clear that the expectations of the parties are amply shown through the Master Deed.

***8** As a result, I find that Plaintiffs have not been unjustly enriched by BPI's development of Phase VII.

Accordingly, I ALLOW Plaintiffs' Motion for Partial Summary Judgment relative to Count I of the Complaint and Count II of the Counterclaim.

Motions to Dismiss.

Under rule 12(b)(1) or (6), the judge accepts "the factual allegations in the [plaintiff's] complaint, as well as any favorable inferences reasonably drawn from them, as true." *Ginther v. Comm'r of Ins.,* 427 Mass. 319, 322, 693 N.E.2d 153 (1998) (citing *Nader v. Citron,* 372 Mass. 96, 98, 360 N.E.2d 870 (1977)). "Under rule 12(b)(1), the judge may consider affidavits and other matters outside the facts of the complaint that are used to support the movant's claim that the court lacks subject matter jurisdiction." *Ginther,* 427 Mass. at 322 n. 6, 693 N.E.2d 153. A determination that this court has subject matter jurisdiction goes to the power of this court to hear and decide the case at bar. A complaint may be dismissed for failure to state a claim upon which relief can be granted pursuant to Mass. R. Civ. P. 12(b)(6) only if " 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Nader,* 372 Mass. at 98, 360 N.E.2d 870 (quoting *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)).

A. *Plaintiffs' Motion to Dismiss Count I of the Counterclaim.*

Plaintiffs seek to have Count I of Bondsville's Counterclaim dismissed under 12(b)(6) for failure to state a claim upon which relief can be granted. Plaintiffs argue that Count I, which seeks compensation for Bondsville's improvements (Phase VII) to the Property under G.L. c. 237, § 16, cannot be sustained because Plaintiffs are not seeking recovery of a freehold estate as is required by G.L. c. 237, § 1, nor do they cite G.L. c. 237. At the summary judgment hearing Bondsville stated that they do not oppose Plaintiffs' motion to dismiss.

Pursuant to G.L. c. 237, § 1, "[a]ll estates of freehold in fee simple, fee tail or for life may be recovered in a civil action." Section 16 provides that

> [i]f the land demanded has been actually held and possessed by the defendant and by those under whom he claims for six years next before the commencement of the action, he shall, if judgment is against him, be entitled to compensation as hereinafter provided for the value of any value of any buildings or improvements made or erected on the land by him or by any person under whom he claims.

Count I of Bondsville's Counterclaim states that Count I of Plaintiffs' Complaint seeking declaratory judgment "should be treated as a writ of entry [to recover possession of a freehold estate] under G.L. c. 237, § 1." As such, Bondsville argues in their brief, they should be entitled to the value of Phase VII as an improvement under G.L. c. 237, § 16. A review of Plaintiffs' Complaint indicates that Count I was not brought under G.L. c. 237, § 1. Moreover, as discussed *supra,* at oral argument Bondsville stated that they do not oppose the motion.

***9** As a result, I GRANT Plaintiffs' Motion to Dismiss Count I of Bondsville's Counterclaim, and such count is hereby dismissed.

B. *Bondsville's Motion to Dismiss Count II of Plaintiffs' Complaint.*

Bondsville seeks to have Count II of Plaintiffs' Complaint dismissed under Mass. R. Civ. P. 12(b)(1) for lack of this court's subject matter jurisdiction to hear such claim.

Plaintiffs contend that their claim in Count II for BPI's breach of fiduciary duty is corollary to their claim for declaratory judgment in Count I concerning the validity of Phase VII. Plaintiffs argue that the alleged breach of fiduciary duty by BPI involves interpretation of the Master Deed and the Condominium Trust, and as such, Count II is within this court's equitable jurisdiction under G.L. c. 185, § 1(k). Plaintiffs also argue that this court should hear Count II for reasons of judicial economy.

A claim for breach of fiduciary duty is a tort. *Latucca v. Rodsham,* 442 Mass. 205, 210, 812 N.E.2d 877 (2004). The elements needed to show breach of fiduciary duty are: (1) the existence of a fiduciary duty; (2) breach; (3) damage; and (4) causation. *See e.g., Hanover Ins. Co. v. Sutton,* 46 Mass.App.Ct. 153, 164, 705 N.E.2d 279 (1999). Restatement (Second) Torts § 874 (1979). This court does not have jurisdiction to hear tort claims under G.L. c. 185, § 1.[23] Plaintiffs' contention that their claim of BPI's breach of fiduciary duty is corollary to their claim for declaratory judgment relating to the phasing rights in the Master Deed, does not recognize the elements of such tort. It is likely that facts and circumstances, which are beyond the legal determination of the interpretation and meaning of the terms of the Master Deed, are needed for a ruling of whether BPI breached a fiduciary duty to Plaintiffs. My determination as to the non-validity of Phase VII is not dispositive of whether there was a breach of some fiduciary relationship between BPI and Plaintiffs. Furthermore, damages are an essential element of breach of fiduciary duty. This is unlike the situation where the Land Court determines damages for trespass after ruling on the litigants' interest in real estate. Damages are not essential for the tort of trespass, *see Old Colony Donuts, Inc. v. American Broadcasting Cos. .,* 368 F.Supp. 785, 789 (D.Mass.1974) (citations omitted), and the title issue is dispositive of the trespass claim, *see Kass v. Cooley Dickinson Hosp., Inc.,* Misc. Case No. 290176 (Land Ct., June 8, 2006) (Sands, J.); *Lin v. Cahaly,* Misc. Case No. 307493, 13 LCR 435 (Land Ct., August 5, 2005) (Piper, J.); *Northwest Bank Minnesota, N.A. v. McKinnon,* Misc. Case No. 277955, 12 LCR 75 (Land Ct., March 3, 2004) (Piper, J.); *Medeiros v. Century House of Peabody, Inc.,* Misc. Case No. 130130, 2 LCR 40 (Land Ct., February 8, 1995) (Cauchon, J.). *See also Essex Co. v. Goldman,* 357 Mass. 427, 258 N.E.2d 526 (1970) (seeking declaratory judgment that rent is due under a covenant running with the land); *Commercial Wharf East Condo. Ass'n v. Waterfront Parking Corp.,* 412 Mass. 309, 315-16, 588 N.E.2d 675 (1997) (upholding the Land Court's determination of damages after a claim that a developer had invalidly retained parking rights under condominium documents). Plaintiffs could seek, under Land Court jurisdiction, damages related to a claim of trespass for the construction of Phase VII or injunctive relief related to their claim for declaratory judgment. Such requests would be ancillary to my determination of the parties rights in the Property.

***10** Plaintiffs' contention that their breach of fiduciary duty falls within the Land Court's equity jurisdiction under G.L. c. 185, § 1(k) is taking an overly broad view of that section. The question of the extent and nature of the fiduciary relationship between Plaintiffs and BPI and whether there was a breach of that duty is not an equitable matter involving a right, title or interest in land. Moreover, Count II of the Complaint alleges BPI's breach of fiduciary duty for the period 1989 to May, 2004. Count I is focused only on a legal interpretation of paragraphs of the Master Deed as it relates to Phase VII. My decision relative to the summary judgment motion held that Phase VII is invalid under the Master Deed and thus, I have determined the respective parties' real property interest in the Property. Whether BPI's construction of Phase VII and their exercise of control of the Condominium Trust for a number of years prior to 2004 was a breach of a fiduciary relationship is a different factual and legal question.[24]

Finally, Plaintiffs' view that judicial economy would be served by this court hearing their claim for breach of fiduciary duty is not a ground for subject matter jurisdiction. Further, Plaintiffs' arguments are not compelling. The parties have not moved for summary judgment on Count II, therefore, the record in not complete on that issue. A subsequent proceeding, likely a trial, to resolve the factual and legal determinations concerning the alleged breach of fiduciary duty would be bound by my ruling *supra. See Lunn & Sweet Co. v. Wolfman,* 268 Mass. 345, 349, 167 N.E. 641 (1929) (stare decisis); *Brockton Savings Bank v. Shapiro,* 324 Mass. 678, 684-85, 88 N.E.2d 344 (1949) (same); *Bagley v. Moxley,* 407 Mass. 633, 636-637, 555 N.E.2d 229 (1990) (issue preclusion). Where this court has not heard all the facts related to the claim of a breach of fiduciary duty, no great risk to judicial economy is presented by the application of my ruling by another judge with competent jurisdiction over such claim.

As a result of the forgoing, I find that this court does not have subject matter jurisdiction over Count II of Plaintiffs' Complaint. Bondsville's Motion to Dismiss Count II of Plaintiffs' Complaint is GRANTED and therefore, Count II of Plaintiffs' Complaint is hereby dismissed.

C. *Count III of Counterclaim.*

Even though neither party has addressed this count in any of their dispositive motions, I shall address it. Plaintiffs have brought an action in Hampden Superior Court on August 26, 2004, on the issue of a lien on Lemieux's condominium unit. This action was filed prior to Bondsville's counterclaim filed on September 3, 2004, and is currently pending in that court, subject to an appeal of that court's denial of defendant's special motion to dismiss defendant's counterclaims. As a result, I dismiss Count III of the Counterclaim because the Hampden Superior Court has jurisdiction over this matter.

Judgment to issue accordingly.

All Citations

Not Reported in N.E.2d, 2006 WL 2237667

Footnotes

1 There was also Count III in the verified Complaint seeking injunctive relief.

2 The counterclaim for declaratory judgment concerning the $254,147 lien was in response to a Complaint filed by Plaintiffs in Hampden Superior Court on August 26, 2004, relative to the same issue.

3 At the Preliminary Injunction hearing, Lemieux gave sworn testimony.

4 On September 30, 2004, Plaintiffs' Limited Motion for Reconsideration was allowed, incorporating paragraphs two and three of the Stipulation into the Preliminary Injunction Order, where BPI agreed not to "phase-in" any additional units into the Condominium, and agreed not to convey, transfer, mortgage, encumber, assign or hypothecate any portion of the Condominium.

5 Bondsville's Motion to Dismiss Count II of Plaintiffs' Complaint and Plaintiffs' Motion to Dismiss Count I of the Counterclaim were not scheduled for hearing, but both parties agreed to have this court decide those motions on the papers. On August 12, 2005, Plaintiffs filed their Opposition to Bondsville's Motion to Dismiss Count II of Plaintiffs' Complaint.

6 On May 28, 2004, a Confirmatory Certificate of Election And/Or Appointment was executed, stating that Plaintiffs had been "duly elected and/or appointed" as the new Trustees of the Condominium Trust. Bondsville does not admit that the Trustees are duly constituted, but do not allege any facts to contradict such statement.

7 For purposes of this Motion for Partial Summary Judgment, Plaintiffs do not challenge the validity of the Second Amendment.

8 For purposes of this Motion for Partial Summary Judgment, Plaintiffs do not challenge the validity of the Master Deed Amendment Reviving Development Rights.

9 The amendments to the Master Deed reference the various phases in both arabic numbers and roman numeral numbers.

10 Lemieux testified at the Preliminary Injunction hearing that of the six units, two foundations were completed, two units had been framed, and two units were near completion.

11 Intervenor did not appear at the summary judgment hearing and did not file any opposition to Plaintiffs' summary judgment motion. It was represented at the hearing that Intervenor conceded that it does not hold a mortgage on the common areas of the Condominium.

12 In the event the percentage interest of the unit owners is effected by an amendment, Paragraph 15(b) requires 100% unit owner vote.

13 *See supra,* footnote 7 and 8.

14 The record indicates that all other phases of the Condominium have been added by an amendment of the Master Deed

together with as-built floor plans.

15 Bondsville makes a non-compelling argument that the sixty-six units specified in Paragraph 15(c) was meant to include only units added after the original eighteen of Phase 1. Paragraph 15©), however, speaks of "all or any combination of Units."

16 Paragraph 15(c)(7) states as follows:

> Upon completion and inclusion in the Condominium of eight-four (84) residential units or at such earlier time as the Declarant shall acknowledge in writing that it has waived any further right to add Units to the Condominium pursuant to this Section ... the Declarant, pursuant to and in accordance with the provisions of this Section, may execute and file a Restated Master Deed ... comprising and consolidating Phase 1, and all such subsequent phases as if the entire Condominium, including all of such phases were then and thereby established as a completed condominium upon and pursuant to the provisions applicable thereto as set forth in this Master Deed and in the amendments by which such subsequent phases are included, and in any other amendments hereto which have been duly made and filed, which Restated Master Deed shall thereupon supersede this Master Deed and all such amendments....

17 Paragraph 15(e) states as follows:

> Declarant reserves for itself, its successors and assigns, the right and power, without the consent of any Unit Owner ... to amend this Master Deed or any Additional Phase Deed, at any one time or from time to time, for the purpose of bringing this Master Deed into compliance with Chapter 183A ... Or of making corrections or revisions of a technical nature, including, without limitation, correction of scrivener's or typographical errors.

18 Bondsville argues that at the time of the filing of its opposition, Plaintiffs had yet to respond to discovery requests on the waiver issue. Bondsville requests that in the event this court is not persuaded by its waiver defense, a ruling on its waiver defense should be deferred under Mass. R. Civ. P. 56(f) for further discovery. This court's post hearing order dated March 28, 2005, after a status conference where the briefing dates and the hearing on summary judgment were set, states that the parties had agreed to finish additional discovery without a deadline. Bondsville has not filed motions to compel discovery or otherwise submitted newly discovered evidence while this matter has been under advisement. Therefore, this court sees no reason to defer ruling on Bondsville's waiver defense.

19 As discussed *infra,* this burden is impacted by the fact that Plaintiffs moved for summary judgment and consequently all inference are drawn in favor of Defendants. *See also Northrup v. Brigham,* 63 Mass.App.Ct. 362, 365, 826 N.E.2d 239 (2005) ("Where ... the moving party does not bear the burden of proof in the case, it must either submit affirmative evidence negating an essential element of the nonmovant's case or show that the nonmovant has no reasonable expectation of proving an essential element at trial.")

20 "An implied contract requires proof that there was a benefit to the defendant, that the plaintiff expected the defendant to pay for the benefit, and that the defendant expected, or a reasonable person should have expected, that he or she would have to pay for that benefit." *T.F. v. B.L.* 442 Mass. 552, 527 (2004). "A Quasi-contract or a contract implied in law is an obligation created by law 'for reasons of justice, without any expression of assent and sometimes even against a clear expression of dissent.... [C]onsiderations of equity and morality play a large part ... in construing a quasi-contract....' " *Salamon,* 394 Mass. at 859, 477 N.E.2d 1029 (quoting 1 A. Corbin, Contracts § 19 (1963)). Restatement (Second) Contracts § 1, ill.b (1981). "An implied-in-fact contract comes into being when, notwithstanding the absence of a written agreement or verbal agreement expressing mutual obligations, the conduct or relations of the parties imply the existence of a contract." *Popponesset Beach Ass'n, Inc. v. Marchillo,* 39 Mass.App.Ct. 586, 592, 658 N.E.2d 983 (1995).

21 There is no evidence to indicate that even if Plaintiffs intend on keeping Phase VII in place, they would benefit. It may be that Plaintiffs choose to keep Phase VII as the lesser of two evils as compared to razing the structures with its attendant problems of noise and restoring the Property to its original condition.

22 Similarly unreasonable was BPI's unreasonable reliance on the unambiguous phasing and amendment rights of the Master Deed as it related to their waiver defense.

23 This court has jurisdiction over the tort of trespass, but only as it relates to cases involving an issue of title to real estate. G.L. c. 185, § 1(o).

24 Plaintiffs cite several Land Court cases as supportive of their position. These cases, however, are factually distinguishable from the case at bar.

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DC ST § 42-1902.17
Formerly cited as DC ST 1981 § 45-1827

§ 42-1902.17. Conversion of **convertible lands**; recordation of appropriate instruments; character of **convertible land**; tax liability; time limitation on conversion.

Currentness

(a) The declarant may convert all or any portion of any **convertible land** into 1 or more units or common elements, or both, subject to any restrictions and limitations which the condominium instruments may specify. Any such conversion shall be deemed to have occurred at the time of the recordation of appropriate instruments pursuant to subsection (b) of this section and § 42-1902.14(c).

(b) The declarant shall prepare, execute, and record an amendment to the declaration describing the conversion. Such amendment shall assign an identifying number to each unit formed out of a **convertible land** and shall reallocate undivided interests in the common elements in accordance with § 42-1902.12(b). Such amendment shall describe or delineate the limited common elements formed out of the **convertible land**, showing or designating the unit or units to which each is assigned.

(c) All **convertible lands** shall be deemed a part of the common elements except for such portions thereof as are converted in accordance with the provisions of this section. Until the expiration of the period during which conversion may occur or until actual conversion, whichever occurs first, real estate taxes shall be assessed against the declarant rather than the unit owners as to both the **convertible land** and any improvements thereon. No such conversion shall occur after 5 years from the recordation of the declaration, or such shorter period of time as the declaration may specify.

Credits

(Mar. 29, 1977, D.C. Law 1-89, title II, § 217, 23 DCR 9532b.)

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DC CODE § 42-1902.17
Current through August 16, 2016

K.S.A. 58-3115a

58-3115a. Conversion of **convertible** **lands**

Currentness

The declarant may convert all or any portion of any **convertible** **land** into one or more condominium units and common areas and facilities subject to any restrictions and limitations which the declaration may specify. Any such conversion shall be deemed to have occurred at the time of the recordation of an amendment to the declaration and the recording of floor plans and the plat of survey required by this act. All **convertible** **lands** shall be deemed a part of the common area and facilities until converted. Until the expiration of the period during which conversion may occur, or until actual conversion, whichever occurs first, the declarant alone shall be liable for real property taxes assessed against the **convertible** **land** and any improvements thereon and all other expenses in connection with that real estate. No other unit owner and no other portion of the condominium shall be subject to a claim for payment of such taxes or expenses, and unless the declaration provides otherwise, any income or proceeds from the **convertible** **land** and any improvements thereon shall inure to the declarant. No such conversion shall occur after seven years from the recordation of the declaration or such shorter period of time as the declaration may specify.

Credits

Laws 1975, ch. 297, § 7; Laws 2008, ch. 69, § 1, eff. July 1, 2008.

K. S. A. 58-3115a, KS ST 58-3115a
Statutes are current through laws enacted during the 2016 Regular and Special Sessions of the Kansas Legislature.

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M.C.L.A. 559.131

559.131. Condominium project containing convertible area; content of master deed

Currentness

Sec. 31. If the condominium project contains any convertible area, the master deed shall contain the following:

(a) A reasonably specific reference to the convertible area within the condominium project.

(b) A statement of the maximum number of condominium units that may be created within the convertible area.

(c) A general statement describing what types of condominium units may be created on the convertible area.

(d) A statement of the extent to which a structure erected on the convertible area will be compatible with structures on other portions of the condominium project.

(e) A general description of improvements that may be made on the convertible area within the condominium project.

(f) A description of the developer's reserved right, if any, to create limited common elements within any convertible area, and to designate common elements therein which may subsequently be assigned as limited common elements.

(g) A time limit of not more than 6 years after initial recording of the master deed, by which the election to use this option expires.

Credits

Amended by P.A.1982, No. 538, § 1, Imd. Eff. Jan. 17, 1983.

M. C. L. A. 559.131, MI ST 559.131
The statutes are current through P.A.2016, No. 280 of the 2016 Regular Session, 98th Legislature.

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U.C.A. 1953 § 57-8-13.2

§ 57-8-13.2. Conversion of convertible land--Amendment to declaration--Limitations

Currentness

(1) The declarant may convert all or any portion of any convertible land into one or more units or limited common areas and facilities subject to any restrictions and limitations which the declaration may specify. Any such conversion shall be deemed to have occurred at the time of the recordation of the appropriate instruments under Subsection (2) of this section and Subsection 57-8-13(2).

(2) Simultaneously with the recording of the condominium plat pursuant to Subsection 57-8-13(2), the declarant shall prepare, execute, and record an amendment to the declaration describing the conversion. The amendment shall assign an identifying number to each unit formed out of a convertible land and shall reallocate undivided interests in the common areas and facilities in accordance with Subsection 57-8-13.10(2). The amendment shall describe or delineate the limited common areas and facilities formed out of the convertible land, showing or designating the unit or units to which each is assigned.

(3) All convertible lands shall be deemed part of the common areas and facilities except for such portions of them as are converted in accordance with this section. No such conversions shall occur after five years from the recordation of the declaration, or such shorter period of time as the declaration may specify, unless three-fourths of unit owners vote in favor of converting the land after the time period has expired.

Credits

Laws 1975, c. 173, § 6; Laws 1996, c. 39, § 1, eff. April 29, 1996; Laws 2003, c. 265, § 5, eff. May 5, 2003.

U.C.A. 1953 § 57-8-13.2, UT ST § 57-8-13.2
Current through 2016 Third Special Session

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VA Code Ann. § 55-79.61

§ 55-79.61. Conversion of convertible lands

Effective: July 1, 2012

Currentness

A. The declarant may convert all or any portion of any convertible land into one or more units and/or limited common elements subject to any restrictions and limitations which the condominium instruments may specify. Any such conversion shall be deemed to have occurred at the time of the recordation of appropriate instruments pursuant to subsection B of this section and subsection C of § 55-79.58.

B. Simultaneously with the recording of plats and plans pursuant to subsection C of § 55-79.58, the declarant shall prepare, execute, and record an amendment to the declaration describing the conversion. Such amendment shall assign an identifying number to each unit formed out of a convertible land and shall reallocate undivided interests in the common elements in accordance with subsection (b) of § 55-79.56. Such amendment shall describe or delineate the limited common elements formed out of the convertible land, showing or designating the unit or units to which each is assigned.

C. All convertible lands shall be deemed a part of the common elements except for such portions thereof as are converted in accordance with the provisions of this section. Until the expiration of the period during which conversion may occur or until actual conversion, whichever occurs first, the declarant alone shall be liable for real estate taxes assessed against the convertible land and any improvements thereon and all other expenses in connection with that real estate, and no other unit owner and no other portion of the condominium shall be subject to a claim for payment of those taxes or expenses, and unless the declaration provides otherwise, any income or proceeds from the convertible land and any improvements thereon shall inure to the declarant. No such conversion shall occur after 10 years from the recordation of the declaration, or such shorter period of time as the declaration may specify.

Credits

Acts 1974, c. 416; Acts 1975, c. 415; Acts 1986, c. 324; Acts 1991, c. 497; Acts 1993, c. 45. Amended by Acts 2012, c. 520.

VA Code Ann. § 55-79.61, VA ST § 55-79.61
Current through End of the 2016 Reg. Sess.

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UNIFORM CONDOMINIUM ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS EIGHTY-SIXTH YEAR
IN VAIL, COLORADO
JULY 29--August, 5, 1977

With Prefatory Note and Comments

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PREFATORY NOTE

This Act contains comprehensive provisions designed to unify and modernize the law of condominiums, which has undergone great change in the last 16 years. As a result of the increasing usefulness and flexibility of the condominium concept, condominiums have become one of the most common forms of community ownership of property in the United States.

All states have statutes which provide for the creation of condominiums and establish some rules concerning their governance. The first statute in the United States was adopted in 1958 in Puerto Rico, and most of the present state statutes are patterned after that 1958 statute, or after the 1962 Federal Housing Administration model condominium statute. As the condominium form of ownership became widespread, however, many states realized that these early statutes were inadequate to deal with the growing condominium industry. In particular, many states perceived a need for additional consumer protection, as well as a need for more flexibility in the creation and use of condominiums. As a result, some states have recently enacted more detailed and comprehensive "second generation" statutes.

The statutes governing condominiums in the various states use varying and sometimes inappropriate terminology, and differ in numerous details, all of which make it difficult for a national

lender to assess the appropriateness of condominium documents and of condominium financing arrangements in those states. Moreover, the varying statutes, creating different "bundles of rights" for purchasers of condominiums in the various states, also make it difficult for the increasingly mobile consumer to become educated in this very complex area. Finally, many actual or potential problems involving such matters as termination of condominiums, eminent domain, insurance, and the rights and obligations of lenders upon foreclosure of a condominium project, have not been satisfactorily addressed by any existing statute. It is primarily to resolve these various problems that the Uniform Condominium Act was drafted.

Article 1 of the Act contains definitions and general provisions applicable throughout the Act. The article deals with such matters as applicability, separate titles and taxation, eminent domain, applicability of other statutes, and other general matters.

Article 2 provides for the creation, alteration, and termination of the condominium. The article provides great flexibility to a developer in creating a condominium project designed to meet the needs of a modern real estate market, while imposing reasonable restrictions on developers' practices which have a potential for harm to unit purchasers.

Article 3 concerns the administration of the unit owners' association, a matter which has received very limited attention in the statutes of the various states. This article provides broad-ranging powers to the association, and covers such matters as insurance, tort and contract liability of the association, and other matters often not dealt with in current statutes.

Article 4 deals with consumer protection for condominium unit purchasers. In addition to treating specific abuses which have developed in the condominium industry in the past, the article requires very substantial disclosure by developers, which must be made available to consumers before conveyance of a unit. To further promote disclosure, the article also requires that all owners of units in residential condominiums provide resale certificates to subsequent purchasers, regardless of when the condominium was created.

Article 5 is an optional article which establishes an administrative agency to supervise a developer's activities. The article is so drafted that it may be included in the Act in those states where an agency is thought desirable, and deleted from the Act in those states which desire to have the Act enforced by private action. In the event that a state determines to delete Article 5 from the Act, other provisions of the Act, indicated in the text by brackets, should also be deleted. A list of these

sections appears in the Prefatory Note to Article 5.

The Uniform Condominium Act was originally a part of the Uniform Land Transactions Act, but was separated from that Act for further consideration at the 1975 annual meeting of the National Conference of Commissioners on Uniform State Laws. This Act was approved at the annual meeting of the Conference in Vail, Colorado in August 1977.

UNIFORM CONDOMINIUM ACT

ARTICLE I

GENERAL PROVISIONS

Section 1-101. [Short Title].

1-102. [Applicability].

1-103. [Definitions].

1-104 [Variation by Agreement].

1-105. [Separate Titles and Taxation].

1-106. [Applicability of Local Ordinances, Regulations, and Building Codes].

1-107. [Eminent Domain].

1-108. [Supplemental General Principles of Law].

1-109. [Construction Against Implicit Repeal].

1-110. [Uniformity of Application and Construction].

1-111. [Severability].

1-112. [Unconscionable Agreement or Term of Contract].

1-113. [Obligation of Good Faith].

1-114. [Remedies to be Liberally Administered].

UNIFORM CONDOMINIUM ACT

ARTICLE 1

GENERAL PROVISIONS

1 SECTION 1-101. [Short Title]. This Act shall be known and may
2 be cited as the Uniform Condominium Act.

1 SECTION 1-102. [Applicability].
2 (a) This Act applies to all condominiums created within this
3 State after the effective date of this Act. Sections 1-105
4 [Separate Titles and Taxation], 1-106 [Applicability of Local
5 Ordinances, Regulations, and Building Codes], 1-107 [Eminent
6 Domain], 2-103 [Construction and Validity of Declaration and
7 Bylaws], 2-104 [Description of Units], 3-102(a) (1) through (6) and
8 (11) through (16) [Powers of Unit Owners' Association], 3-111 [Tort
9 and Contract Liability], 3-115 [Lien for Assessments], 3-116
10 [Association Records], 4-107 [Resales of Units], and 4-115 [Effect
11 of Violation on Rights of Action; Attorney's Fees], and Section
12 1-103 [Definitions] to the extent necessary in construing any of
13 those sections, apply to all condominiums created in this State
14 before the effective date of this Act; but those sections apply
15 only with respect to events and circumstances occurring after the
16 effective date of this Act and do not invalidate existing
17 provisions of the [declaration, bylaws, or plats or plans] of those
18 condominiums.

19 (b) The provisions of [insert reference to all present
20 statutes expressly applicable to condominiums or horizontal
21 property regimes] do not apply to condominiums created after the
22 effective date of this Act and do not invalidate any amendment to
23 the [declaration, bylaws, and plats and plans] of any condominium
24 created before the effective date of this Act if the amendment
25 would be permitted by this Act. The amendment must be adopted in
26 conformity with the procedures and requirements specified by those
27 instruments and by [insert reference to all present statutes
28 expressly applicable to condominiums or horizontal property
29 regimes]. If the amendment grants to any person any rights,
30 powers, or privileges permitted by this Act, all correlative
31 obligations, liabilities, and restrictions in this Act also apply
32 to that person.
33 (c) This Act does not apply to condominiums or units located
34 outside this State, but the public offering statement provisions
35 (Sections 4-102 through 4-105) apply to all dispositions thereof in
36 this State unless exempt under Section 4-101(b)(5) [and the agency
37 regulation provisions under Article 5 apply to any offering thereof
38 in this State].

COMMENTS

1. The question of the extent to which a state statute should apply to particular condominiums involves two problems: first, the extent to which the statute should require or permit different results for condominiums created before and after the statute becomes effective; and second, whether the statute should impose any or all of its substantive requirements on condominiums

located outside the state.

Two conflicting policies are posed when considering the applicability of this Act to "old" and "new" condominiums located in the enacting state. On the one hand, it is desirable, for reasons of uniformity, for the Act to apply to all condominiums located in a particular state, regardless of whether the condominium was created before or after adoption of the Act in that state. To the extent that different laws apply within the same state to different condominiums, confusion results in the minds of both lenders and consumers. Moreover, because of the inadequacies and uncertainties of condominiums created under old law, and because of the requirements placed on developers and unit owners' associations by this Act which might increase the costs of new condominiums, different markets might tend to develop for condominiums created before and after adoption of the Act.

On the other hand, to make all provisions of this Act automatically apply to "old" condominiums might violate the constitutional prohibition on impairment of contracts. In addition, aside from the constitutional issue, automatic applicability of the entire Act almost certainly would unduly alter the legitimate expectations of some present unit owners and developers.

Accordingly, the philosophy of this section reflects a desire to maximize the uniform applicability of the Act to all condominiums in the enacting state, while avoiding the difficulties raised by automatic application of the entire Act to pre-existing condominiums.

2. In carrying out this philosophy with respect to "new" condominiums, the Act applies to all condominiums "created" within the state after the Act's effective date. This is the effect of the first sentence of subsection (a). The first sentence of subsection (b) makes clear that the provisions of old statutes expressly applicable to condominiums do not apply to condominiums created after the effective date of this Act.

"Creation" of a condominium pursuant to this Act occurs upon recordation of a declaration pursuant to Section 2-101; however, the definition of "condominium" in Section 1-103(7) contemplates that de facto condominiums may exist, if the nature of the ownership interest fits the definition, and the Act would apply to such a condominium. Any real estate project which includes individually owned units and common elements owned by the unit owners as tenants in common is therefore subject to the Act if created within the state after the Act's effective date. No intent to subject the condominium to the Act is required, and an express intention to the contrary would be invalid and ineffective.

3. The section adopts a novel three-step approach to condominiums created before the effective date of the Act. First, certain provisions of the Act automatically apply to "old" condominiums, but only prospectively, and only in a manner which does not invalidate provisions of condominium declarations and bylaws valid under "old" law. Second, "old" law remains applicable to previously created condominiums where not automatically displaced by the Act. Third, owners of "old" condominiums may amend any provision of their declaration or bylaws, even if the amendment would not be permitted by "old" law, so long as (a) the amendment is adopted in accordance with the procedure required by "old" law and the existing declaration and bylaws and (b) the substance of the amendment does not violate this Act.

4. Elaboration of the principles described in Comment 3 may be helpful.

First, the second sentence of subsection (a) provides that the enumerated provisions automatically apply to condominiums created under pre-existing law, even though no action is taken by the unit owners. Many of the sections which do apply should measurably increase the ability of the unit owners to effectively manage the association, and should help to encourage the marketability of condominiums created under earlier condominium statutes. To avoid possible constitutional challenges, these provisions, as applied to "old" condominiums, apply only to "events and circumstances occurring after the effective date of this Act"; moreover, the provisions of this Act are subject to the provisions of the instruments creating the condominium, and this Act does not invalidate those instruments.

<u>EXAMPLE 1</u>: Under subsection (a), Section 4-107 (Resale Certificates) automatically applies to "old" condominiums. Accordingly, unit owners in condominiums established prior to adoption of the Act would be obligated after the Act's effective date to provide resale certificates to future purchasers of units in "old" condominiums. However, the failure of a unit owner to provide such a certificate to a purchaser who acquired the unit before the effective date of the Act would not create a cause of action in the purchaser, because the conveyance was an event occurring before the effective date of the Act.

<u>EXAMPLE 2</u>: Under subsection (a), Section 3-116 (Association Records) automatically applies to "old" condominiums. As a result, a unit owners' association of an "old" condominium must maintain certain financial records, and

> all the records of the association "shall be made reasonably available for examination by any unit owner and his authorized agents", even if the "old" law did not require that records be kept, or access provided. If the declaration or bylaws, however, provided that unit owners could not inspect the records of the association without permission of the president of the association, the restriction in the declaration would continue to be valid and enforceable.

Second, the prior laws of the state relating to condominiums are not repealed by this Act because those laws will still apply to previously-created condominiums, except when displaced. Some states, such as Connecticut and Florida, have made certain provisions of their condominium statutes automatically applicable to pre-existing condominiums. In certain instances, this attempted retroactive application has raised serious constitutional questions, has caused doubts to arise as to the continued validity of those condominiums, and has created general confusion as to what statutory rules should be applied.

Third, the Act seeks to alleviate any undesirable consequences of "old" law, by a limited "opt-in" provision. More specifically, subsection (d) permits the owners of a pre-existing condominium to take advantage of the salutary provisions of this statute to the extent that can be accomplished consistent with the procedures for amending the condominium instruments as specified in those instruments and in the pre-existing statute.

> <u>EXAMPLE</u>: Under most "first generation" condominium statutes, unit owners have no power to relocate boundaries between adjoining units. Under Section 2-114 of this Act, unit owners have such power, unless limited by the declaration. While Section 2-114 does not automatically apply to "old" condominiums, if the unit owners of a pre-existing condominium amend their condominium instruments in the manner permitted by the old statute and their existing instruments to permit unit owners to relocate boundaries, this section would validate that amendment, even if it were invalid under old law.

5. In considering the permissible amendments under subsection (b), it is important to distinguish between the law governing the procedure for amending declarations, and the substance of the amendments themselves. An amendment to the declaration of a condominium created under "old" law, even if permissible under this Act, must nevertheless be adopted "in conformity with the procedures and requirements specified" by the

original condominium instruments, and in compliance with the old law.

EXAMPLE: Suppose an "old" condominium declaration, and "old" state law, both provide that approval by 100 percent of the unit owners is required to amend the declaration, but the unit owners wish to amend the declaration to provide for only 67 percent of unit owners' approval of future amendments, as permitted by Section 2-119 of this Act. The amendment would not be valid unless 100 percent of the unit owners approved it, because of the procedural requirement of the declaration and "old" law. Once approved, however, only 67 percent would be required for subsequent amendments.

6. The last sentence of subsection (b) addresses the potential problem of a declarant seeking to take undue advantage of the amendment provisions to assume a power granted by the Act without being subject to the Act's limitations on the power. The last sentence insures that if developers or other persons assume any of the powers and rights which the Act grants, the correlative obligations, liabilities, and restrictions of the Act also apply to that person, even if the amendment itself does not require that result.

EXAMPLE: Assume that "old" law permits a declarant to exercise control over the association for only 4 years from the date the condominium is created, but that control may be maintained during that period for so long as declarant owns any units. In the absence of any amendment, this provision would be valid and enforceable. Assume further that, in the second year following creation of the condominium in question, this Act is adopted. The declarant then properly amends the declaration pursuant to subsection (b) to extend the period of declarant control for 5 years from the date of creation. The amendment would effectively extend control for an additional year, because a 5 year period of control is permitted in Section 3-103(c).

If, however, the declarant in the third year has sold 75 percent of the units that may ever be a part of the condominium, the period of declarant control would terminate by virtue of the limitation in Section 3-103(c). That limitation is imposed on the declarant even if the amendment called for retaining control for so long as any units were owned by declarant, and despite the provision in the "old" law permitting such a restriction.

7. The reference in subsection (b) to "all present statutes expressly applicable to condominiums or horizontal property regimes" is intended to distinguish between a state's condominium enabling statutes and those statutes which apply not only to condominiums but to other forms of real estate, such as taxation statutes, or subdivision statutes. Thus, reference to the State's condominium or horizontal property regime enabling statutes should be included here, while references to taxation, subdivision, or other statutes which are not restricted solely to condominiums should not be included.

8. In place of the words "declaration, bylaws, and plats and plans", each state should insert the appropriate terminology for those documents under the present state law, e.g., "master deed, rules and regulations", etc.

9. This section does not permit a pre-existing condominium to elect to come entirely within the provisions of the Act, disregarding old law. However, the owners of a pre-existing condominium may elect to terminate the condominium under pre-existing law and create a new condominium which would be subject to all the provisions of this Act.

1 SECTION 1-103. [Definitions]. In the declaration and bylaws,
2 unless specifically provided otherwise or the context otherwise
3 requires, and in this Act:
4 (1) "Additional real estate" means real estate that may be
5 added to a flexible condominium.
6 (2) "Affiliate of a declarant" means any person who controls,
7 is controlled by, or is under common control with a declarant. A
8 person "controls" a declarant if the person (i) is a general
9 partner, officer, director, or employee of the declarant, (ii)
10 directly or indirectly or acting in concert with one or more other
11 persons, or through one or more subsidiaries, owns, controls, holds
12 with power to vote, or holds proxies representing, more than 20
13 percent of the voting interests of the declarant, (iii) controls in

14 any manner the election of a majority of the directors of the
15 declarant, or (iv) has contributed more than 20 percent of the
16 capital of the declarant. A person "is controlled by" a declarant
17 if the declarant (i) is a general partner, officer, director, or
18 employee of the person, (ii) directly or indirectly or acting in
19 concert with one or more other persons, or through one or more
20 subsidiaries, owns, controls, holds with power to vote, or holds
21 proxies representing, more than 20 percent of the voting interests
22 of the person, (iii) controls in any manner the election of a
23 majority of the directors of the person, or (iv) has contributed
24 more than 20 percent of the capital of the person.
25 (3) "Association" or "unit owners' association" means the
26 unit owners' association organized under Section 3-101.
27 (4) "Common elements" means all portions of a condominium
28 other than the units.
29 (5) "Common expenses" means expenditures made or liabilities
30 incurred by or on behalf of the association, together with any
31 allocations to reserves.
32 (6) "Common expense liability" means the liability for common
33 expenses allocated to each unit pursuant to Section 2-108.
34 (7) "Condominium" means real estate, portions of which are
35 designated for separate ownership and the remainder of which is
36 designated for common ownership solely by the owners of those
37 portions. Real estate is not a condominium unless the undivided
38 interests in the common elements are vested in the unit owners.
39 (8) "Conversion condominium" means a condominium containing

40 any building that at any time before recording of the declaration
41 was occupied wholly or partially by persons other than purchasers
42 and persons who occupy with the consent of purchasers.
43 (9) "Convertible real estate" means a portion of a flexible
44 condominium not within a building containing a unit, within which
45 additional units or limited common elements, or both, may be
46 created.
47 (10) "Declarant" means:
48 (i) if the condominium has been created, (A) any person
49 who has executed a declaration, or an amendment to a declaration to
50 add additional real estate, other than persons holding interests in
51 the real estate solely as security for an obligation, persons whose
52 interests in the real estate will not be conveyed to unit owners,
53 or, in the case of a leasehold condominium, a lessor who possesses
54 no special declarant rights and who is not an affiliate of a
55 declarant who possesses special declarant rights, or (B) any person
56 who succeeds under Section 3-104 to any special declarant rights;
57 [or]
58 (ii) if the condominium has not yet been created, (A) any
59 person who offers to dispose of or disposes of his interest in a
60 unit not previously disposed of [, or (B) any person who applies
61 for registration of a condominium][.][;or]
62 [(iii) if a declaration is executed by a trustee of a land
63 trust, "declarant" means the beneficiary of the trust.]
64 (11) "Dispose" or "disposition" means a voluntary transfer of
65 any legal or equitable interest in a unit, other than as security

66 for an obligation.

67 (12) "Executive board" means the body, regardless of name,
68 designated in the declaration to act on behalf of the association.

69 (13) "Flexible condominium" means a condominium containing
70 withdrawable or convertible real estate, a condominium to which
71 additional real estate may be added, or a combination thereof.

72 (14) "Identifying number" means a symbol that identifies only
73 one unit in a condominium.

74 (15) "Leasehold condominium" means a condominium in which all
75 or a portion of the real estate is subject to a lease the
76 expiration or termination of which will terminate the condominium
77 or reduce its size.

78 (16) "Limited common element" means a portion of the common
79 elements allocated by the declaration or by operation of Section
80 2-102(2) or (4) for the exclusive use of one or more but fewer than
81 all of the units.

82 (17) "Offering" means any advertisement, inducement,
83 solicitation, or attempt to encourage any person to acquire any
84 interest in a unit, other than as security for an obligation. An
85 advertisement in a newspaper or other periodical of general
86 circulation, or in any broadcast medium to the general public, of a
87 condominium not located in this State, is not an offering if the
88 advertisement states that an offering may be made only in
89 compliance with the law of the jurisdiction in which the
90 condominium is located.

91 (18) "Person" means a natural person, corporation,

92 partnership, association, trust, other entity, or any combination
93 thereof.
94 (19) "Purchaser" means any person, other than a declarant, who
95 by means of a voluntary transfer acquires a legal or equitable
96 interest in a unit, other than (i) a leasehold interest (including
97 renewal options) of less than 5 years, or (ii) as security for an
98 obligation.
99 (20) "Real estate" means any leasehold or other estate or
100 interest in, over, or under land, including structures, fixtures,
101 and other improvements and interests which by custom, usage, or law
102 pass with a conveyance of land though not described in the contract
103 of sale or instrument of conveyance. "Real estate" includes
104 parcels with or without upper or lower boundaries, and spaces that
105 may be filled with air or water.
106 (21) "Special declarant rights" means rights reserved for the
107 benefit of a declarant to complete improvements indicated on plats
108 and plans filed with the declaration (Section 2-110); to convert
109 convertible real estate in a flexible condominium (Section 2-111);
110 to add additional real estate to a flexible condominium (Section
111 2-111); to withdraw withdrawable real estate from a flexible
112 condominium (Section 2-112); to convert a unit into 2 or more
113 units, common elements, or into 2 or more units and common elements
114 (Section 2-115); to maintain sales offices, management offices,
115 signs advertising the condominium, and models (Section 2-117); to
116 use easements through the common elements for the purpose of making
117 improvements within the condominium or within any convertible or

118 additional real estate (Section 2-118); or to appoint or remove any
119 officer of the association or any executive board member during any
120 period of declarant control (Section 3-103(c)).
121 (22) "Unit" means a portion of the condominium designated for
122 separate ownership, the boundaries of which are described pursuant
123 to Section 2-105(4).
124 (23) "Unit owner" means a declarant who owns a unit, a person
125 to whom ownership of a unit has been conveyed, or a lessee of a
126 unit in a leasehold condominium whose lease expires simultaneously
127 with any lease the expiration or termination of which will remove
128 the unit from the condominium, but does not include a person having
129 an interest in a unit solely as security for an obligation. [If
130 title to a unit is held in a land trust, "unit owner" means the
131 beneficiary of the trust.]
132 (24) "Withdrawable real estate" means real estate that may be
133 withdrawn from a flexible condominium.

COMMENTS

1. The first clause of this section permits the defined terms used in the Act to be defined differently in the declaration and bylaws. Regardless of how terms are used in those documents, however, terms have an unvarying meaning in the Act, and any restricted practice which depends on the definition of a term is not affected by a changed term in the documents.

EXAMPLE: A declarant might vary the definition of "unit owner" in the declaration to exclude himself in an attempt to avoid assessments for units which he owns. The attempt would be futile, since the Act defines a declarant who owns a unit as a unit owner and defines the liabilities of a unit owner.

2. The definition of "affiliate of a declarant" (Section

3-103(2)) is similar to the definitions in 12 U.S.C. §1730(a), which prescribes the authority of the Federal Savings and Loan Insurance Corporation to regulate the activities of savings and loan holding companies, and in 15 U.S.C. §78(c)(18), which defines persons deemed to be associated with a broker or dealer for purposes of the federal securities laws.

The objective standards of the definition permit a ready determination of the existence of affiliate status to be made. Unlike 12 U.S.C. §1730(a)(2) B, no power is vested in an agency to subjectively determine the existence of "control" necessary to establish affiliate status. Thus, affiliate status does not exist under the Act unless these objective criteria are met.

3. Definitions (4) and (22), treating "common elements" and "units," should be examined in light of Section 2-102, which specifies in detail how the precise differentiation between units and common elements is to be determined in any given condominium to the extent that the declaration does not provide a different scheme. No exhaustive list of items comprising the common elements is necessary in this Act or in the declaration; as long as the boundaries between units and common elements can be ascertained with certainty, the common elements include by definition all of the real estate in the condominium not designated as part of the units.

4. Definition (7), "condominium," makes clear that personal property, even if owned by the unit owners or their association, is not part of the condominium.

The second sentence of the definition of "condominium" also makes clear that unless the ownership interest in the common elements is vested in the owners of the units, the project is not a condominium. Thus, for example, if the common elements were owned by an association in which each unit owner was a member, the project would not be a condominium. Similarly, if a developer sold units in a building but retained title to the common areas, granting easements over them to unit owners, no condominium would have been created. Such projects have many of the attributes of condominiums, but they are not covered by this Act.

5. Definition (3), "conversion condominium," is important because of the protection which the Act provides in Section 4-110 for tenants of buildings which are being converted into a condominium. The definition distinguishes between new buildings which have never been occupied by any person before the time that the building is submitted to the condominium form of ownership, and buildings, whether new or old, which have been previously occupied by tenants. In the former case, because there have been no tenants in the building, the building would not be a converison condominium, and no additional consumer protection or disclosure is

necessary.

If any building in the condominium has ever been occupied by a tenant, however, that tenancy brings the entire condominium within the definition of "conversion condominium", unless every such tenancy was in connection with a contract for sale of the apartment upon conversion.

6. Definition (9) "convertible real estate," describes real estate which is a part of the condominium, rather than outside its boundaries. As a result, convertible real estate, until converted, is a part of the common elements, and the legal ownership of the real estate resides in the unit owners. In that respect, it differs from "additional real estate" which is not a part of the condominium, and is not owned by the unit owners.

Nevertheless, the beneficial interest in convertible real estate rests with the declarant, who controls its ultimate use so long as the option to convert this real estate (which must be reserved in the declaration under Section 2-106(1)) exists. For that reason, all costs attributable to convertible real estate, including taxes, must be borne by the declarant until the option expires or is exercised. See Section 2-111(c).

Convertible real estate, like additional real estate, is a device which permits the declarant to build the project in phases, but offers certain advantages which additional real estate may not provide.

For example, suppose the declarant is developing a condominium project eventually to consist of 100 units in two 50-unit buildings, with one underground garage lying beneath both buildings to serve all 100 units. The entire garage and only one building will be completed first. The simplest way of creating this condominium may be to include all of the real estate which will constitute the condominium, and to designate the location of the second building and the garage as convertible real estate. The 50 units in the first building could then be conveyed after they are completed, together with any limited common element parking spaces to be assigned to those units by converting a portion of the convertible real estate in the underground garage into limited common elements. This could be done before the second building (also in convertible real estate) is completed and converted into 50 more units. However, the entire parcel of real estate would be part of the condominium from the beginning.

Two advantages of convertible real estate over additional real estate in this example would be that no horizontal metes and bounds description would be required to divide the second building from the remainder of the condominium, and no special easements over the convertible real estate benefitting the units in the first building

would be required.

The designation of a portion of a condominium as convertible real estate would not be subdivision of that real estate because all portions of the condominium would be owned by the same persons. On the other hand, if a declarant created a condominium out of a portion of his property and declared the remainder as additional real estate, that might constitute a subdivision of the real estate under local ordinances.

The definition also makes clear that convertible real estate must be a portion of the condominium "not within a building containing a unit." Thus, while a portion of a building might be submitted to the condominium regime and the remaining portion not submitted (a common occurrence in high-rise buildings), no portion could be designated as convertible real estate if any unit has been created in the building. Much the same result, however, could be achieved through at least two other techniques, depending on subdivision or zoning ordinances. First, the portion of the building not submitted could be designated as "additional real estate," and added at a later date. Alternatively, the entire building could be included in the condominium, but all or a portion of it designated as withdrawable real estate, and subsequently withdrawn. In addition, if the declarant were uncertain as to the most desirable layout of the building, he could designate all or a portion of the building as one or more units which he reserved the right under Section 2-115 to subdivide into two or more units, common elements or both. See the comments to Section 2-115.

7. Definition (10), "declarant," excludes mortgagees, trustees under deeds of trust, and any other persons holding interests solely as security for an obligation, so long as they do not have any special declarant rights. Nothing in this Act makes it necessary for such persons, other than lessors in a leasehold condominium, (see Section 2-101(a)) to execute the declaration, but it is customary in many states for them to do so to signify their assent to the creation of the condominium.

If a secured lender did not assent to a condominium created under this Act, he could refuse to provide the partial releases the declarant needs under Section 4-104 as a precondition to the conveyance of units. By the same token, if a secured lender is bound by an ancillary agreement to furnish such releases, or if he in fact furnishes one or more such releases, then he has effectively assented to the creation of the condominium and no purpose would be served by his executing the declaration.

Under Section 2-120(g), foreclosure or enforcement of even a pre-existing lien or encumbrance would not, of itself, terminate the condominium or cause the affected real estate to be withdrawn from the condominium. A foreclosing lender, however, could cast

the votes allocated to any unit acquired by foreclosure, for termination.

The definition of "declarant" focuses on two distinct time periods regarding the condominium: before and after the condominium has been created. After the condominium has been created, "declarant" includes anyone who executes a declaration or an amendment to a declaration to add additional real estate, as well as any person who succeeds to any special declarant right. Excluded from the definition, as indicated above, are mortgagees and other persons holding an interest solely as security for an obligation. However, if a mortgagee or any other person succeeded to a "special declarant right", he would thereby become a declarant. <u>See</u> Section 1-103(21).

Also excluded from the definition of declarant after a condominium has been created is a person who may have executed a declaration but whose interest will not be conveyed to a unit owner. For example, it is not uncommon in the case of a leasehold condominium for the ground lessor to submit his interest to the condominium form of ownership and to evidence that submission by execution of the declaration. Frequently, however, the ground lessor does not control any aspect of the development, but merely collects rent from the developer, who in fact constructs the project and conveys leasehold units to purchasers. In that case, where the ground lessor possesses no special declarant rights, there is no reason to subject the lessor to liability as a declarant. If, however, the lessor is an affiliate of a declarant, or does himself possess special declarant rights, then the ground lessor would be an additional declarant.

The definition also focuses on those circumstances where liability should be imposed upon a potential declarant before the condominium is created. In those circumstances, the declarant would not meet the definition contained in subsection (10)(i). It is a common market practice in some states, however, for a prospective declarant to sell or to offer to contract to sell condominium units to prospective purchasers before the condominium is created. In such a case, the offeror would meet the definition of a declarant contained in subsection (10)(ii).

The definition of "declarant" excludes offerors who offer to dispose of interests which are not their own, to make clear that real estate brokers are not declarants. The definition also excludes offers of interests in units, if those interests had previously been disposed of. This excludes the possibility that a unit purchaser, who had executed a sales contract before the condominium was created, might assign his interest in a unit to a third person and thereby meet the definition of declarant.

The bracketed language appearing at the end of subsection (ii)

should be deleted in those states which do not adopt Article 5 of the Act, since registration of the condominium would not be required.

In states utilizing the land-trust device, subsection (iii) should be included to make clear that the trustee does not become a declarant by his mere execution of the declaration, (assuming that he does not otherwise possess special declarant rights) and that the beneficiary of the trust is the declarant, whether or not he executes the declaration.

8. Definition (11), "dispose" or "disposition", includes voluntary transfers of any interest in a unit, other than as security for an obligation, thereby excluding mortgages from the definition of disposition as well as involuntary transfers such as liens. However, the term includes more than conveyances and would, for example, cover contracts of sale.

9. Definition (13), "flexible condominium," describes any condominium in which the amount of real estate submitted to the condominium regime may be increased by adding real estate (additional real estate) or reduced by withdrawing real estate previously submitted (withdrawable real estate) or in which new units or limited common elements may be built, either on additional real estate or on real estate already a part of the condominium but designated for that purpose (convertible real estate). Indeed, it is possible to reserve the right to designate all the real estate comprising the condominium as "additional", "convertible" and "withdrawable" real estate so long as some portion of the land is 'submitted," and there exists at least one unit and some common elements. This practice should not be as widespread as has been the case in Virginia and other jurisdictions specifically permitting flexible condominiums, however, because the declarant is exclusively liable, under this Act, for all expenses in connection with withdrawable or convertible land.

The Act is designed to maximize the developers' flexibility in creating condominiums. Thus, the Act significantly differs from "first generation" condominium statutes which, in many instances, require or attempt to require a single phase project with fixed allocations of common element interests, votes, and common expense liability.

Under this Act, as new units are added to a condominium, common element interests, votes in the association, and common expense liabilities will change, and may dramatically affect the liability of purchasers in the condominium's early phases. As a result, disclosure of the conditions under which a flexible condominium may be developed is required, <u>see</u> Section 2-108, and a maximum limit of 7 years is suggested as the period during which such changes may be made by any declarant.

Importantly, the flexibility inherent in the Act results not only from the definition of "flexible condominium," and its concept of expanding or contracting the physical property which may at any time be subjected to a single condominium regime, but from several other provisions as well.

For example, the terms "units" and "common elements" may mean anything which the developer chooses them to mean; the definition of "unit" is not limited to "apartment." It would be possible, for example, for a condominium to be composed of a high-rise building, all of which was designated as a single unit which could subsequently be subdivided or converted by the declarant under Section 2-115 into units and common elements. While Section 2-102 provides a simple definition of the boundaries of a unit in a typical apartment condominium project, this definition is completely subject to the provisions of the declaration.

Similarly, the distinction between "common elements" and "limited common elements" provides important flexibility to the declarant. While common elements and limited common elements are owned in common by all the unit owners, any or all portions of the common elements could be designated as limited common elements, resulting in a use of those common elements by only one or more, but less than all, unit owners.

An example of this flexibility may be helpful. A declarant, in deciding how to designate the parking spaces to be used by the unit owners of a project, has several choices under the Act, only some of which are described here. First, he might designate the boundaries of the "units" in such a way as to include various parking spaces as part of each unit, or even as separate units; this would be true whether or not the parking spaces were in a garage. Alternatively, each unit might be assigned a particular parking space as a limited common element, which would give the owner exclusive use of that particular space. Third, a block of parking spaces might be assigned as limited common elements reserved exclusively for the units in one building, excluding residents of other buildings from the use of those spaces. Fourth, all of the parking spaces might be designated as common elements, and not assigned as limited common elements, thereby giving the unit owners the right to park anywhere in any of the parking spaces. Fifth, the real estate on which the parking lot is located might be left out of the real estate submitted to the condominium regime, and spaces leased directly to the association in a block, or to individual unit owners. Sixth, a leasehold estate in the real estate on which the parking lot is located could be submitted to the condominium, thereby creating a leasehold condominium. Thereafter, any of the first four possibilities could be repeated, as could other configurations not noted above.

At the same time, to continue the example, expenses for the

upkeep of the parking spaces might be assigned to the association, or to individual unit owners, depending upon the desires of the declarant and the needs of the project. See Sections 3-107, 3-114(c).

Flexibility also results from the fact that non-contiguous parcels of real estate may be included in one condominium. Thus, for example, several apartment buildings in a city, or on a block in a city, although not contiguous, could be combined as one condominium. Alternatively, each of the apartment buildings could constitute a separate condominium, but subject to an "umbrella" association or confederation for certain purposes.

Flexibility is also enhanced by loosening the traditional restrictions on allocation of common element interests, common expense liabilities, and votes in the association. See Section 2-108. Under the Act, common element interests and common expense liabilities may be allocated on any basis whatsoever in a non-flexible condominium, and may be allocated to particular units using two completely different bases. Votes allocated to a unit may be proportionate to a unit's common expense liability, proportionate to its common element interest, or equal, (reflecting the fact that equal voting is often a simpler means of casting votes and determining majorities). In addition, different allocations of votes may be made to different units on particular matters if those matters are specified in the declaration. See Section 2-108(c). The Act also permits cumulative voting and differing majorities of votes may be required on different issues. See Section 3-110(c).

Other provisions of the Act contributing to flexibility include the ability of unit owners to relocate the boundaries between adjoining units without unanimous consent, see Section 2-114, to subdivide units, see Section 2-115, and to reassign limited common elements, such as parking spaces, in a simple way. See Section 2-109.

While a time limit on the exercise of declarant's rights and full disclosure of the nature of those rights are important protections to purchasers, flexibility in the Act is highly desirable in order to permit economically viable development of condominiums in a rapidly changing market. A number of states, such as Georgia, Maryland, South Carolina, Utah, and Virginia, now provide for expanding a condominium by adding land and building units on that land. At the same time, it is common practice in states without statutory sanction to provide for expansion in the declaration through proxies and powers of attorney. This latter procedure is clearly awkward, confusing, subject to some uncertainty, and contains no safeguards for purchasers. Moreover, in some states, this has resulted in what are actually single projects being developed as a multitude of small condominiums under

an "umbrella" association, creating unnecessary administrative difficulties.

10. Definition (15), "leasehold condominium", should be distinguished from land which is leased to a condominium but not subjected to the condominium regime. A leasehold condominium means, by definition, real estate which has been subjected to the condominium form of ownership. In such a case, units located on the leasehold real estate are typically leased for long terms. At the expiration of such a lease, the condominium unit or the real estate underlying the unit would be removed from the condominium if the lease were not extended or renewed. On the other hand, real estate may not be subjected to condominium ownership, but may be leased directly to the association or to one or more unit owners for a term of years.

This distinction is very significant. Under Section 3-105, the unit owners' association is empowered, following expiration of the period of declarant control, to cancel any lease of recreational or parking areas or facilities to which it is a party, regardless of who the lessor is. The association also has the power to cancel any lease for any land if the declarant or an affiliate of a declarant is a party to that lease. If the leased real estate, however, is subjected by the declarant to the condominium form of ownership, that lease may not be cancelled unless it is unconscionable or unless the real estate was submitted to the condominium regime for the purpose of avoiding the right to terminate the lease. _See_ Section 3-105.

While the subjective test of declarant's "purpose" may not always be clear, the rights of the association to cancel a lease depend upon the test. Thus, for example, a declarant who wishes to lease a swimming pool to the unit owners would have a choice of subjecting the pool for, say, a term of 20 years to the condominium form of ownership as a common element. At the end of the term, the lease would terminate and the real estate containing the pool would be automatically removed from the condominium unless there were a right to renew the lease. During the 20-year term, the lease would not be cancellable, regardless of its terms, unless it were found to be unconscionable under Section 1-112, or cancellable because submitted for the purpose of avoiding the right to cancel. On the other hand, if the pool were not submitted to the condominium form of ownership and was leased directly to the association for a 20-year term, the association could cancel that lease 90 days after the period of declarant control expired, even if, for example, 18 years remained of the term.

In either case, the terms of the lease would have to be disclosed in the public offering statement.

11. Definition (19), "purchaser", includes a person who

acquires any interest in a unit, even as a tenant, if his tenancy entitles him to occupy the premises for more than 5 years. This would include a tenant who holds a lease of a unit in a fee simple condominium for one year, if the lease entitles the tenant to renew the lease for more than 4 additional years. Excluded from the definition, however, are mortgagees.

12. Definition (20), "real estate," is very broad, and is very similar to the definition of "real estate" in Section 1-201(16) of the Uniform Land Transactions Act.

Although often thought of in two-dimensional terms, real estate is a three-dimensional concept and the third dimension is unusually important in the condominium context. Where real estate is described in only two dimensions (length and width), it is correctly assumed that the property extends indefinitely above the earth's surface and downwards toward a point in the center of the planet. In most condominiums, however, as in so-called "air rights" projects, ownership does not extend _ab solo usque ad coelum_, because units are stacked on top of units or units and common elements are interstratified. In such cases the upper and lower boundaries must be identified with the same precision as the other boundaries.

13. Definition (21), "special declarant rights", seeks to isolate those rights reserved for the benefit of a declarant which are unique to the declarant and not shared in common with other unit owners. The list, while short, encompasses virtually every significant right which a declarant might seek in the course of creating or expanding a condominium.

Any person who possesses a special declarant right would be a "declarant", including any who succeed under Section 3-104 to any of those rights. Thus, the concept of special declarant rights triggers the imposition of obligations on those who possess the rights. Under Section 3-104, those obligations vary significantly, depending upon the particular special declarant rights possessed by a particular declarant. These circumstances are described more fully in the comments to Section 3-104.

14. Definition (23), "unit owner," contemplates that a seller under a land installment contract would remain the unit owner until the contract is fulfilled. As between the seller and the buyer, various rights and responsibilities might be assigned to the buyer by the contract itself, but the association would continue to look to the seller (for payment of any arrears in common expense assessments, for example) as long as the seller holds title.

By specifically referring to "a declarant who owns a unit", in the definition of "unit owner", the Act makes clear that declarants, so long as they own units in the condominium, are

subject to all of the obligations imposed on other unit owners, including the obligation to pay common expense assessments against those units. This provision is designed to resolve ambiguities on this point which have arisen under several existing state statutes.

15. Definition (24), "withdrawable real estate," describes real estate which is initially a part of the condominium, and thereby owned as a common element by all the unit owners, but which may subsequently be removed from the condominium, to be owned by the declarant or his successors. In those states, such as Virginia, which now have the withdrawable real estate concept, real estate designated as "withdrawable" is also typically designated as "convertible," to permit the declarant to develop the real estate as part of the condominium, or withdraw it for other uses.

The withdrawable real estate technique may be used with respect to any part of the condominium, whether units or common elements, and whether undeveloped land or part of a building. Thus, for example, it would be possible for the declarant to designate all the recreational facilities, or each unit in a high-rise building, as withdrawable real estate. If properly designated, any of the recreational facilities, or any unit owned by declarant, could be withdrawn pursuant to Section 2-112, so long as the option to withdraw is valid and no unit in the convertible real estate is owned by anyone other than a declarant. Under Section 2-106(1), the option to withdraw could be exercised for up to 7 years after the condominium is created.

As in the case of convertible real estate, because the beneficial use of withdrawable real estate lies with the declarant, he must bear all the costs of maintaining it, including taxes. See Sections 1-105 and 2-112(c).

While withdrawable real estate is an important concept and serves valid purposes, a potential purchaser could be dramatically affected by the withdrawal of part of the condominium's real estate, which might then be used for purposes inconsistent with the remaining part of the condominium, and perhaps never contemplated by the purchaser. For that reason, the declarant is obligated in the declaration and in the public offering statement to either (1) state the extent to which any restrictions in the declaration concerning the use or development of the condominium would apply to real estate which is withdrawn, or (2) state that no restrictions apply if the real estate is withdrawn. See Sections 2-106(15) and 4-102(a)(4).

Any misrepresentations by declarant concerning the withdrawable land, of course, would also be actionable under Section 4-115 or in a common law action for fraud.

1 SECTION 1-104. [Variation by Agreement].

2 Except as expressly provided in this Act, provisions of this
3 Act may not be varied by agreement, and rights conferred by this
4 Act may not be waived. A declarant may not act under a power of
5 attorney, or use any other device, to evade the limitations or
6 prohibitions of this Act or the declaration.

COMMENTS

1. The Act is generally designed to provide great flexibility in the creation of condominiums and, to that end, the Act permits the parties to vary many of its provisions. In many instances, however, provisions of the Act may not be varied, because of the need to protect purchasers, lenders, and developers. Accordingly, this section adopts the approach of prohibiting variation by agreement except in those cases where it is expressly permitted by the terms of the Act itself.

2. One of the consumer protections in this Act is the requirement for consent by specified percentages of unit owners to particular actions or changes in the declaration. In order to prevent declarants from evading these requirements by obtaining powers of attorney from all unit owners, or in some other fashion controlling the votes of unit owners, this section forbids the use by a declarant of any device to evade the limitations or prohibitions of the Act or of the declaration.

3. The following sections permit variation:

Section 1-102. [Applicability]. Pre-existing condominiums may elect to conform to the Act.

Section 1-103. [Definitions]. All definitions used in the declaration and bylaws may be varied in the declaration, but not in interpretation of the Act.

Section 1-107. [Eminent Domain]. The formulas for reallocation upon taking of part of a unit, and for allocation of proceeds attributable to limited common elements, may be varied.

Section 2-102. [Unit Boundaries]. The declaration may vary the distinctions as to what constitutes the units and common elements.

Section 2-105. [Contents of Declaration]. A declarant may add

any information he desires to the required content of the declaration.

Section 2-106. [Contents of Declaration: Flexible Condominiums]. Wide latitude is provided a declarant regarding the assurances he must make.

Section 2-108. [Allocation of Interests]: A declarant may allocate the interests in any way desired, subject to certain limitations.

Section 2-109. [Limited Common Elements]. The Act permits reallocation of limited common elements unless prohibited by the declaration.

Section 2-110. [Plats and Plans]. There is a presumption regarding horizontal boundaries of units, unless the declaration provides otherwise.

Section 2-111. [Conversion and Expansion of Flexible Condominiums]. All income from convertible real estate inures to declarant unless the declaration otherwise provides.

Section 2-112. [Withdrawal of Withdrawable Real Estate]. All income from withdrawable real estate inures to the declarant unless the declaration otherwise provides.

Section 2-113. [Alterations Within Units]. Subject to the provisions of the declaration, unit owners may make alterations and improvements to units.

Section 2-114. [Relocation of Boundaries Between Adjoining Units]. Subject to the provisions of the declaration, boundaries between adjoining units may be relocated by affected unit owners.

Section 2-115. [Subdivision or Conversion of Units]. If the declaration expressly so permits, a unit may be subdivided into two or more units or a declarant may convert a unit into 2 or more units, common elements or both.

Section 2-117. [Use for Sales Purposes]. The declarant may maintain sales offices, management offices, and model units only if the declaration so provides. Unless the declaration provides otherwise, the declarant may maintain advertising on the common elements.

Section 2-118. [Easement to Facilitate Completion, Conversion, and Expansion]. Subject to the provisions of the declaration, the declarant has an easement for these purposes.

Section 2-119. [Amendment of Declaration]. The declaration of a

non-residential condominium may specify less than a two-thirds vote to amend the declaration. Any declaration may require a larger majority.

Section 2-120. [Termination of Condominium]. The declaration may specify a majority larger than 80 percent to terminate and, in a non-residential condominium, a smaller majority.

Section 3-102. [Powers of the Association]. The declaration may limit the right of the association to exercise any of the listed powers, except in a manner which discriminates in favor of a declarant.

Section 3-103. [Executive Board Members and Officers]. Except as limited by the declaration or bylaws, the Executive Board may act for the association.

Section 3-106. [ByLaws]. The bylaws may contain any matter in addition to that required by the Act.

Section 3-107. [Upkeep of the Condominium]. Except to the extent otherwise provided by the declaration, maintenance responsibilities are set forth in this section.

Section 3-109. [Quorums]. This section permits quorum requirements to be set within statutory limits.

Section 3-110. [Voting, Proxies]. Multiple owners of a single unit must vote unanimously unless the declaration provides otherwise. The declaration may vary the proportion of votes on specific issues, and may provide for cumulative and class voting.

Section 3-112. [Insurance]. The declaration may vary these provisions in non-residential condominiums, and may require additional insurance.

Section 3-113. [Surplus Funds]. Unless otherwise provided in the declaration, surplus funds are credited to unit owners in proportion to common expense liability.

Section 3-114. [Assessments for Common Expenses]. Except to the extent otherwise provided in the declaration, common expenses for limited common elements must be assessed against the units to which they are assigned.

Section 3-115. [Lien For Assessments]. Unless the declaration provides otherwise, fines, late charges and other fees are treated as assessments for lien purposes.

Section 4-101. [Applicability; Waiver]. All of Article 4 is modifiable or waivable by agreement in a condominium restricted to

non-residential uses.

Section 4-113. [Warranties]. Implied warranties of quality may be excluded or modified by agreement.

Section 4-114. [Statute of Limitations for Warranties. The 6 year limitation may be modified by agreement of the parties.

4. The second sentence of the section is an important limitation upon the rights of a declarant. It is the practice in many jurisdictions today, particularly jurisdictions which do not permit expansion of a condominium by statute, for a declarant to secure powers of attorney from all unit purchasers permitting the declarant unilaterally to expand the condominium by "unanimous consent" to include new units and to reallocate common element interests, common expense liability, and votes. With such powers of attorney, many declarants have purported to comply with the typical provision of "first generation" condominium statutes requiring unanimous consent for amendments of the declaration concerning such matters.

Section 2-119 requires unanimous consent to make certain amendments to the declaration and bylaws. If a declarant were permitted to use powers of attorney to accomplish such changes, the substantial protection which Section 2-119(d) provides to unit owners would be illusory. Section 1-104 prohibits the declarant from using powers of attorney for such purposes.

5. While freedom of contract is a principle of this Act, and variation by agreement is accordingly widely available, freedom of contract does not extend so far as to permit parties to disclaim obligations of good faith, see Section 1-113, or to enter into contracts which are unconscionable when viewed as a whole, or which contain unconscionable terms. See Section 1-112. This section derives from Section 1-102(3) of the Uniform Commercial Code.

1 SECTION 1-105. [Separate Titles and Taxation].

2 (a) Except as provided in subsection (b), each unit together
3 with its common element interest constitutes for all purposes a
4 separate parcel of real estate.

5 (b) If there is a unit owner other than a declarant, each
6 unit together with its common element interest, but excluding its
7 common element interest in convertible or withdrawable real estate,

8 shall be separately taxed and assessed, and each portion of any
9 convertible or withdrawable real estate shall be separately taxed
10 and assessed; otherwise, the real estate comprising the condominium
11 may be taxed and assessed in any manner provided by law.

COMMENTS

1. A condominium may be created, by the recordation of a declaration, long before the first unit is conveyed. This happens frequently with existing rental apartment projects which are converted into condominiums. Subsection (b) spares the local taxing authorities from having to assess each unit separately until such time as the declarant begins conveying units, although separate assessment is permitted from the date the condominium is created. When separate tax assessments become mandatory under this section, the assessment for each unit must include the value of that unit's common element interest, and no separate tax bill on the common elements is to be rendered to the association or to the unit owners collectively.

Convertible and withdrawable real estate, although a part of the condominium and lawfully "owned" by the unit owners in common, is in fact an asset of the declarant, and should not be taxed and assessed against unit owners. Under Sections 2-111(c) and 2-112(c), the declarant is exclusively liable for those taxes. No separate tax bill on the common elements is to be rendered to the association or to the unit owners collectively.

2. If there is any question in a particular state that a unit occupied as a residential dwelling is not entitled to treatment as any other residential single-family detached dwelling under the homestead statutes, this section should be modified to insure that units are similarly treated.

3. Unlike the law of New York and perhaps other states, this section imposes no limitation on the power of a jurisdiction to tax the condominium unit based on its fair market value. In most jurisdictions, experience has shown that the conversion of an apartment building to the condominium form of ownership greatly increases the fair market value of that building. Accordingly, a jurisdiction under this Act may impose real estate taxes on condominium units which reflect the fair market value of those units in the same way that the jurisdiction taxes other forms of real estate.

1 SECTION 1-106. [Applicability of Local Ordinances,
2 Regulations, and Building Codes].
3 A zoning, subdivision, building code, or other real estate use
4 law, ordinance, or regulation may not prohibit the condominium form
5 of ownership or impose any requirement upon a condominium which it
6 would not impose upon a physically identical development under a
7 different form of ownership. Otherwise, no provision of this Act
8 invalidates or modifies any provision of any zoning, subdivision,
9 building code, or other real estate use law, ordinance, or
10 regulation.

COMMENTS

1. The first sentence of this section prohibits discrimination against condominiums by local law-making authorities. Thus, if a local law, ordinance, or regulation imposes a requirement which cannot be met if property is subdivided as a condominium but which would not be violated if all of the property constituting the condominium were owned by a single owner, this section makes it unlawful to apply that requirement or restriction to the condominium. For example, in the case of a high-rise apartment building, if a local requirement imposing a minimum number of parking spaces per apartment would not prevent a rental apartment building from being built, this Act would override any requirement that might impose a higher number of spaces per apartment merely by virtue of the same building being owned as a condominium.

2. The second sentence makes clear that, except for the prohibition on discrimination against condominiums, the Act has no effect on real estate use laws. For example, a particular piece of real estate submitted to the condominium form of ownership might be of such size that all of the real estate is required to support a proposed density of units or to satisfy minimum setback requirements. Under this Act, part of the submitted real estate might be designated withdrawable real estate, and the mere designation would not constitute a subdivision of the parcel into separate ownership. If a declarant or foreclosing lender at a later time sought to exercise the option to withdraw the real estate, however, withdrawal would constitute a subdivision and

would be illegal if the effect of withdrawal would be to violate setback requirements, or to exceed the density of units permitted on the remaining parcel.

1 SECTION 1-107. [Eminent Domain].

2 (a) If a unit is acquired by eminent domain, or if part of a
3 unit is acquired by eminent domain leaving the unit owner with a
4 remnant which may not practically or lawfully be used for any
5 purpose permitted by the declaration, the award must compensate the
6 unit owner for his unit and its common element interest, whether or
7 not any common element interest is acquired. Upon acquisition,
8 unless the decree otherwise provides, that unit's entire common
9 element interest, votes in the association, and common expense
10 liability are automatically reallocated to the remaining units in
11 proportion to the respective interests, votes, and liabilities of
12 those units before the taking, and the association shall promptly
13 prepare, execute, and record an amendment to the declaration
14 reflecting the reallocations. Any remnant of a unit remaining
15 after part of a unit is taken under this subsection is thereafter a
16 common element.

17 (b) Except as provided in subsection (a), if part of a unit
18 is acquired by eminent domain, the award must compensate the unit
19 owner for the reduction in value of the unit and its common element
20 interest. Upon acquisition, (1) that unit's common element
21 interest, votes in the association, and common expense liability
22 are reduced in proportion to the reduction in the size of the unit,
23 or on any other basis specified in the declaration, and (2) the

24 portion of common element interest, votes, and common expense
25 liability divested from the partially acquired unit are
26 automatically reallocated to that unit and the remaining units in
27 proportion to the respective interests, votes, and liabilities of
28 those units before the taking, with the partially acquired unit
29 participating in the reallocation on the basis of its reduced
30 interests, votes, and liabilities.
31 (c) If part of the common elements is acquired by eminent
32 domain, the award must be paid to the association. The association
33 shall divide any portion of the award not used for any restoration
34 or repair of the remaining common elements among the unit owners in
35 proportion to their respective common element interests before the
36 taking, but the portion of the award attributable to the
37 acquisition of a limited common element must be equally divided
38 among the owners of the units to which that limited common element
39 was allocated at the time of acquisition, or in any manner the
40 declaration provides.
41 (d) The court decree shall be recorded in every [county] in
42 which any portion of the condominium is located.

COMMENTS

1. The provisions of this statute are not intended to supplant the usual rules of eminent domain but merely to supplement the rules to address the unique problems which eminent domain raises in the context of a condominium. Nevertheless, because the law of eminent domain differs widely among the various states, the law of each state should be reviewed to ensure that the eminent domain code and this section are properly integrated.

2. When a unit is taken or partially taken by eminent

domain, this section provides for a recalculation of the common element interests, votes in the association, and common expense liabilities of all units.

<u>EXAMPLE 1</u>: Suppose that all the votes, common expense liabilities and comment element interests in a 9 unit condominium were originally allocated to the units on the basis of size. If eight of the units are equal in size and one is twice as large as the others, the percentage interests would be 20 percent for the largest unit and 10 percent for each of the other eight units.

Suppose that one of the smaller units is taken out of the condominium by a condemning authority. Subsection (a) provides that the percentage interests would automatically shift, at the time of the taking, so that the large unit would have 22 2/9 percent while each of the smaller units would have 11 1/9 percent.

<u>EXAMPLE 2</u>: Suppose, in Example 1, that the condemnation only reduced the size of one of the smaller units by 50 percent, leaving the remaining half of the unit usable. Subsection (b) provides that the common element interests would automatically shift to 5 5/19 percent for the partially taken unit, 21 1/19 percent for the largest unit, and 10 10/19 percent for each of the other units. Note that the fact that the partially taken unit was reduced to half its former size does <u>not</u> mean that its percentage interest is only half as large as it was before the taking. Rather, it participates in the reallocation in proportion to its reduced size. That is why the partially taken unit's reallocated percentage interest is 5 5/19 percent rather than 5 percent.

3. An important issue raised by this section is whether or not a governmental body acquiring a unit by eminent domain has a right to also take the undivided interests in the common elements, the votes, and the common expense liability allocated to that unit, and thereby assume membership in the association by virtue of its power of eminent domain. While there is no question that a governmental body may acquire any real property by eminent domain, there is no case law on the question of whether or not the governmental body may take a condominium unit as a part of the condominium or must take the unit and have the unit excluded from the condominium.

Subsection (a) merely requires that the taking body compensate the unit owner for all his unit and common element interest, whether or not the common element interest is acquired. The Act also requires that the common element interest, votes, and common expense liability upon taking are automatically reallocated to the remaining units unless the decree provides otherwise. Whether or not the decree may constitutionally provide otherwise in the case of a particular taking (for example, by allocating the common element interest, votes, and common expense liability to the government) is an unanswered question.

4. In the circumstances of a taking of part of a unit, it is important to have some objective test by which to measure the portion of common element interest, votes in the association, and common expense liability reallocated. Subsection (b) sets forth a formula based on relative size, but permits the declaration to vary that formula to some other more appropriate formula in a particular circumstance. This right to vary the formula in the declaration is important, since it is clear that the formula set forth in the statute may in some instances result in gross inequities.

If a portion of a unit is taken by eminent domain, the common element interest of that unit must be reduced in accordance with the provisions of this section.

EXAMPLE 1: Suppose, in a commercial condominium, consisting of four units, each unit consists of a factory and parking lot, and that the declaration provides that each unit's common expense liability, including utilities, is equal. Suppose further that the area of the factory building and parking lot in unit #1 are equal, and that the parking lot is taken by eniment domain, leaving the factory and 1/2 the lot intact. Under the formula set out in the statute, unit #1's common expense liability would be reduced even though its utilities might not be reduced at all, thus resulting in a windfall for the unit owner.

EXAMPLE 2: Suppose that a condominium contains ten units, each of which is allocated a 1/10 undivided interest in the common elements. Suppose further that a taking by eminent domain reduces the size of one of the units by 50 percent. In such case, the common element interest of all the units will be reallocated so that the partially-taken unit has a 1/19 undivided interest in the common elements and the remaining 9 units each have a 2/19 undivided interest in the common elements. Thus, the

partially-taken unit has a common element interest equal to 1/2 of the common element interest allocated to each of the other units. Note that this is not equivalent to the partially-taken unit having a 5 percent undivided interest and the remaining 9 units each having a 10 percent undivided interest.

5. Even before the amendment formally acknowledging the reallocation of percentages required by this section is recorded, the reallocation is deemed to have occurred simultaneously with the taking. This rule is necessary to avoid the hiatus that otherwise could occur between the taking and reallocation of interests, votes, and liabilities.

6. The provision in subsection (c) that if part of the common elements is acquired, the award is paid to the association, would not normally be the rule in the absence of such a provision. The purpose of this provision is to permit the association to use the award to restore or repair the remaining common elements and to pay or divide the portion of the award not used for that purpose among all the unit owners.

1 SECTION 1-108. [Supplemental General Principles of Law
2 Applicable].
3 The principles of law and equity, including the law of
4 corporations [and unincorporated associations], the law of real
5 property and the law relative to capacity to contract, principal
6 and agent, eminent domain, estoppel, fraud, misrepresentation,
7 duress, coercion, mistake, receivership, substantial performance,
8 or other validating or invalidating cause supplement the provisions
9 of this Act, except to the extent inconsistent with this Act.

COMMENTS

1. This Act displaces existing law relating to condominiums and other law only as stated by specific sections and by reasonable implication therefrom. Moreover, unless specifically displaced by

each section should be read in light of the purpose and policy of the rule or principle in question, and also of the Act as a whole.

1 SECTION 1-111. [Severability].

2 If any provision of this Act or the application thereof to any
3 person or circumstances is held invalid, the invalidity does not
4 affect other provisions or applications of this Act which can be
5 given effect without the invalid provisions or application, and to
6 this end the provisions of this Act are severable.

1 SECTION 1-112. [Unconscionable Agreement or Term of
2 Contract].

3 (a) The court, upon finding as a matter of law that a
4 contract or contract clause was unconscionable at the time the
5 contract was made, may refuse to enforce the contract, enforce the
6 remainder of the contract without the unconscionable clause, or
7 limit the application of any unconscionable clause in order to
8 avoid an unconscionable result.

9 (b) Whenever it is claimed, or appears to the court, that a
10 contract or any contract clause is or may be unconscionable, the
11 parties, in order to aid the court in making the determination,
12 shall be afforded a reasonable opportunity to present evidence as
13 to:

14 (1) the commercial setting of the negotiations;

15 (2) whether a party has knowingly taken advantage of the

16 inability of the other party reasonably to protect his interests by
17 reason of physical or mental infirmity, illiteracy, or inability to
18 understand the language of the agreement or similar factors;
19 (3) the effect and purpose of the contract or clause;
20 and
21 (4) if a sale, any gross disparity, at the time of
22 contracting, between the amount charged for the real estate and the
23 value of the real estate measured by the price at which similar
24 real estate was readily obtainable in similar transactions, but a
25 disparity between the contract price and the value of the real
26 estate measured by the price at which similar real estate was
27 readily obtainable in similar transactions does not, of itself,
28 render the contract unconscionable.

COMMENT

This section is similar to Section 2-302 of the Uniform Commercial Code and Section 1-311 of the Uniform Land Transactions Act. The rationale and comments provided in those sections are equally applicable to this section.

1 SECTION 1-113. [Obligation of Good Faith].
2 Every contract or duty governed by this Act imposes an
3 obligation of good faith in its performance or enforcement.

COMMENT

This section sets forth a basic principle running throughout this Act: in condominium transactions, good faith is required in the performance and enforcement of all agreements and duties. Good

faith, as used in this Act, means observance of two standards, "honesty in fact" and observance of reasonable standards of fair dealing. While the term is not defined, the term is derived from and used in the same manner as in Section 1-201 of the Uniform Simplification of Land Transfers Act, and Sections 2-103(i)(b) and 7-404 of the Uniform Commercial Code.

1 SECTION 1-114. [Remedies To Be Liberally Administered].

2 (a) The remedies provided by this Act shall be liberally
3 administered to the end that the aggrieved party is put in as good
4 a position as if the other party had fully performed. However,
5 consequential, special, or punitive damages may not be awarded
6 except as specifically provided in this Act or by other rule of
7 law.

8 (b) Any right or obligation declared by this Act is
9 enforceable by judicial proceeding.

ARTICLE 2
CREATION, ALTERATION, AND TERMINATION OF CONDOMINIUMS

Section 2-101. [Creation of Condominium].
2-102. [Unit Boundaries].
2-103. [Construction and Validity of Declaration and Bylaws].
2-104. [Description of Units].
2-105. [Contents of Declaration: All Condominiums].
2-106. [Contents of Declaration: Flexible Condominiums].
2-107. [Leasehold Condominiums].
2-108. [Allocation of Common Element Interests, Votes, and Common Expense Liabilities].
2-109. [Limited Common Elements].
2-110. [Plats and Plans].
2-111. [Conversion and Expansion of Flexible Condominiums].
2-112. [Withdrawal of Withdrawable Real Estate].
2-113. [Alterations of Units].
2-114. [Relocation of Boundaries Between Adjoining Units].
2-115. [Subdivision or Conversion of Units].
2-116. [Alternative A.] [Easement for Encroachments].
2-116. [Alternative B.] [Interpretation of Deeds].
2-117. [Use for Sales Purposes].
2-118. [Easement to Facilitate Completion, Conversion, and Expansion].
2-119. [Amendment of Declaration].
2-120. [Termination of Condominium].
2-121. [Rights of Secured Lenders].

ARTICLE 2

CREATION, ALTERATION, AND TERMINATION OF CONDOMINIUMS

1 SECTION 2-101. [Creation of Condominium].

2 (a) A condominium may be created pursuant to this Act only by
3 recording a declaration executed, in the same manner as a deed, by
4 all persons whose interests in the real estate will be conveyed to
5 unit owners and by every lessor of a lease the expiration or
6 termination of which will terminate the condominium or reduce its
7 size. The declaration shall be recorded in every [county] in which
8 any portion of the condominium is located, and shall be indexed in
9 the name of the condominium and each declarant.

10 (b) A declaration or an amendment to a declaration adding
11 units to a condominium, may not be recorded unless all structural
12 components and mechanical systems of all buildings containing or
13 comprising any units thereby created are substantially completed in
14 accordance with the plans, as evidenced by a recorded certificate
15 of completion executed by an independent [registered] engineer,
16 surveyor, or architect [,or unless the agency has approved the
17 declaration or amendment in the manner prescribed in Section
18 5-103(b)].

19 (c) No interest in a unit may be conveyed until the unit is
20 substantially completed, [except pursuant to Section 5-103(b)], as
21 evidenced by a recorded certificate of completion executed by an
22 independent [registered] architect, surveyor, or engineer.

COMMENTS

1. A condominium has not been lawfully created unless the requirements of this section have been complied with. Nevertheless, a project which meets the definition of "condominium" in Section 1-103(7) is subject to this Act even if this or other sections of the Act have not been complied with.

2. Mortgagees and other lienholders need not execute the declaration, and foreclosure of a mortgage or other lien will not, of itself, terminate the condominium. See Section 2-120(h). However, the declarant may wish to obtain agreements from mortgagees or other lienholders that they will give partial releases permitting lien-free conveyance of the condominium units. See Section 4-109(a).

3. Except when development proceeds pursuant to Section 5-103, this section contemplates that two different stages of construction must be reached before (1) a condominium may be created or (2) a unit in the condominium may be conveyed. These stages are described, respectively, in subsections (b) and (c). The purpose of imposing these requirements is to insure that a purchaser will in fact take title to a unit which may be used for its intended purpose.

If a condominium were said to consist from the beginning of a certain number of units even though some of those units had not yet been completed, or even begun, serious problems would arise if the remaining units were never constructed and if no obligation to complete construction could be enforced against any solvent person. If the insolvent owner of the unbuilt units failed to pay his common expense assessments, for example, the unit owners association might be left with no remedy except a lien of doubtful value against mere cubicles of airspace. Moreover, votes in the unit owners association could be assigned to units, and voted, even those the units were never built. The Act therefore requires that significant construction take place before units are assigned an interest in the common elements, a vote in the association, and a share of the common expense liabilities, and before units are conveyed. This requirement of substantial completion [or the alternative bonding procedure and other assurances required by Section 5-103] reduces the possibility that a failure to complete will upset the expectations of purchasers or otherwise harm their interests in case the declarant becomes insolvent and no solvent person has the obligation to complete the unit.

4. Section 2-101(b) requires that "all structural components and mechanical systems of all buildings containing or comprising any units" which will be created by recording a declaration, must be substantially completed in accordance with the plans. The intent

of subsection (b) is that if any buildings are depicted on the plats and plans which are required by Section 2-110, and these buildings contain or comprise spaces which become units by virtue of recording the declaration, the structural components and mechanical systems of these buildings must be substantially complete before the declaration is recorded. This is required even though the plats and plans recorded pursuant to Section 2-110 depict only the boundaries of the buildings and the units created in those buildings and not the structural components or mechanical systems (which need not be shown). If the boundaries of units are not depicted, of course, then no units are created. If the declarant fails to comply with this section, title is not affected; see Comment 6, below.

The concept of "structural components and mechanical systems" is one commonly understood in the contruction field and this comment is not intended as a "laundry list" of the components required. For example, however, the term "structural components" is generally understood to include those portions of a building necessary to keep any part of the building from collapsing, and to maintain the building in a weathertight condition. This would include the foundations, bearing walls and columns, exterior walls, roof, floors and similar components. It would clearly not include such components as interior non-bearing partitions, surface finishes, interior doors, carpeting, and the like. Similarly, typical examples of "mechanical systems" include the plumbing, heating, air conditioning and other like systems. Whether or not "electrical systems" are included within the meaning of the term depends on local practice.

5. Section 2-101(c) further requires that before an individual unit is conveyed, the unit must be "substantially completed". "Substantial completion" is a well understood term in the construction industry. For example, the American Institute of Architects Document A201, General Conditions of the Contract for Construction (1976 ed.) at para. 8.1.3, states:

> The Date of Substantial Completion of the Work... is the date certified by the Architect when construction is sufficiently complete, in accordance with the Contract Documents (that is, the owner-contractor agreement, the conditions of the contract, and the specifications and all addenda and modifications), so the Owner can occupy or utilize the Work... for the use for which it is intended.

This standard is also one often used by building officials in issuing certificates of occupancy. It does not suggest that the unit is "entirely completed" as that term is understood in the construction industry; lesser details, such as

sticking doors, leaking windows, or some decorative items, might still remain, and the Act contemplates that they need not be completed prior to lawful conveyance.

6. Subsection (b) and (c) require that completion certificates be recorded as evidence of the fact that the required levels of construction have been met. Once the certificates have been recorded, good title to the units may be conveyed in reliance on the record. It is possible, of course, that the declarant may have failed to complete the required levels of construction; the architect, surveyor or engineer, (whichever is appropriate in a particular jurisdiction) may have filed a false certificate. Such acts would create a cause of action in the purchaser under Section 4-115, but would not affect the validity of the purchasers' title to the condominium.

7. The requirement of "substantial completion" does not mean that the declarant must complete all buildings in which all possible units would be located before creating the condominium. If only some of the buildings in which units which may ultimately be located have been "structurally" completed, the declarant may create a "flexible condominium" (Section 2-106) in which only the completed units are treated as units from the outset, while an option is reserved to create additional units later in "convertible real estate" or "additional real estate." The optional units may never be completed or added to the condominium; however, this will not affect the integrity of the condominium as originally created.

8. Requiring "substantial completion" of the structural components and mechanical systems in the buildings containing or comprising the units in a condominium may encourage creation of more "flexible condominiums" under Section 2-106 in projects which once were in fact built in phases, but under a single non-expandable declaration. Experience in the several states where significantly more rigorous requirements are imposed by statute, however, has shown that this does not create a difficult situation either for the developer or the lender. Moreover, it appears likely that the size of the initial phase of a multi-building project will be dictated largely by economics, rather than this Act, as occurs in most jurisdictions today. Finally, many lenders and developers are increasingly sensitive to the secondary mortgage market requirements, particularly those of the Federal National Mortgage Association (FNMA) and the Federal Home Loan Mortgage Corporation (FHLMC). Experience indicates that the presale requirements imposed by FNMA and FHLMC frequently dictate that multi-building condominium projects be structured on a phased or flexible condominium basis.

9. The requirement of completion would be irrelevant in some types of condominiums, such as campsite condominiums or some

subdivision condominiums. In a subdivision condominium, the units might consist of unimproved lots, and the airspace above them, within which each purchaser would be free to construct or not construct a residence. Any residence actually constructed would ordinarily become a part of the "unit" by the doctrine of fixtures, but nothing in this Act would require any residence to be built before the lots could be treated as units.

10. The term "independent" architect, surveyor or engineer in subsection (c) and elsewhere in the Act distinguishes between any such professional person who acts as an independent contractor in his relationship to the declarant or lender, and a similar professional who is an employee of the declarant or lender.

1 SECTION 2-102. [Unit Boundaries].

2 Except as provided by the declaration:

3 (1) If walls, floors, or ceilings are designated as
4 boundaries of a unit, all lath, furring, wallboard, plasterboard,
5 plaster, paneling, tiles, wallpaper, paint, finished flooring, and
6 any other materials constituting any part of the finished surfaces
7 thereof are a part of the unit, and all other portions of the
8 walls, floors, or ceilings are a part of the common elements.

9 (2) If any chute, flue, duct, wire, conduit, bearing wall,
10 bearing column, or any other fixture lies partially within and
11 partially outside the designated boundaries of a unit, any portion
12 thereof serving only that unit is a limited common element
13 allocated solely to that unit, and any portion thereof serving more
14 than one unit or any portion of the common elements is a part of
15 the common elements.

16 (3) Subject to the provisions of paragraph (2), all spaces,
17 interior partitions, and other fixtures and improvements within the

18 boundaries of a unit are a part of the unit.

19 (4) Any shutters, awnings, window boxes, doorsteps, stoops,
20 porches, balconies, patios, and all exterior doors and windows or
21 other fixtures designed to serve a single unit, but located outside
22 the unit's boundaries, are limited common elements allocated
23 exclusively to that unit.

COMMENTS

1. It is important for title purposes and other reasons to have a clear guide as to precisely which parts of a condominium constitute the units and which parts constitute the common elements. This section fills the gap left when the declaration merely defines unit boundaries in terms of floors, ceilings, and perimetric walls. The provisions of this section can be varied to the extent that the declarant wishes to modify the details for a particular condominium.

2. The differentiation between components constituting common elements and components which are part of the units is particularly important in light of Section 3-107(a), which (subject to the exceptions therein mentioned) makes the association responsible for upkeep of the former and each unit owner individually responsible for upkeep of the latter.

3. The differentiation between unit components and common element components is not particularly important for insurance purposes under this Act, since Section 3-112(a) contemplates that both will normally be insured by the association (exclusive of improvements and betterments in individual units) and the cost of such insurance will be a common expense.

1 SECTION 2-103. [Construction and Validity of Declaration and
2 Bylaws].

3 (a) All provisions of the declaration and bylaws are
4 severable.

5 (b) The rule against perpetuities may not be applied to

6 defeat any provision of the declaration or this Act, or any
7 instrument executed pursuant to the declaration or this Act.
8 (c) In the event of a conflict between the provisions of the
9 declaration and the bylaws, the declaration prevails except to the
10 extent the declaration is inconsistent with this Act.
11 (d) Title to a unit and its common element interest is not
12 rendered unmarketable or otherwise affected by any provision of
13 unrecorded bylaws, or by reason of an insubstantial failure of the
14 declaration to comply with this Act.

COMMENTS

1. No special prohibition against racial or other forms of discrimination is included in this Act because the provisions of generally applicable federal and state law apply as much to condominiums as to other forms of real estate.

2. Some examples may help to clarify what sorts of defects in the declaration are to be regarded as "insubstantial" within the meaning of the last clause of subsection (d).

Suppose the declaration allocates common element interests to all the units but fails to indicate the formula for the allocation as required by Section 2-108. This would be a substantial defect if the assigned interests were unequal, but if all units were assigned identical interests it would be possible to infer that the basis of allocation was equality--and the failure of the declaration to say so would be an insubstantial defect. Were this to happen in a flexible condominium, however, it should be noted that a subsequent amendment to the declaration adding new units could not use any formula other than equality for reallocating the common element interests unless a different formula were specified pursuant to Section 2-106 (4).

Other examples of insubstantial defects that might occur might include failure of the declaration to include the word "condominium" in the name of the project, as required by Section 2-105(1), or failure of the plats and plans to comply satisfactorily with the requirement of Section 2-110(a) that they be "clear and legible", so long as they can at least be deciphered

by persons with proper expertise. Failure to organize the unit owners association at the time specified in Section 3-101 would not be a defect in the declaration at all, and would not affect the validity or marketability of titles in the condominium. It would, however, be a violation of this Act, and create a claim for relief under Section 4-115.

1 SECTION 2-104. [Description of Units].

2 After the declaration is recorded, a description of a unit
3 which sets forth the name of the condominium, the [recording data]
4 for the declaration, the [county] in which the condominium is
5 located, and the identifying number of the unit, is a sufficient
6 legal description of that unit and its common element interest even
7 if the common element interest is not described or referred to
8 therein.

COMMENT

The intent of this section is that no description of a unit in a deed, lease, deed of trust, mortgage, or any other instrument or document shall be subject to challenge for failure to meet any common law or other requirements so long as the requirements of this section are satisfied and the declaration itself, together with the plats and plans which are a part of the declaration, provides a legally sufficient description.

1 SECTION 2-105. [Contents of Declaration: All Condominiums].

2 The declaration for a condominium must contain:

3 (1) the name of the condominium, which must include the
4 word "condominium" or be followed by the words "a condominium";

5 (2) the name of every [county] in which any part of the
6 condominium is situated;

7 (3) a legally sufficient description of the real estate
8 included in the condominium;
9 (4) a description or delineation of the boundaries of
10 each unit, including the unit's identifying number;
11 (5) a statement of the maximum number of units that may
12 be created by the subdivision or conversion of units owned by the
13 declarant pursuant to Section 2-115(c);
14 (6) a description of any limited common elements, as
15 provided in Section 2-109;
16 (7) a description of any common elements not within the
17 boundaries of any convertible real estate which may be allocated
18 subsequently as limited common elements, together with a statement
19 that they may be so allocated and a description of the method by
20 which the allocations are to be made;
21 (8) an allocation to each unit of an undivided interest
22 in the common elements, a portion of the votes in the association,
23 and a percentage or fraction of the common expenses of the
24 association (Section 2-108);
25 (9) any restrictions on use, occupancy, and alienation
26 of the units;
27 (10) the [recording data] for recorded easements and
28 licenses appurtenant to or included in the condominium or to which
29 any portion of the condominium is or may become subject; and
30 (11) any other matters the declarant deems appropriate.

COMMENTS

1. Section 2-102 makes it possible, in many condominiums, to satisfy paragraph (4) of this section by merely providing the identifying numbers of the units, and stating that each unit is bounded by its ceiling, floor, and walls. The plats and plans will show where those ceilings, floors, and perimetric walls are located, and Section 2-102 provides all other details, except to the extent the declaration may make additional or contradictory specifications.

2. Easements affecting or appurtenant to additional real estate must be described pursuant to paragraph (10) of this section because that additional real estate may subsequently become part of the condominium.

3. The plats and plans are made a part of the declaration by Section 2-110(a). In order to determine what additional matters should be treated in the declaration, it is necessary to examine particularly Sections 2-106, 2-107, 2-108, 2-109, 2-117, 3-110, and 3-114.

1 SECTION 2-106. [Contents of Declaration: Flexible
2 Condominiums].
3 The declaration for a flexible condominium shall include, in
4 addition to the matters specified in Section 2-105:
5 (1) an explicit reservation of any options to create
6 units, limited common elements, or both, within convertible real
7 estate, or to add additional real estate to or withdraw
8 withdrawable real estate from the condominium;
9 (2) a statement of the time limit, not exceeding [7]
10 years after the recording of the declaration, upon which any option
11 reserved under paragraph (1) will lapse, together with a statement
12 of any circumstances that will terminate the option before the
13 expiration of the time limit;

14 (3) a statement of any limitations on any option
15 reserved under paragraph (1), other than limitations created by or
16 imposed pursuant to law, or else a statement that there are no such
17 limitations;

18 (4) a statement of the extent to which the common
19 element interest, relative voting strength in the association, and
20 share of common expense liability of each unit in the condominium
21 at the time the declaration is recorded may be increased or
22 decreased by actions pursuant to any option reserved under
23 paragraph (1), including the formulas to be used for those
24 reallocations;

25 (5) legally sufficient descriptions of each portion of
26 convertible, additional, and withdrawable real estate;

27 (6) if portions of any convertible, additional, or
28 withdrawable real estate may be converted, added, or withdrawn at
29 different times, a statement to that effect together with (i)
30 either a statement fixing the boundaries of those portions and
31 regulating the order in which they may be converted, added, or
32 withdrawn or a statement that no assurances are made in those
33 regards, and (ii) a statement as to whether, if any portion of
34 convertible, additional, or withdrawable real estate is converted,
35 added, or withdrawn, all or any particular portion of that or any
36 other real estate must be converted, added, or withdrawn;

37 (7) a statement of (i) the maximum number of units that
38 may be created within any additional or convertible real estate, or

39 within any portion of either, the boundaries of which are fixed
40 pursuant to paragraph (6), (ii) how many of those units will be
41 restricted exclusively to residential use, and (iii) the maximum
42 number of units per acre that may be created within any portions
43 the boundaries of which are not fixed pursuant to paragraph (6);
44 (8) if any of the units that may be built within any
45 additional or convertible real estate are not to be restricted
46 exclusively to residential use, a statement, with respect to each
47 portion of the additional and convertible real estate, of the
48 maximum percentage of the real estate areas, and the maximum
49 percentage of the floor areas of all units that may be created
50 therein, that are not restricted exclusively to residential use;
51 (9) a statement of the extent to which any buildings and
52 units that may be erected upon each portion of the additional or
53 convertible real estate will be compatible with the other buildings
54 and units in the condominium in terms of architectural style,
55 quality of construction, principal materials employed in
56 construction, and size, or a statement that no assurances are made
57 in those regards;
58 (10) a statement that all restrictions in the declaration
59 affecting use, occupancy, and alienation of units will apply to
60 units created within any convertible or additional real estate, or
61 a statement of any differentiations that may be made as to those
62 units;
63 (11) general descriptions of all other improvements and

64 limited common elements that may be made or created upon or within
65 each portion of the additional or convertible real estate, or a
66 statement that no assurances are made in that regard;
67 (12) a statement of any limitations as to the locations
68 of any buildings or other improvements that may be made within
69 convertible or additional real estate, or a statement that no
70 assurances are made in that regard;
71 (13) a statement that any limited common elements created
72 within any convertible or additional real estate will be of the
73 same general types and sizes as those within other parts of the
74 condominium, or a statement of any other assurances in that regard,
75 or a statement that no assurances are made in that regard;
76 (14) a statement that the proportion of limited common
77 elements to units created within convertible or additional real
78 estate will be approximately equal to the proportion existing
79 within other parts of the condominium, or a statement of any other
80 assurances in that regard, or a statement that no assurances are
81 made in that regard; and
82 (15) a statement of the extent to which any assurances
83 made in the declaration regarding additional or withdrawable real
84 estate pursuant to paragraphs (6) through (14) apply in the event
85 any additional real estate is not added to or any withdrawable land
86 is withdrawn from the condominium, or a statement that those
87 assurances do not apply if the real estate is not added to or is
88 withdrawn from the condominium.

COMMENTS

1. The remarks in Comments 1 and 2 to Section 2-108 are applicable to the formulas for reallocation required by paragraph (4) of this section.

2. Paragraph (7) means that if the declaration does not fix in advance the boundaries of tracts of convertible or additional real estate that may be converted or added at any one time, but instead reserves to the declarant the right to convert or add all or any part of such real estate, the declaration must state in advance the maximum number of units per acre that may be created in any part that he subsequently adds or converts.

EXAMPLE: Suppose that the declarant reserves the right to add all or any part of a 5-acre parcel within which he initially plans to create a maximum of 50 units. If the declaration states that the maximum number of units per acre within any portion of that real estate subsequently added will not exceed 10, this means that if the declarant first adds a 2-acre portion containing only 15 units, he is nevertheless limited to a maximum of 30 units in the remaining 3-acre portion. To create 35 units within that 3-acre portion would not exceed the limit of 50 units he had stipulated in the declaration as the maximum number for all of the additional real estate, but it would exceed the 10 units per acre limitation specified pursuant to the last part of this subsection.

3. Plats and plans are made a part of the declaration for legal purposes by Section 2-110, and their content may in part provide some of the information required by this section.

1 SECTION 2-107. [Leasehold Condominiums].

2 (a) Any lease the expiration or termination of which may

3 terminate the condominium or reduce its size, [or a memorandum

4 thereof,] shall be recorded, and the declaration shall state:

5 (1) the [recording data] for the lease [or a statement

6 of where the complete lease may be inspected];

7 (2) the date on which the lease is scheduled to expire;

8 (3) a legally sufficient description of the real estate
9 subject to the lease;
10 (4) any right of the unit owners to redeem the reversion
11 and the manner whereby those rights may be exercised, or a
12 statement that they do not have those rights;
13 (5) any right of the unit owners to remove any
14 improvements within a reasonable time after the expiration or
15 termination of the lease, or a statement that they do not have
16 those rights; and
17 (6) any rights of the unit owners to renew the lease and
18 the conditions of any renewal, or a statement that they do not have
19 those rights.
20 (b) After the declaration for a leasehold condominium is
21 recorded, neither the lessor nor his successor in interest may
22 terminate the leasehold interest of a unit owner who makes timely
23 payment of his share of the rent and otherwise complies with all
24 covenants which, if violated, would entitle the lessor to terminate
25 the lease. A unit owner's leasehold interest is not affected by
26 failure of any other person to pay rent or fulfill any other
27 covenant.
28 (c) Acquisition of the leasehold interest of any unit owner
29 by the owner of the reversion or remainder does not merge the
30 leasehold and fee simple interests unless the leasehold interests
31 of all unit owners subject to that reversion or remainder are
32 acquired.

33 (d) If the expiration or termination of a lease decreases the
34 number of units in a condominium, the common element interests,
35 votes in the association, and common expense liabilities shall be
36 reallocated in accordance with Section 1-107(a) as though those
37 units had been taken by eminent domain. Reallocations shall be
38 confirmed by an amendment to the declaration prepared, executed,
39 and recorded by the association.

COMMENTS

1. In any state where the recording acts do not specify the essential terms which must be included in a memorandum of lease, either this section should be supplemented to specify the essential terms or else the bracketed language relating to such memoranda should be deleted.

2. Subsection (b) is intended to protect the "unit owner" regardless of whether he is a lessee, sublessee, or even further down in a chain of transfer of leasehold interests. Thus, for example, if the "unit owner" is a sublessee, the term "lessor (or) his successor in interest" includes not only the lessor, but also the lessee.

3. Subsection (b) further protects the unit owner by assuring that he will not share with his fellow unit owners any collective obligations toward their common lessor. All obligations are instead fractionalized so that no unit owner can be made liable or otherwise penalized for a default by any of his fellows.

1 SECTION 2-108. [Allocation of Common Element Interests, Votes,
2 and Common Expense Liabilities].
3 (a) The declaration shall allocate a fraction or percentage
4 of undivided interest in the common elements and in the common
5 expenses of the association, and a portion of the votes in the
6 association, to each unit and state the formulas used to establish

7 those allocations.

8 (b) In a flexible condominium, the common element interest
9 and common expense liability allocated to each unit must be equal,
10 or proportionate to the relative size of each unit, unless the
11 declaration as originally recorded:

12 (1) requires that any units created in additional or
13 convertible real estate be substantially identical to the other
14 units in the condominium and provides that common element interests
15 and common expense liabilities will be allocated to those units in
16 accordance with the formulas used for the initial allocations; or

17 (2) identifies all other types of units that may be
18 created in additional or convertible real estate in terms of
19 architectural style, quality of construction, principal materials
20 to be used, and ranges of sizes, and states the formulas upon which
21 any reallocations of common element interests and common expense
22 liabilities will be made, or states the common element interest and
23 common expense liability to be allocated to each unit that may be
24 created.

25 (c) The number of votes allocated to each unit must be equal,
26 proportionate to that unit's common expense liability, or
27 proportionate to that unit's common element interest. If the
28 declaration allocates an equal number of votes in the association
29 to each unit, each unit that may be subdivided or converted by the
30 declarant into 2 or more units, common elements, or both (Section
31 2-115), must be allocated a number of votes in the association

32 proportionate to the relative size of that unit compared to the
33 aggregate size of all units, and the remaining votes in the
34 association must be allocated equally to the other units. The
35 declaration may provide that different allocations of votes shall
36 be made to the units on particular matters specified in the
37 declaration.

38 (d) Except in the case of eminent domain (Section 1-107),
39 expansion or conversion of a flexible condominium (Section 2-111),
40 withdrawal of withdrawable real estate (Section 2-112), relocation
41 of boundaries between adjoining units (Section 2-114) or
42 subdivision of units (Section 2-115), the common element interest,
43 votes, and common expense liability allocated to any unit may not
44 be altered without unanimous consent of all unit owners. The
45 common elements are not subject to partition, and any purported
46 conveyance, encumbrance, judicial sale, or other voluntary or
47 involuntary transfer of an undivided interest in the common
48 elements made without the unit to which it is allocated is void.

49 (e) Except for minor variations due to rounding, the sums of
50 the undivided interests in the common elements and common expense
51 liabilities allocated at any time to all the units shall each equal
52 one if stated as fractions or 100 percent if stated as percentages.
53 In the event of discrepancy between the common element interest,
54 votes, or common expense liability allocated to a unit and the
55 result derived from application of the formulas, the allocated
56 common element interest, vote, or common expense liability

57 prevails.

COMMENTS

1. Most existing condominium statutes require a single common basis, usually related to the "value" of the units, to be used in the allocation of common element interests, votes in the association, and common expense liabilities. This Act departs radically from such requirements by permitting each of these allocations to be made on different bases, and by permitting allocations which are unrelated to value.

Thus, all three allocations might be made equally among all units, or in proportion to the relative size of each unit, or on the basis of any other formulas the declarant may select, regardless of the values of those units. Moreover, "size" might be used, for example, in allocating expenses and common element interests, while "equality" is used for allocating votes in the association. This section does not require that the formulas used by the declarant be justified, but it does require that the formulas be explained.

2. If size is chosen as a basis of allocation, the declarant must choose between reliance on area or volume, and the choice must be indicated in the declaration. The declarant might further refine the formula by, for example, excluding unheated areas from the calculation or by partially discounting such areas by means of a ratio. Again, the declaration must indicate the choices he has made and explain the formulas he has chosen.

3. Most existing condominium statutes require that "value" be used as the basis of all allocations. Under this Act a declarant is free to select such a basis if he wishes to do so. For example, he might designate the "par value" of each unit as a stated number of dollars or points. However, the formula used to develop the par values of the various units would have to be explained in the declaration. For example, the declaration for a high-rise condominium might disclose that the par value of each unit is based on the relative area of each unit on the lower floors, but increases by specified percentages at designated higher levels. The formula for determining area in this example could be further refined in the manner suggested in Comment 2, above, and any other factors (such as the direction in which a unit faces) could also be given weight so long as the weight given to each factor is explained in the declaration.

4. The purpose of subsection (b) is to afford some advance disclosure to purchasers of units in the first phase of a flexible

condominium of how common element interests, votes, and common expense liabilities will be reallocated if additional units are added. In the case of a flexible condominium, a declarant wishing to make allocations on a basis other than equality or size must describe from the outset the types of additional units that may be created. In addition, the reallocation formulas set forth pursuant to subsection (a) must be comprehensive enough to disclose from the outset the weight that will be given to various factors in reallocating common element interests, votes, and common expense liabilities, among the additional units and the original units.

5. Subsection (d) means what it says when it states that a lien or encumbrance on a common element interest without the unit to which that common element interest is allocated is void. Thus, consider the case of a flexible condominium in which there are 50 units in the first phase, each of which initially has a 2 percent undivided interest in the common elements. The declarant borrows money by mortgaging additional real estate which will later become phase 2 and the construction lender takes a lien on the additional real estate. When the declarant expands the condominium by adding phase 2 containing an additional 50 units, he reallocates the common element interests in the manner described in his original declaration, to give each of the 100 units a 1 percent undivided interest in the common elements in both phases of the condominium. At this point, the construction lender cannot have a lien on the undivided interest of phase 1 owners in the common elements of phase 2 because of the wording of the statute. Thus, the most th the construction lender can have is a lien on the phase 2 units together with their common element interests. The mortgage documents may be written to reflect the fact that upon the addit of phase 2 of the condominium, the lien on the additional real estate will be converted into a lien on the phase 2 units and on the common element interests as they pertain to those units in b phase 1 and phase 2; however, <u>see</u> Comment to Section 2-111.

Unless the lender also requires phase 2 to be designa as withdrawable real estate, the phase 2 portion may not be foreclosed upon other than as condominium units and the construction lender may not dispose of phase 2 other as units w are a part of the condominium. In the event that phase 2 is designated as withdrawable land, then the construction lender m force withdrawal of phase 2 and dispose of it as he wishes, su to the provisions of the declaration. If one unit in phase 2, however, is owned by anyone other than the declarant, then pha ceases to be withdrawable land by operation of Section 2-112(b

6. Subsection (c) provides that if votes in the unit o association are equally distributed to the other units, the declaration shall nevertheless assign votes to any unit which declarant may subdivide or convert into common elements (call

"convertible space" in some existing state statutes) on the basis of "size." The declaration would have to indicate whether area or volume had been chosen as the measure of size and explain any further refinements of the formula as mentioned in Comment 3, above.

7. If a unit owned by the declarant may be subdivided into 2 or more units but cannot be converted in whole or in part into common elements, it is not a unit "that may be subdivided or converted into 2 or more units, common elements, or both" within the meaning of subsection (c) of this section or Section 2-115.

1 SECTION 2-109. [Limited Common Elements].

2 (a) Except for the limited common elements described in
3 Section 2-102(2) and (4), the declaration shall specify to which
4 unit or units each limited common element is allocated. That
5 allocation may not be altered without the consent of the unit
6 owners whose units are affected.

7 (b) Subject to any provisions of the declaration, a limited
8 common element may be reallocated by a recorded assignment executed
9 by the unit owners between or among whose units the reallocation is
10 made, or by an amendment to the declaration executed by those unit
11 owners. The persons executing the assignment or amendment to the
12 declaration shall provide a copy thereof to the association.

13 (c) A common element not previously allocated as a limited
14 common element may not be so allocated except pursuant to
15 provisions in the declaration made in accordance with Section
16 2-105(7). The declaration may provide that the allocations shall
17 be made by deeds or assignments executed by the declarant or the
18 association, or by amendments to the declaration.

COMMENTS

1. Like all other common elements, limited common elements are owned in common by all unit owners. The use of a limited common element, however, is reserved to less than all of the unit owners. Unless the declaration provides otherwise, the association is responsible for the upkeep of a limited common element and the cost of such upkeep is assessed in equal shares against the owners of the units to which it is assigned. See Sections 3-107(a) and 3-114(c)(1). This might include the costs of repainting all shutters, or balconies, for example, which are limited common elements pursuant to section 2-102(4). Accordingly, there may be occasions where, to meet the expectations of owners and to minimize separate billings, the declaration might provide that the costs will be borne by all unit owners as part of their common expense assessments.

2. Even common elements which are not "limited" within the meaning of this Act may nevertheless be restricted by the unit owners association pursuant to the powers set forth in Section 3-102(6) and (10) unless that power is limited in the declaration. For example, the association might assign reserved parking spaces to designated unit owners, or even to persons who are not unit owners. Such a parking space would differ from a limited common element in that its use would be merely a personal right of the person to whom it is assigned and this section would not have to be complied with to allocate it or to reallocate it.

3. Because a mortgage or deed of trust may restrict the borrower's right to transfer the use of a limited common element without the lender's consent, the terms of the encumbrance should be examined to determine whether the lender's consent or release is needed to transfer that right of use to another person.

1 SECTION 2-110. [Plats and Plans].

2 (a) Plats and plans are a part of the declaration. Separate
3 plats and plans are not required by this Act if all the information
4 required by this section is contained in either a plat or plan.
5 Each plat and plan must be clear and legible and contain a
6 certification that the plat or plan accurately depicts all existing
7 conditions and contains all information required by this section.

8 (b) Each plat must show:

9 (1) the name, location, and dimensions of the
10 condominium;

11 (2) the location and dimensions of all existing
12 improvements;

13 (3) the intended location and dimensions of any
14 contemplated improvement to be constructed anywhere within the
15 condominium labeled either "MUST BE BUILT" or "NEED NOT BE BUILT",
16 but need not show contemplated improvements within the boundaries
17 of convertible real estate;

18 (4) the location and dimensions of any convertible real
19 estate, labeled as such;

20 (5) the location and dimensions of any withdrawable real
21 estate, labeled as such;

22 (6) the extent of any encroachments by or upon any
23 portion of the condominium;

24 (7) to the extent feasible, the location and dimensions
25 of all easements serving or burdening any portion of the
26 condominium;

27 (8) the location and dimensions of any vertical unit
28 boundaries not shown or projected on plans recorded pursuant to
29 subsection (c) and that unit's identifying number;

30 (9) the location with reference to established datum of
31 any horizontal unit boundaries not shown or projected on plans
32 recorded pursuant to subsection (c) and that unit's identifying

number;

(10) the location and dimensions of any real estate in which the unit owners will own only an estate for years, labeled as "leasehold real estate";

(11) the distance between non-contiguous parcels of real estate comprising the condominium;

(12) the location and dimensions of limited common elements, including porches, balconies and patios, other than parking spaces and the other limited common elements described in Sections 2-102(2) and (4);

(13) all other matters customarily shown on land surveys.

(c) Plans of every building that contains or comprises all or part of any unit and is located or must be built within any portion of the condominium, other than within the boundaries of any convertible real estate, must show:

(1) the location and dimensions of the vertical boundaries of each unit, to the extent those boundaries lie within or coincide with the boundaries of the building in which the unit is located, and that unit's indentifying number;

(2) any horizontal unit boundaries, with reference to established datum, not shown on plats recorded pursuant to subsection (b), and that unit's identifying number; and

(3) any units that may be converted by the declarant to create additional units or common elements (Section 2-115(c)), identified appropriately.

8 (d) Unless the declaration provides otherwise, the horizontal
9 boundaries of part of a unit located outside of a building have the
0 same elevation as the horizontal boundaries of the inside part, and
1 need not be depicted on the plats and plans.
2 (e) Upon converting convertible real estate or adding
3 additional real estate (Section 2-111), the declarant shall record
4 new plats for that real estate conforming to the requirements of
5 subsection (b) and new plans for any buildings on that real estate
6 conforming to the requirements of subsection (c). If less than all
7 of any convertible real estate is being converted, the new plats
8 must also show the location and dimensions of the remaining
9 portion.
0 (f) If a declarant converts any unit into 2 or more units,
1 limited common elements, or both (Section 2-115), he shall record
2 new plans showing the location and dimensions of any new units and
3 limited common elements thus created as well as the location and
4 dimensions of any portion of that space not being converted.
5 (g) Instead of recording new plats and plans as required by
6 subsections (e) and (f), the declarant may record new
7 certifications of plats and plans previously recorded if those
8 plats and plans show all improvements required by subsections (e)
9 and (f).
0 (h) Any certification of a plat or plan required by this
1 Section or Section 2-101(b) must be made by an independent
2 [registered] surveyor, architect, or engineer.

COMMENTS

1. If the plats do not show a proposed improvement, the declarant cannot subsequently create that improvement unless (i) he builds it within convertible real estate or additional real estate, (ii) the plats are amended pursuant to Section 2-119 to show the proposed improvement, or (iii) the association (which the declarant may control) makes the improvement pursuant to Section 3-102(7). As to the declarant's obligation to complete an improvement that is shown, see Section 4-118(a).

2. As noted in Comment 5 to Section 2-101, a condominium unit may consist of unenclosed ground and/or airspace, with no "building" involved. If this were true of all units in a particular condominium, the provisions of this Act relating to Section 2-110 plans (but not plats) would be inapplicable.

3. The terms "horizontal" and "vertical" are now commonly understood in condominium parlance to refer, respectively, to "upper and lower" and "lateral or perimetric." Thus, Section 2-102 contemplates that the perimetric walls may be designated as the "vertical" boundaries of a unit and the floor and ceiling as its "horizontal" boundaries. That is the sense in which the words "horizontal" and "vertical" are to be understood in this section and throughout this Act.

4. Sections 4-116 and 4-117 reveal the effect of labeling an improvement "MUST BE BUILT" or "NEED NOT BE BUILT", as required by subsection (b)(3).

1 SECTION 2-111. [Conversion and Expansion of Flexible
2 Condominiums].
3 (a) To convert convertible real estate or add additional real
4 estate pursuant to an option reserved under Section 2-106(1), the
5 declarant shall prepare, execute, and record an amendment to the
6 declaration (Section 2-119) and comply with Section 2-110. The
7 declarant is the unit owner of any units thereby created. The
8 amendment to the declaration must assign an identifying number to
9 each unit formed in the convertible or additional real estate, and

0 reallocate common element interests, votes in the association, and
1 common expense liabilities. The amendment must describe or
2 delineate any limited common elements formed out of the convertible
3 or additional real estate, showing or designating the unit to which
4 each is allocated to the extent required by Section 2-109 (Limited
5 Common Elements).
6 (b) Convertible or withdrawable real estate may be created
7 within any additional real estate added to the condominium if the
8 amendment adding that real estate includes all matters required by
9 Section 2-105 or 2-106, as the case may be, and the plat includes
0 all matters required by Section 2-110(b). This provision does not
1 extend the time limit on conversion or contraction of a flexible
2 condominium imposed by the declaration pursuant to Section
3 2-106(2).
4 (c) Until conversion occurs or the period during which
5 conversion may occur expires, whichever occurs first, the declarant
6 alone is liable for real estate taxes assessed against convertible
7 real estate and all other expenses in connection with that real
8 estate. No other unit owner and no other portion of the
9 condominium is subject to a claim for payment of those taxes or
0 expenses. Unless the declaration provides otherwise, any income or
1 proceeds from convertible real estate inures to the declarant.

COMMENT

A typical construction loan mortgage on a portion of a flexible condominium might provide that as soon as that portion is

converted or added pursuant to Section 2-111 (or, if the portion is also designated withdrawable land, as soon thereafter as anyone other than the declarant becomes the unit owner of a unit therein) the lien converts into a lien on all of the units located within that portion together with their respective common element interests. The common element interests of those units will extend to the common elements in other sections of the condominium. However, failure of a construction loan mortgage to so provide is not fatal, because conveyance of the units in that phase to the lender or to a purchaser at a foreclosure sale would automatically transfer all of those units' common element interests, as a result of the requirements of Sections 2-108(d) and 2-111(a).

1 SECTION 2-112. [Withdrawal of Withdrawable Real Estate].
2 (a) To withdraw withdrawable real estate from a flexible
3 condominium pursuant to an option reserved under Section 2-106(1),
4 the declarant shall prepare, execute, and record an amendment to
5 the declaration containing a legally sufficient description of the
6 real estate being withdrawn and stating the fact of withdrawal.
7 The amendment must reallocate common element interests, votes in
8 the association, and common expense liabilities to the remaining
9 units in the condominium in proportion to the respective interests,
0 votes, and liabilities of those units before the withdrawal, and
1 the reallocation is effective when the amendment is recorded.
2 (b) If a portion of the withdrawable real estate was
3 described pursuant to Section 2-106(6), that portion may not be
4 withdrawn if any person other than the declarant owns a unit
5 situated therein. If the portion was not so described, none of it
6 is withdrawable if any person other than the declarant owns a unit
7 situated therein.
8 (c) Until withdrawal occurs or the period during which

9 withdrawal may occur expires, whichever occurs first, the declarant
0 alone is liable for real estate taxes assessed against withdrawable
1 real estate and all other expenses in connection with that real
2 estate. No other unit owner and no other portion of the
3 condominium is subject to a claim for payment of those taxes or
4 expenses. Unless the declaration provides otherwise, any income or
5 proceeds from withdrawable real estate inures to the declarant.

COMMENTS

1. Under subsection (b) of this section, the declarant cannot withdraw any withdrawable real estate if anyone else owns a unit therein. However, if the declarant were able to reacquire title to all units in withdrawable real estate, before the option to withdraw expired, he could then withdraw the real estate unless his option were otherwise restricted.

2. A lender who holds a mortgage lien on one portion of a condominium may not cause that portion to be withdrawn from the condominium unless the portion constitutes withdrawable real estate in which there is no unit owner other than the declarant. Even then, the amendment effectuating the withdrawal must be executed by the declarant. Consequently, unless the lender wishes to become a declarant subsequent to foreclosure or a deed in lieu of foreclosure in order to execute the amendment, or foreclose in order to require an amendment from the association under Section 2-120(g), a lender might require that the signed amendment be deposited in escrow at the time the loan is made in order to protect against a recalcitrant borrower.

3. As indicated in the Comments to Sections 1-103(24) and 1-106, the withdrawal of real estate from a condominium may constitute a subdivision of land under the applicable subdivision ordinance. Under most subdivision ordinances the owner of the real estate is regarded as the "subdivider". In the event of a withdrawal under this section, however, the declarant is in fact the subdivider because of his unique interest in and control over the real estate, even though the real estate, for title purposes, is a common element until withdrawn. Accordingly, he would bear the cost of compliance with any subdivision ordinance required to withdraw a part of the real estate from the condominium.

1 SECTION 2-113. [Alterations of Units].

2 Subject to the provisions of the declaration and other
3 provisions of law, a unit owner:

4 (1) may make any improvements or alterations to his unit
5 that do not impair the structural integrity or mechanical systems
6 or lessen the support of any portion of the condominium;

7 (2) may not change the appearance of the common
8 elements, or the exterior appearance of a unit or any other portion
9 of the condominium, without permission of the association;

0 (3) after acquiring an adjoining unit or an adjoining
1 part of an adjoining unit, may remove or alter any intervening
2 partition or create apertures therein, even if the partition in
3 whole or in part is a common element, if those acts do not impair
4 the structural integrity or mechanical systems or lessen the
5 support of any portion of the condominium. Removal of partitions
6 or creation of apertures under this paragraph is not an alteration
7 of boundaries.

COMMENTS

1. A nail driven by a unit owner to hang a picture might enter a portion of the wall designated as part of the common elements, but this section would not be violated because structural integrity would not be impaired. Moreover, no trespass would be committed because each unit owner, as a part owner of the common elements, has a right to utilize them subject only to such restrictions as may be created by the Act, the declaration, bylaws, and the unit owners association pursuant to Section 3-102.

2. Removal of a partition or the creation of an aperture

between adjoining units would permit the units to be used as one, but they would not become one unit. They would continue to be separate within the meaning of Section 1-104 and would continue to be treated separately for the purposes of this Act.

3. In addition to the restrictions placed on unit owners by this section, the declaration or bylaws may restrict a unit owner from altering the interior appearance of his unit. Although this might be an undue restriction if imposed upon the primary residence of a unit owner, it may be appropriate in the case of time-share or other condominiums.

1 SECTION 2-114. [Relocation of Boundaries Between Adjoining
2 Units].
3 (a) Subject to the provisions of the declaration and other
4 provisions of law, the boundaries between adjoining units may be
5 relocated by an amendment to the declaration upon application to
6 the association by the owners of those units. If the owners of the
7 adjoining units have specified a reallocation between their units
8 of their common element interests, votes in the association, and
9 common expense liabilities, the application must state the proposed
0 reallocations. Unless the executive board determines, within 30
1 days, that the reallocations are unreasonable, the association
2 shall prepare an amendment that identifies the units involved,
3 states the reallocations, is executed by those unit owners,
4 contains words of conveyance between them, and, upon recordation,
5 is indexed in the name of the grantor and the grantee.
6 (b) The association shall prepare and record plats or plans
7 necessary to show the altered boundaries between adjoining units,
8 and their dimensions and identifying numbers.

COMMENT

1. This section changes the effect of most current condominium statutes, under which the boundaries between units may not be altered without unanimous or nearly unanimous consent of the unit owners. As the section makes clear, this result may be varied by restrictions in the declaration.

2. This section contemplates that, upon relocation of the unit boundaries, no reallocation of common element interests, votes, and common expense liabilities will occur if none is specified in the application. If a reallocation is specified but the Executive Board deems it unreasonable, then the applicants have the choice of resubmitting the application with a reallocation more acceptable to the board, or going to court to challenge the board's finding as unreasonable.

1 SECTION 2-115. [Subdivision or Conversion of Units].

2 (a) If the declaration expressly so permits, a unit may be
3 subdivided into 2 or more units or, in the case of a unit owned by
4 a declarant, may be subdivided or converted into 2 or more units,
5 common elements, or a combination of units and common elements.
6 Subject to the provisions of the declaration and other provisions
7 of law, upon application of a unit owner to subdivide a unit, or
8 upon application of a declarant to convert a unit, the association
9 shall prepare, execute, and record an amendment to the declaration,
0 including the plats and plans, subdividing or converting that unit.
1 (b) The amendment to the declaration must be executed by the
2 owner of the unit to be subdivided, assign an identifying number to
3 each unit created, and reallocate the common element interest,
4 votes in the association, and common expense liability formerly
5 allocated to the subdivided unit to the new units in any reasonable
6 manner prescribed by the owner of the subdivided unit.

17. (c) In the case of a unit owned by a declarant, if a
18. declarant converts all of a unit to common elements, the amendment
19. to the declaration must reallocate among the other units the common
20. element interest, votes in the association, and common expense
21. liability formerly allocated to the converted unit on the same
22. basis used for the initial allocation thereof.

COMMENT

This section, in addition to providing for subdivision of units by any unit owner, incorporates a concept which permits the declarant to defer a final decision as to the size of certain units by permitting the subdivision of larger interior spaces into smaller units. The declarant may thus "build to suit" for purchasers' needs or to meet changing market demand. The concept is called "convertible space" in several existing state statutes.

For example, a declarant of a five-story office building condominium may have purchasers committed at the time of the filing of the condominium declaration but lack purchasers for the upper two floors. In such a circumstance, the declarant could designate the upper two floors as a unit reserving to himself the right to subdivide or convert that unit into additional units, common elements or a combination of units and common elements as needed to suit the requirements of ultimate purchasers.

1 [SECTION 2-116. [ALTERNATIVE A.] [Easement for
2 Encroachments].
3 To the extent that any unit or common element encroaches on
4 any other unit or common element, a valid easement for the
5 encroachment exists. The easement does not relieve a unit owner of
6 liability in case of his willful misconduct nor relieve a declarant
7 or any contractor, subcontractor, or materialman of liability for
8 failure to adhere to the plats and plans.]

[SECTION 2-116. [ALTERNATIVE B.] [Interpretation of Deeds].

In interpreting deeds and plans, the existing physical boundaries of a unit or of a unit reconstructed in substantial accordance with the original plats and plans thereof become its boundaries rather than the metes and bounds expressed in the deed or plat or plan, regardless of settling or lateral movement of the building, or minor variance between boundaries shown on the plats or plans or in the deed and those of the building.]

COMMENT

Two approaches are presented here as alternatives, since uniformity on this issue is not essential, and various states have adopted one approach or the other. Both theories recognize the fact that the actual physical boundaries may differ somewhat from what is shown on the plats and plans, and the practical effect of both is the same.

The easement approach of Alternative A creates easements for whatever discrepancies may arise, while the "monuments as boundaries" approach of Alternative B would make the title lines move to follow movement of the physical boundaries caused by such discrepancies or subsequent settling or shifting.

SECTION 2-117. [Use for Sales Purposes].

A declarant may maintain sales offices, management offices, and models in the condominium only if the declaration so provides and specifies the rights of a declarant with regard to the number, size, location, and relocation thereof. Any sales office, management office, or model not designated a unit by the declaration is a common element, and if a declarant ceases to be a unit owner, he ceases to have any rights with regard thereto unless

9 it is removed promptly from the condominium in accordance with a
0 right to remove reserved in the declaration. Subject to any
1 limitations in the declaration, a declarant may maintain signs on
2 the common elements advertising the condominium.

1 SECTION 2-118. [Easement to Facilitate Completion, Conversion,
2 and Expansion].

3 Subject to the provisions of the declaration, a declarant has
4 an easement through the common elements as may be reasonably
5 necessary for the purpose of discharging a declarant's obligations
6 or exercising special declarant rights, whether arising under this
7 Act or reserved in the declaration.

COMMENT

The easement created by this section can be utilized for the purposes indicated by employees, independent contractors, or other persons acting at the instance of the declarant.

1 SECTION 2-119. [Amendment of Declaration].

2 (a) Except in cases of amendments that may be executed by a
3 declarant under Sections 2-110(e) and (f), 2-111(a), or 2-112(a);
4 the association under Sections 1-107, 2-107(d), 2-109(c), or
5 2-115(a); or certain unit owners under Sections 2-109(b), 2-114(a),
6 2-115(b), or 2-120(b), and except as limited by subsection (d), the
7 declaration, including the plats and plans, may be amended only by
8 vote or agreement of unit owners of units to which at least [67]

9 percent of the votes in the association are allocated, or any
.0 larger majority the declaration specifies. The declaration may
.1 specify a smaller number only if all of the units are restricted
.2 exclusively to non-residential use.

.3 (b) No action to challenge the validity of an amendment
.4 adopted by the association pursuant to this section may be brought
.5 more than one year after the amendment is recorded.

.6 (c) Every amendment to the declaration must be recorded in
.7 every [county] in which any portion of the condominium is located,
.8 and is effective only upon recordation.

.9 (d) Except to the extent expressly permitted or required by
0 other provisions of this Act, no amendment may create or increase
1 special declarant rights, increase the number of units, or change
.2 the boundaries of any unit, the common element interest, common
:3 expense liability, or voting strength in the association allocated
:4 to a unit, or the uses to which any unit is restricted, in the
:5 absence of unanimous consent of the unit owners.

:6 (e) Amendments to the declaration required by this Act to be
:7 recorded by the association shall be prepared, executed, recorded,
:8 and certified by any officer of the association designated for that
:9 purpose or, in the absence of designation, by the president of the
:0 association.

COMMENT

Section 1-104 does not permit the declarant to use any device, such as powers of attorney executed by purchasers at closings, to

circumvent subsection (d)'s requirement of unanimous consent. This section does not supplant any requirements of common law or of other statutes with respect to conveyancing if title to real property is to be affected.

1 SECTION 2-120. [Termination of Condominium].

2 (a) Except in the case of a taking of all the units by
3 eminent domain (Section 1-107), a condominium may be terminated
4 only by agreement of unit owners of units to which at least 80
5 percent of the votes in the association are allocated, or any
6 larger percentage the declaration specifies. The declaration may
7 specify a smaller percentage only if all of the units in the
8 condominium are restricted exclusively to non-residential uses.

9 (b) An agreement of unit owners to terminate a condominium
0 must be evidenced by their execution of a termination agreement or
1 ratifications thereof. If, pursuant to a termination agreement,
2 the real estate constituting the condominium is to be sold
3 following termination, the termination agreement must set forth the
4 terms of the sale. A termination agreement and all ratifications
5 thereof must be recorded in every [county] in which a portion of
6 the condominium is situated, and is effective only upon
7 recordation.

8 (c) The association, on behalf of the unit owners, may
9 contract for the sale of the condominium, but the contract is not
0 binding on the unit owners until approved pursuant to subsections
1 (a) and (b). If the real estate constituting the condominium is to
2 be sold following termination, title to that real estate, upon

3 termination, vests in the association as trustee for the holders of
4 all interests in the units. Thereafter, the association has all
5 powers necessary and appropriate to effect the sale. Until the
6 sale has been concluded and the proceeds thereof distributed, the
7 association continues in existence with all powers it had before
8 termination. Proceeds of the sale must be distributed to unit
9 owners and lien holders as their interests may appear, in
0 proportion to the respective interests of unit owners as provided
1 in subsection (f). Unless otherwise specified in the termination
2 agreement, as long as the association holds title to the real
3 estate, each unit owner and his successors in interest have an
4 exclusive right to occupancy of the portion of the real estate that
5 formerly constituted his unit. During the period of that
6 occupancy, each unit owner and his successors in interest remain
7 liable for all assessments and other obligations imposed on unit
8 owners by this Act or the declaration.
9 (d) If the real estate constituting the condominium is not to
0 be sold following termination, title to the real estate, upon
1 termination, vests in the unit owners as tenants in common in
2 proportion to their respective interests as provided in subsection
3 (f), and liens on the units shift accordingly. While the tenancy
4 in common exists, each unit owner and his successors in interest
5 have an exclusive right to occupancy of the portion of the real
6 estate that formerly constituted his unit.
7 (e) Following termination of the condominium, and after

8 payment of or provision for the claims of the association's
9 creditors, the assets of the association shall be distributed to
0 unit owners in proportion to their respective interests as provided
1 in subsection (f). The proceeds of sale described in subsection
2 (c) and held by the association as trustee are not assets of the
3 association.

4 (f) The respective interests of unit owners referred to in
5 subsections (c), (d), and (e) are as follows:

6 (1) Except as provided in paragraph (2), the respective
7 interests of unit owners are the fair market values of their units,
8 limited common elements, and common element interests immediately
9 before the termination, as determined by one or more independent
0 appraisers selected by the association. The decision of the
1 independent appraisers shall be distributed to the unit owners and
2 becomes final unless disapproved within 30 days after distribution
3 by unit owners of units to which 25 percent of the votes in the
4 association are allocated. The proportion of any unit owner's
5 interest to that of all unit owners is determined by dividing the
6 fair market value of that unit owner's unit and common element
7 interest by the total fair market values of all the units and
8 common elements.

9 (2) If any unit or any limited common element is
0 destroyed to the extent that an appraisal of the fair market value
1 thereof prior to destruction cannot be made, the interests of all
2 unit owners are their respective common element interests

'3 immediately before the termination.

'4 (g) Foreclosure or enforcement of a lien or encumbrance

'5 against the entire condominium does not of itself terminate the

'6 condominium, and foreclosure or enforcement of a lien or

'7 encumbrance against a portion of the condominium, other than

8 withdrawable real estate, does not withdraw that portion from the

9 condominium. Foreclosure or enforcement of a lien or encumbrance

:0 against withdrawable real estate does not of itself withdraw that

:1 real estate from the condominium, but the person taking title

:2 thereto has the right to require from the association, upon

:3 request, an amendment excluding the real estate from the

4 condominium.

COMMENTS

1. Unless the declaration requires unanimous consent for termination, the declarant may be able to terminate the condominium despite the unanimous opposition of other unit owners if the declarant has the requisite number of votes.

2. Foreclosure of a mortgage or other lien or encumbrance does not automatically terminate the condominium, but if a mortgagee or other lienholder (or any other party) acquires units with a sufficient number of votes, that party can cause the condominium to be terminated pursuant to subsection (a) of this section.

3. A mortgage or deed of trust on a condominium unit may provide for the lien to shift, upon termination, to become a lien on what will then be the borrower's undivided interest in the whole property. However, such a shift would be deemed to occur even in the absence of express language, pursuant to the first sentence of subsection (d).

4. With respect to the association's role as trustee under subsection (c), see Section 3-117.

5. If an initial appraisal made pursuant to subsection (f) were rejected by vote of the unit owners, the association would be obligated to secure a new appraisal.

6. "Foreclosure" in subsection (g) includes deeds in lieu of foreclosure, and "liens" includes tax and other liens on convertible or withdrawable real estate.

7. The termination agreement should adopt or contain any restrictions, covenants and other provisions for the governance and operation of the property formerly constituting the condominium which the owners deem appropriate. These might closely parallel the provisions of the declaration and bylaws. This is particularly important in the case of a condominium which is not to be sold pursuant to the terms of the termination agreement. In the absence of such provisions, the general law of the state governing tenancies in common would apply.

1 SECTION 2-121. [Rights of Secured Lenders]. The declaration
2 may require that all or a specified number or percentage of the
3 mortgagees or beneficiaries of deeds of trust encumbering the units
4 approve specified actions of the unit owners or the association as
5 a condition to the effectiveness of those actions, but no
6 requirement for approval may operate to (1) deny or delegate
7 control over the general administrative affairs of the association
8 by the unit owners or the executive board, or (2) prevent the
9 association or the executive board from commencing, intervening in,
0 or settling any litigation or proceeding, or receiving and
1 distributing any insurance proceeds pursuant to Section 3-112.

ARTICLE 3

MANAGEMENT OF THE CONDOMINIUM

Section 3-101. [Organization of Unit Owners' Association].

3-102. [Powers of Unit Owners' Association].

3-103. [Executive Board Members and Officers].

3-104. [Transfer of Special Declarant Rights].

3-105. [Termination of Contracts and Leases of Declarant].

3-106. [Bylaws].

3-107. [Upkeep of the Condominium].

3-108. [Meetings].

3-109. [Quorums].

3-110. [Voting, Proxies].

3-111. [Tort and Contract Liability].

3-112. [Insurance].

3-113. [Surplus Funds].

3-114. [Assessments for Common Expenses].

3-115. [Lien for Assessments].

3-116. [Association Records].

3-117. [Association as Trustee].

ARTICLE 3

MANAGEMENT OF THE CONDOMINIUM

1 SECTION 3-101. [Organization of Unit Owners' Association].

2 A unit owners' association shall be organized no later than
3 the date the condominium is created. The membership of the
4 association at all times shall consist exclusively of all the unit
5 owners or, following termination of the condominium, of all former
6 unit owners entitled to distributions of proceeds under Section
7 2-120, or their heirs, successors, or assigns. The association
8 shall be organized as a profit or nonprofit corporation [or as an
9 unincorporated association].

COMMENTS

1. This section requires the organization of the association no later than the date the condominium is created. The intent is to encourage the developer to maintain separate records for the association and to involve unit owners in the governance of the condominium even during a period of declarant control reserved pursuant to Section 3-103(c).

2. The bracketed language preserves the flexibility existing under the vast majority of present condominium statutes to organize the association as a profit or non-profit corporation or as an unincorporated association. Although at least one state (Georgia) requires the organization of the association in corporate form, it is not desirable to mandate this result in a uniform act. If a state wishes to mandate incorporation, it should delete the bracketed language.

1 SECTION 3-102. [Powers of Unit Owners' Association].

2 (a) Subject to the provisions of the declaration, the

3 association [,even if unincorporated,] may:

4 (1) adopt and amend bylaws and rules and regulations;

5 (2) adopt and amend budgets for revenues, expenditures,
6 and reserves and collect assessments for common expenses from unit
7 owners;

8 (3) hire and terminate managing agents and other
9 employees, agents, and independent contractors;

10 (4) institute, defend, or intervene in litigation or
11 administrative proceedings in its own name on behalf of itself or 2
12 or more unit owners on matters affecting the condominium;

13 (5) make contracts and incur liabilities;

14 (6) regulate the use, maintenance, repair, replacement,
15 and modification of common elements;

16 (7) cause additional improvements to be made as a part
17 of the common elements;

18 (8) acquire, hold, encumber, and convey in its own name
19 any right, title, or interest to real or personal property;

20 (9) grant easements, leases, licenses, and concessions
21 through or over the common elements;

22 (10) impose and receive any payments, fees, or charges
23 for the use, rental, or operation of the common elements other than
24 limited common elements described in Sections 2-102(2) and (4);

25 (11) impose charges for late payment of assessments and,
26 after notice and an opportunity to be heard, levy reasonable fines
27 for violations of the declaration, bylaws, and rules and

:8 regulations of the association;

:9 (12) impose reasonable charges for the preparation and

.0 recordation of amendments to the declaration, resale certificates

.1 required by Section 4-107, or statements of unpaid assessments;

2 (13) provide for the indemnification of its officers and

3 executive board and maintain directors' and officers' liability

4 insurance;

5 (14) exercise any other powers conferred by the

6 declaration or bylaws;

7 (15) exercise all other powers that may be exercised in

8 this State by legal entities of the same type as the association;

9 and

0 (16) exercise any other powers necessary and proper for

1 the governance and operation of the association.

2 (b) Notwithstanding subsection (a), the declaration may not

3 impose limitations on the power of the association to deal with the

4 declarant that are more restrictive than the limitations imposed on

5 the power of the association to deal with other persons.

COMMENTS

1. This section permits the declaration, subject to the limitations of subsection (b), to include limitations on the exercise of any of the enumerated powers. The bracketed language making a specific reference to unincorporated associations is not intended to exclude other forms of association; the unincorporated association would have such powers, subject to the declaration, regardless of the legal status of an unincorporated association in the state. If a state wishes to permit the association to be unincorporated and the law of the state is unclear whether an unincorporated association would have such powers in the absence of

the language, the bracketed language should be retained and the brackets removed.

2. Required provisions of the bylaws of the association, referenced in paragraph (1), are set forth in Section 3-106.

3. Many state condominium statutes give the association the power to sue and be sued in its own name. In the absence of a statutory grant of standing such as that set forth in paragraph (4), some courts have held that the association, because it has no ownership interest in the condominium, has no standing to bring, defend, or to intervene in litigation or administrative proceedings in its own name.

4. Paragraph (9) permits the association to grant easements, leases, licenses, and concessions on behalf of the unit owners with respect to the common elements. This power is needed because of the unique characteristics of condominium ownership; for example, in the absence of this provision, the consent of all unit owners would be required to grant a utilities easement across the common elements.

5. The powers granted the association in paragraph (11) to impose charges for late payment of assessments and to levy reasonable fines for violations of the association's rules reflect the need to provide the association with sufficient powers to exercise its "governmental" functions as the ruling body of the condominium community. These powers are intended to be in addition to any rights which the association may have under other law.

6. If the association is incorporated, it may, pursuant to paragraph (15), exercise all other powers of a corporation. Similarly, if the association is unincorporated, the association may, by virtue of paragraph (15), exercise all other powers of an unincorporated association. Inconsistent provisions of state corporation or unincorporated association law are subject to the provisions of this Act, as provided in Section 1-108.

1 SECTION 3-103. [Executive Board Members and Officers].

2 (a) Except as provided in the declaration, the bylaws, in

3 subsection (b), or other provisions of this Act, the executive

4 board may act in all instances on behalf of the association. The

5 officers and members of the executive board appointed by the

6 declarant are subject to liability as fiduciaries of the unit
7 owners for their acts or omissions.

8 (b) The executive board may not act on behalf of the
9 association to amend the declaration (Section 2-119), to terminate
10 the condominium (Section 2-120), or to elect members of the
11 executive board or determine the qualifications, powers and duties,
12 or terms of office of executive board members (Section 3-103(e)),
13 but the executive board may fill vacancies in its membership for
14 the unexpired portion of any term. In addition to other rights
15 conferred by the declaration, bylaws or this Act, the unit owners,
16 by majority or any larger vote specified in the declaration, may
17 reject any budget or capital expenditure approved by the executive
18 board, within [30] days after the approval.

19 (c) Subject to subsection (d), the declaration may provide
20 for a period of declarant control of the association, during which
21 period a declarant, or persons designated by him, may appoint and
22 remove the officers and members of the executive board. Any period
23 of declarant control extends from the date of the first conveyance
24 of a unit to a person other than a declarant for a period not
25 exceeding [5] years in the case of a flexible condominium
26 containing convertible real estate or to which additional real
27 estate may be added, or [3] years in the case of any other
28 condominium. Regardless of the period provided in the declaration,
29 a period of declarant control terminates no later than [60] days
30 after conveyance of [75] percent of the units to unit owners other

31 than a declarant. A declarant may voluntarily surrender the right
32 to appoint and remove officers and members of the executive board
33 before termination of that period, but in that event he may
34 require, for the duration of the period of declarant control, that
35 specified actions of the association or executive board, as
36 described in a recorded instrument executed by the declarant, be
37 approved by the declarant before they become effective.

38 (d) Not later than [60] days after conveyance of [25] percent
39 of the units to unit owners other than a declarant, not less than
40 [25] percent of the members of the executive board shall be elected
41 by unit owners other than the declarant. Not later than [60] days
42 after conveyance of [50] percent of the units to unit owners other
43 than a declarant, not less than [33 1/3] percent of the members of
44 the executive board shall be elected by unit owners other than the
45 declarant.

46 (e) Not later than the termination of any period of declarant
47 control, the unit owners shall elect an executive board of at least
48 3 members, at least a majority of whom must be unit owners. The
49 executive board shall elect the officers. The persons elected
50 shall take office upon election.

51 (f) In determining whether the period of declarant control
52 has terminated under subsection (c), or whether unit owners other
53 than a declarant are entitled to elect members of the executive
54 board under subsection (d), the percentage of the units conveyed is
55 presumed to be that percentage which would have been conveyed if

6 all the units the declarant has [built or reserved the right to
7 build in the declaration] [registered with the agency] were
8 included in the condominium.

COMMENTS

1. Subsection (a) makes members of the executive board appointed by the declarant liable as fiduciaries of the unit owners with respect to their actions or omissions as members of the board. This provision imposes a very high standard of duty because the board is vested with great power over the property interests of unit owners, and because there is a great potential for conflicts of interest between the unit owners and the declarant. This section leaves the liability of officers and directors not appointed by the declarant to the general law of the state; as a result, these independent directors in many jurisdictions would be subject to a lesser standard of care. This is not unreasonable, since directors elected by the unit owners would not typically have the same conflicts of interest as would directors appointed by declarant.

2. Subsection (b) guarantees the unit owners the right to reject any budget or capital expenditure approved by the executive board. From the perspective of most unit owners, the most important decisions made by the executive board will relate to the expenditure of association funds which must be raised by common expense assessments. Granting the unit owners a right of veto rather than requiring affirmative approval by them of any budget or capital expenditure approved by the executive board allows the unit owners to exercise ultimate control over monetary matters without unduly interfering with the executive board's ability to administer the affairs of the condominium on a day-to-day basis.

3. Subsections (c) and (d) recognize the practical necessity for the declarant to control the association during the developmental phases of a condominium project. However, any executive board member appointed by the declarant pursuant to subsection (c) is liable as a fiduciary to any unit owner for his acts or omissions in such capacity.

4. Subsection (c) permits a declarant to surrender his right to appoint and remove officers and executive board members prior to the termination of the period of declarant control in exchange for a veto right over certain actions of the association or its executive board. This provision is designed to encourage transfer of control by declarants to unit owners as early as possible,

without impinging upon the declarant's rights (for the duration of the period of declarant control) to maintain ultimate control of those matters which he may deem particularly important to him. It might be noted that the declarant at all times (even after the expiration of the period of declarant control) is entitled to cast the votes allocated to his units in the same manner as any other unit owner.

5. Subsection (d), in combination with subsection (c), provides for a gradual transfer of control of the association to the unit owners from the declarant. Such a gradual transfer preferable to a one-time turnover of control since it assures that the unit owners will be involved, to some extent, in the affairs of the association from a relatively early date and that some unit owners will acquire experience in dealing with association matters.

6. The appropriate alternative language set out in brackets in subsection (f) should be selected, depending upon whether or not an agency is designated to administer the Act. The purpose of subsection (f) is to avoid the possibility of the declarant alternately losing and then regaining control which would occur, for example, if 75 percent of the units in a first phase were conveyed to unit owners but new units were subsequently added in a later phase which reduced the percentage of units conveyed to less than 75 percent of the new total.

1 SECTION 3-104. [Transfer of Special Declarant Rights].

2 (a) No special declarant rights (Section 1-103(21)) created

3 or reserved under this Act may be transferred except by an

4 instrument evidencing the transfer recorded in every [county] in

5 which any portion of the condominium is located. The instrument is

6 not effective unless executed by the transferee.

7 (b) Upon transfer of any special declarant right, the

8 liability of a transferor declarant is as follows:

9 (1) A transferor is not relieved of any obligation or

10 liability arising before the transfer and remains liable for

11 warranty obligations imposed upon him by this Act. Lack of

.2 privity does not deprive any unit owner of standing to bring an
.3 action to enforce any obligation of the transferor.
.4 (2) If a transferor retains any special declarant right,
.5 or if a successor to any special declarant right is an affiliate of
.6 a declarant (Section 1-103(2)), the transferor is subject to
.7 liability for all obligations and liabilities imposed on a
.8 declarant by this Act or by the declaration arising after the
.9 transfer and is jointly and severally liable with the successor for
0 the liabilities and obligations of the successor which relate to
1 the condominium.
2 (3) A transferor who retains no special declarant right
3 has no liability for any act or omission or any breach of a
4 contractual or warranty obligation arising from the exercise of a
5 special declarant right by a successor declarant who is not an
6 affiliate of the transferor.
7 (c) Unless otherwise provided in a mortgage instrument or
8 deed of trust, in case of foreclosure of a mortgage, sale by a
9 trustee under a deed of trust, or sale under Bankruptcy Act or
0 receivership proceedings, of any units owned by a declarant in the
1 condominium, a person acquiring title to all the units being
2 foreclosed or sold, but only upon his request, succeeds to all
3 special declarant rights, or only to any rights reserved in the
4 declaration pursuant to Section 2-117 to maintain models, sales
5 offices and signs. The judgment or instrument conveying title
6 shall provide for transfer of only the special declarant rights

37 requested.

38 (d) Upon foreclosure, sale by a trustee under a deed of
39 trust, or sale under Bankruptcy Act or receivership proceedings, of
40 all units in a condominium owned by a declarant:

41 (1) the declarant ceases to have any special declarant
42 rights, and

43 (2) the period of declarant control (Section 3-103(c))
44 terminates unless the judgment or instrument conveying title
45 provides for transfer of all special declarant rights to a
46 successor declarant.

47 (e) The liabilities and obligations of persons who succeed to
48 special declarant rights are as follows:

49 (1) A successor to any special declarant right who is an
50 affiliate of a declarant is subject to all obligations and
51 liabilities imposed on any declarant by this Act or by the
52 declaration.

53 (2) A successor to any special declarant right, other
54 than a successor described in paragraphs (3) or (4), who is not an
55 affiliate of a declarant, is subject to all obligations and
56 liabilities imposed upon a declarant by this Act or the
57 declaration, but he is not subject to liability for
58 misrepresentations or warranty obligations on improvements made by
59 any previous declarant or made before the condominium was created,
60 or for a breach of fiduciary obligation by any previous declarant.

61 (3) A successor to only a right reserved in the

52 declaration to maintain models, sales offices, and signs (Section
53 2-117), if he is not an affiliate of a declarant, may not exercise
54 any other special declarant right, and is not subject to any
55 liability or obligation as a declarant, except the obligation to
56 provide a public offering statement[,] [and] any liability arising
57 as a result thereof [,and obligations under Article 5].

58 (4) A successor to all special declarant rights who is
59 not an affiliate of a declarant and who succeeded to those rights
70 pursuant to a deed in lieu of foreclosure or a judgment or
71 instrument conveying title to units under subsection (c), may
72 declare his intention in a recorded instrument to hold those rights
73 solely for transfer to another person. Thereafter, until
74 transferring all special declarant rights to any person acquiring
75 title to any unit owned by the successor, or until recording an
76 instrument permitting exercise of all those rights, that successor
77 may not exercise any of those rights other than the right to
78 control the executive board in accordance with the provisions of
79 Section 3-103(c) for the duration of any period of declarant
80 control, and any attempted exercise of those rights is void. So
81 long as a successor declarant may not exercise special declarant
82 rights under this subsection, he is not subject to any liability or
83 obligation as a declarant other than liability for the successor's
84 acts and omissions under Section 3-103(c).

85 (f) Nothing in this section subjects any successor to a
86 special declarant right to any claims against or other obligations

17 of a transferor declarant, other than claims and obligations

18 arising under this Act or the declaration.

COMMENTS

1. This section deals with the issue of the extent to which obligations and liabilities imposed upon a declarant by this Act are transferred to a third party by a transfer of the declarant's interest in a condominium. There are two parts to the problem. First, what obligations and liabilities to unit owners (both existing unit owners and persons who become unit owners in the future) should a declarant retain, notwithstanding his transfer of interests. Second, what obligations and liabilities may fairly be imposed upon the declarant's successor in interest. No present condominium statute adequately addresses these issues.

2. This section strikes a balance between the obvious need to protect the interests of unit owners and the equally important need to protect innocent successors to a declarant's rights, especially persons such as mortgagees whose only interest in the condominium project is to protect their debt security. The general scheme of the section is to impose upon a declarant continuing obligations and liabilities for promises, acts, or omissions undertaken during the period that he was in control of the condominium, while relieving a declarant who transfers his entire interest in a project of such responsibilities with respect to the promises, acts, or omissions of a successor over whom he has no control. Similarly, the section imposes obligations and liabilities arising after the transfer upon a non-affiliated successor to a declarant's interests, but absolves such a transferee of responsibility for the promises, acts, or omissions of a transferor declarant over which he had no control. Finally, the section makes special provision for the interests of certain successor declarants (e.g., a mortgagee who succeeds to the rights of the declarant pursuant to a "deed in lieu of foreclosure" and who holds the project solely for transfer to another person) by relieving such persons of virtually all of the obligations and liabilities imposed upon declarants by this Act.

3. Subsection (a) provides that a successor in interest to a declarant may acquire the special rights of the declarant only by recording an instrument which reflects a transfer of those rights. This recordation requirement is important to determine the duration of the period of declarant control pursuant to Section 3-103(c) and (d), as well as to place unit owners on notice of all persons entitled to exercise the special rights of a declarant under this Act. The transfer by a declarant of all of his interest in a

condominium project to a successor, without a concomitant transfer of the special rights of a declarant pursuant to this subsection, results in the automatic termination of such special declarant rights and of any period of declarant control. If the declarant is a natural person, he should provide for the transfer of his special declarant rights to his heirs or devisees in the event of his death in compliance with subsection (a).

4. Under subsection (b), a transferor declarant remains liable to unit owners (both existing unit owners and persons who subsequently become unit owners) for all obligations and liabilities, including warranty obligations on all improvements made by him, arising prior to the transfer. If a transferor declarant retains any special declarant right (i.e., if the transferor declarant retains any right to control the future development or operation of the condominium) or if he transfers any such right to an affiliate (as defined in Section 1-103(2)), the transferor remains subject to all liabilities specified in paragraph (1) of subsection (b), and in addition, is jointly and severally liable with his successor in interest for all obligations and liabilities of the successor.

5. The obligations and liabilities imposed upon transferee declarants under the Act are set forth in subsection (e). In general, a transferee declarant (other than an affiliate of the original declarant and other than a successor whose interest in the project is solely for the protection of debt security) becomes subject to all obligations and liabilities imposed upon a declarant by the Act or by the declaration with respect to any promises, acts, or omissions undertaken subsequent to the transfer. Such a transferee is liable for the promises, acts, or omissions of the original declarant undertaken prior to the transfer, except as set forth in paragraph (e)(2). For example, a successor declarant would not be liable for the warranty obligations of the original declarant with respect to improvements to the project made by the original declarant. Similarly, a successor would not be liable, under normal circumstances, for any misrepresentation or breach of fiduciary duty by the original declarant prior to the transfer. The successor is liable, however to complete improvements labeled "MUST BE BUILT" on the original plans; see paragraph (e) (2).

6. To preclude declarants from evading their obligations and liabilities under this Act by transferring their interests to affiliated companies, paragraph (1) of subsection (e) makes clear that any successor declarant who is an affiliate of the original declarant is subject to all obligations and liabilities imposed upon the original declarant by the Act or by the declaration. Similarly, as previously noted, paragraph (2) of subsection (b) provides that an original declarant who transfers his rights to an affiliate remains jointly and severally liable with his successor

for all obligations and liabilities imposed upon declarants by the Act or by the declaration.

7. The section handles the problem of certain successor declarants (*i.e.*, persons whose sole interest in the condominium project is the protection of debt security) in three ways. First, subsection (c) provides that, in the case of a foreclosure of a mortgage, a sale by a trustee under a deed of trust, or a sale by a trustee in bankruptcy of any units owned by a declarant, any person acquiring title to all of the units being foreclosed or sold may request the transfer of special declarant rights. In that event, and only upon such request, such rights will be transferred in the instrument conveying title to the units and such transferee will thereafter become a successor declarant subject to the other provisions of this section. In the event of a foreclosure, sale by a trustee under a deed of trust, or sale by a trustee in bankruptcy of *all* units owned by a declarant, if the transferee of such units does not request the transfer of special declarant rights then, under subsection (d), such special declarant rights cease to exist and any period of declarant control terminates.

Second, any person who succeeds to special declarant rights as a result of the transfers just described or by deed in lieu of foreclosure, may, pursuant to paragraph (4) of subsection (e), declare his intention (in a recorded instrument) to hold those rights solely for transfer to another person. Thereafter, such a successor may transfer all special declarant rights to a third party acquiring title to any units owned by the successor but may not, prior to such transfer, exercise any special declarant rights other than the right to control the executive board of the association in accordance with the provisions of Section 3-103(c). A successor declarant who exercises such a right is relieved of any liability under the Act except liability for any acts or omissions related to his control of the executive board of the association. This provision is designed to deal with the typical problem of a foreclosing mortgage lender who opts to bid in and obtain the project at the foreclosure sale solely for the purpose of subsequent resale. It permits such a foreclosing lender to undertake such a transaction without incurring the full burden of declarant obligations and liabilities. At the same time, the provision recognizes the need for continuing operation of the association and, to that end, permits a foreclosing lender to assume control of the association for the purpose of ensuring a smooth transition.

Third, paragraph (3) of subsection (e) provides that a successor who has only the right to maintain model units, sales offices, and signs does not thereby become subject to any obligations or liabilities as a declarant, except for the obligation to provide a public offering statement and any liability

resulting therefrom. This provision also is designed to protect mortgage lenders and contemplates the situation where a lender takes over a condominium project and desires to sell out existing units without making any additional improvements to the project. This provision facilitates such a transaction by relieving the mortgage lender, in that instance, from the full burden of obligations and liabilities ordinarily imposed upon a declarant under the Act.

SECTION 3-105. [Termination of Contracts and Leases of Declarant].

If entered into before the executive board elected by the unit owners pursuant to Section 3-103(e) takes office, (1) any management contract, employment contract, or lease of recreational or parking areas or facilities, (2) any other contract or lease to which a declarant or an affiliate of a declarant is a party, or (3) any contract or lease that is not bona fide or was unconscionable to the unit owners at the time entered into under the circumstances then prevailing, may be terminated without penalty by the association at any time after the executive board elected by the unit owners pursuant to Section 3-103(e) takes office upon not less than [90]-days' notice to the other party. This subsection does not apply to any lease the termination of which would terminate the condominium or reduce its size, unless the real estate subject to that lease was submitted to the condominium for the purpose of avoiding the right of the association to terminate a lease under this section.

COMMENTS

1. This section deals with a common problem in the development of condominium projects: the temptation on the part of the developer, while in control of the association, to enter into, on behalf of the association, long-term contracts and leases with himself or with an affiliated entity.

The Act deals with this problem in two ways. First, Section 3-103(a) imposes upon all executive board members appointed by the declarant liability as fiduciaries of the unit owners for all of their acts or omissions as members of the board. Second, Section 3-105 provides for the termination of certain contracts and leases made during a period of declarant control.

2. In addition to contracts or leases made by a declarant with himself or with an affiliated entity, there are also certain contracts and leases so critical to the operation of the condominium and to the unit owners' full enjoyment of their rights of ownership that they too should be voidable by the unit owners upon the expiration of any period of declarant control. At the same time, a statutorily-sanctioned right of cancellation should not be applicable to all contracts or leases which a declarant may enter into in the course of developing a condominium project. For example, a commercial tenant would not be willing to invest substantial amounts in equipment and other improvements for the operation of his business if the lease could unilaterally be cancelled by the association. Accordingly, this section provides that, (subject to the exception set forth in the last sentence thereof) upon the expiration of any period of declarant control, the association may terminate without penalty, any "critical" contract (i.e., any management contract, employment contract, or lease of recreational or parking areas or facilities) entered into during a period of declarant control, any contract or lease to which the declarant or an affiliate of the declarant is a party, or any contract or lease previously entered into by the declarant which is not bona fide or which was unconscionable to the unit owners at the time entered into under the circumstances then prevailing.

3. The last sentence of the section addresses the usual leasehold condominium situation where the underlying real estate is subject to a long-term ground lease which is then submitted to the Act. Because termination of the ground lease would terminate the condominium, this sentence prevents cancellation. However, in order to avoid the possibility that recreation and other leases otherwise cancellable under subsection (a) will be restructured to come within the exception, a subjective test of "intent" is imposed. Under the test, if a declarant's principal purpose in subjecting the leased real estate to the condominium was to prevent

termination of the lease, the lease may nevertheless be terminated.

1 SECTION 3-106. [Bylaws].

2 (a) The bylaws of the association must provide for:

3 (1) the number of members of the executive board and the

4 titles of the officers of the association;

5 (2) election by the executive board of a president,

6 treasurer, secretary, and any other officers of the association the

7 bylaws specify;

8 (3) the qualifications, powers and duties, terms of

9 office, and manner of electing and removing executive board members

10 and officers and filling vacancies;

11 (4) which, if any, of its powers the executive board or

12 officers may delegate to other persons or to a managing agent; and

13 (5) which of its officers may prepare, execute, certify,

14 and record amendments to the declaration on behalf of the

15 association.

16 (b) Subject to the provisions of the declaration, the bylaws

17 may provide for any other matters the association deems necessary

18 and appropriate.

COMMENTS

1. Because the Act does not require the recordation of bylaws, it is contemplated that unrecorded bylaws will set forth only matters relating to the internal operations of the association and various "housekeeping" matters with respect to the condominium. The Act requires specific matters to be set forth in the recorded declaration and not in the bylaws, unless the bylaws are to be

recorded as an exhibit to the declaration. The Act provides, therefore, in Section 2-103(d), that title to a unit and its common element interest is not rendered unmarketable by reason of any failure of unrecorded bylaws to comply with the requirements of this Act.

2. The requirement, set forth in subsection (a)(5), that the bylaws designate which of the officers of the association has the responsibility to prepare, execute, certify, and record amendments to the declaration reflects the obligation imposed upon the association by several provisions of this Act to record such amendments in certain circumstances. These provisions include Section 1-107 (eminent domain), Section 2-107 (expiration of certain leases), Section 2-114(a) (relocation of boundaries between adjoining units), and Section 2-115(a) (subdivision or conversion of units). Section 2-119(e) provides that if no officer is designated for this purpose, it shall be the duty of the president.

1 SECTION 3-107. [Upkeep of the Condominium].

2 (a) Except to the extent provided by the declaration or
3 Section 3-112(d), the association is responsible for maintenance,
4 repair, and replacement of the common elements, and each unit owner
5 is responsible for maintenance, repair, and replacement of his
6 unit. Each unit owner shall afford to the association and the
7 other unit owners, and to their agents or employees, access through
8 his unit reasonably necessary for those purposes. If damage is
9 inflicted on the common elements or any unit through which access
10 is taken, the unit owner responsible for the damage, or the
11 association if it is responsible, is liable for the prompt repair
12 thereof.

13 (b) If any unit in a condominium all of whose units are
14 restricted to nonresidential use is damaged, and the exterior
15 appearance of the unit is thereby affected, the person responsible

L6 for the exterior of the unit shall cause the unit to be repaired or

L7 rebuilt to the extent necessary to restore its exterior appearance.

.8 If that person fails within a reasonable period of time to effect

.9 the repairs or rebuilding, the association may purchase the unit at

20 its fair market value to be determined by an independent appraiser

21 selected by the association.

COMMENTS

1. The Act permits the declaration to separate maintenance responsibility from ownership. This is commonly done in practice. In the absence of any provision in the declaration, maintenance responsibility follows ownership of the unit or rests with the association in the case of common elements. Under this Act, limited common elements (which might include, for example, patios, balconies, and parking spaces) are common elements. See Section 1-103(16). As a result, under subsection (a), unless the declaration requires that unit owners are responsible for the upkeep of such limited common elements, the association will be responsible for their maintenance. Further, under Section 3-114(c), the cost of maintenance, repair, and replacement for such limited common elements is assessed against only the units to which the limited common elements are assigned, unless the declaration provides for such expenses to be paid as a common expense. See Comment 1 to Section 2-109.

2. Subsection (b) is not inconsistent with Section 3-112(g) because of its application to nonresidential condominiums. The provisions of Section 3-112(g) may be varied in a nonresidential condominium pursuant to Section 3-112(h), and subsection (b) would not govern the obligation to repair or restore the damage to the exterior of the unit, but only the remedy if the person on whom the obligation were placed failed to perform.

3. The obligation of a unit owner to rebuild or (at the association's option) sell a unit under subsection (b) is limited solely to nonresidential condominiums, becuase it is only in the case of such condominiums that the Act does not require insurance covering both the common elements and the units. See Section 3-112(a). In some cases it may be the association's obligation to rebuild the exterior of the unit, in which event the association could not refuse to perform in order to force a sale.

SECTION 3-108. [Meetings].

The bylaws must require that meetings of the association be held at least once each year and provide for special meetings. The bylaws must specify which of the association's officers, not less than [10] nor more than [60] days in advance of any meeting, shall cause notice to be hand-delivered or sent prepaid by United States mail to the mailing address of each unit or to any other mailing address designated in writing by the unit owner. The notice of any meeting must state the time and place of the meeting and the items on the agenda, including the general nature of any proposed amendment to the declaration or bylaws.

SECTION 3-109. [Quorums].

(a) Unless the bylaws provide otherwise, a quorum is deemed present throughout any meeting of the association if persons entitled to cast [20] percent of the votes which may be cast for election of the executive board are present in person or by proxy at the beginning of the meeting. The bylaws may require a larger percentage or a smaller percentage not less than [10] percent.

(b) Unless the bylaws specify a larger percentage, a quorum is deemed present throughout any meeting of the executive board if persons entitled to cast [50] percent of the votes on that board are present at the beginning of the meeting.

COMMENT

Mandatory quorum requirements lower than 50 percent for meetings of the association are often justified because of the common difficulty of inducing unit owners to attend meetings. The problem is particularly acute in the case of resort condominiums where many owners may reside elsewhere, often at considerable distances, for most of the year.

1 SECTION 3-110. [Voting; Proxies].

2 (a) If only one of the multiple owners of a unit is present
3 at a meeting of the association, he is entitled to cast all the
4 votes allocated to that unit. If more than one of the multiple
5 owners are present, the votes allocated to that unit may be cast
6 only in accordance with their unanimous agreement unless the
7 declaration expressly provides otherwise. There is unanimous
8 agreement if any one of the multiple owners casts the votes
9 allocated to that unit without protest being made promptly to the
.0 person presiding over the meeting by any of the other owners of the
.1 unit.

.2 (b) Votes allocated to a unit may be cast pursuant to a proxy
.3 duly executed by a unit owner. If a unit is owned by more than one
.4 person, each owner of the unit may vote or register protest to the
.5 casting of votes by the other owners of the unit through a duly
.6 executed proxy. A unit owner may not revoke a proxy given pursuant
.7 to this section except by actual notice of revocation to the person
.8 presiding over a meeting of the association. A proxy is void if it
.9 is not dated or purports to be revocable without notice. A proxy
!0 terminates one year after its date, unless it specifies a shorter

21 term.

22 (c) The declaration may provide for cumulative voting only
23 for the purpose of electing members of the executive board and for
24 class voting on specified issues affecting the class if necessary
25 to protect valid interests of the class. A declarant may not
26 utilize cumulative or class voting for the purpose of evading any
27 limitation imposed on declarants by this Act.

28 (d) No votes allocated to a unit owned by the association may
29 be cast.

COMMENT

This section recognizes that there may be certain instances in which class voting in an association may be desirable. For example, in a mixed-use condominium consisting of both residential and commercial units, there may be certain kinds of issues upon which the residential or commercial unit owners should have a special voice. At the same time, class voting is subject to abuse by the declarant, who can thereby perpetuate his control of the association or unduly favor one particular class of unit owners. Accordingly, subsection (c) permits class voting only with respect to specified issues directly affecting the designated class and only insofar as necessary to protect valid interests of the designated class. For example, commercial unit owners may constitute a class to vote on expenditures for the recreational facilities when they pay a portion of the expenses, but they might not be permitted to vote on rules for the use of the recreational facilities. The subsection further provides that the declarant may not use the class voting device for the purpose of evading any limitation imposed on declarants by this Act (e.g., to maintain declarant control beyond the period permitted by Section 3-103).

1 SECTION 3-111. [Tort and Contract Liability].

2 (a) An action in tort alleging a wrong done by a declarant or
3 his agent or employee in connection with a portion of any

4 convertible or withdrawable real estate or other portion of the
5 condominium which the declarant has the responsibility to maintain
6 may not be brought against the association or a unit owner other
7 than a declarant. Otherwise, an action in tort alleging a wrong
8 done by the association or by an agent or employee of the
9 association, or an action arising from a contract made by or on
.0 behalf of the association, shall be brought against the
.1 association. If the tort or breach of contract occurred during any
.2 period of declarant control (Section 3-103(c)), the declarant is
.3 liable to the association for all unreimbursed losses suffered by
.4 the association as a result of that tort or breach of contract,
5 including costs and reasonable attorney's fees. Any statute of
6 limitation affecting the association's right of action under this
7 section is tolled until the period of declarant control terminates.
8 A unit owner is not precluded from bringing an action contemplated
9 by this subsection because he is a unit owner or a member or
0 officer of the association.

1 (b) A judgment for money against the association [if
2 recorded] [if docketed] [if (insert other procedure required under
3 state law to perfect a lien on real property as a result of a
4 judgment)] is a lien against all of the units, but no other
5 property of a unit owner is subject to the claims of creditors of
6 the association.
7 (c) A judgment against the association shall be indexed in

28 the name of the condominium.

COMMENTS

1. Subsection (a) provides that any action in tort or contract arising out of acts or omissions of the association shall be brought against the association and not against the individual unit owners. This changes the law in some states where plaintiffs are forced to name individual unit owners as the real parties in interest to any action brought against the association. The subsection also provides that a unit owner is not precluded from bringing an action in tort or contract against the association solely because he is a unit owner or a member or officer of the association.

2. In recognition of the practical control that can (and in most cases will) be exercised by a declarant over the affairs of the association during any period of declarant control permitted pursuant to Section 3-103, subsection (a) provides that the association shall have a right of action against the declarant for any losses (including both payment of damages and attorneys' fees) suffered by the association as a result of an action based upon a tort or breach of contract arising during any period of declarant control. To assure that the decision to bring such an action can be made by an executive board free from the influence of the declarant, the subsection also provides that any statute of limitations affecting such a right of action by the association shall be tolled until the expiration of any period of declarant control.

3. Under subsection (b), a judgment against the association may be satisfied either from the property of the association or, because it becomes a lien against each of the units for a pro rata share of the judgment, from the individual units. The judgment can be collected in the same manner as an assessment for common expenses, and partial releases of that lien would be available under Section 4-109(b). The judgment is still against the association, however, and is not converted into a personal judgment against each unit owner. Each unit owner's liability is limited, therefore, to the value of his equity in his unit. A creditor of the association who obtains a judgment against the association after termination of the condominium does not have a lien against any of the property formerly constituting the condominium and can only proceed against any assets which the association is holding and not assets held in trust for the unit owners. This may leave the creditor remedyless.

4. The bracketed language in subsection (b) should be

modified in each state to incorporate the procedure whereby money judgments become a valid lien against real property.

1 SECTION 3-112. [Insurance].

2 (a) Commencing not later than the time of the first
3 conveyance of a unit to a person other than a declarant, the
4 association shall maintain, to the extent reasonably available:

5 (1) property insurance on the common elements and units,
6 exclusive of improvements and betterments installed in units by
7 unit owners, insuring against all risks of direct physical loss
8 commonly insured against or, in the case of a conversion
9 condominium, against fire and extended coverage perils. The total
0 amount of insurance after application of any deductibles shall be
1 not less than 80 percent of the actual cash value of the insured
2 property, exclusive of land, excavations, foundations, and other
3 items normally excluded from property policies; and

4 (2) comprehensive general liability insurance, including
5 medical payments insurance, in an amount determined by the
6 executive board but not less than any amount specified in the
7 declaration, covering all occurrences commonly insured against for
8 death, bodily injury, and property damage arising out of or in
9 connection with the use, ownership, or maintenance of the common
0 elements.

1 (b) If the insurance described in subsection (a) is not
2 maintained, the association promptly shall cause notice of that

23 fact to be hand-delivered or sent prepaid by United States mail to
24 all unit owners. The declaration may require the association to
25 carry any other insurance, and the association in any event may
26 carry any other insurance it deems appropriate to protect the
27 association or the unit owners.

28 (c) Insurance policies carried pursuant to subsection (a)
29 must provide that:

30 (1) each unit owner is an insured person under the
31 policy with respect to liability arising out of his ownership of an
32 undivided interest in the common elements or membership in the
33 association;

34 (2) the insurer waives its right to subrogation under
35 the policy against any unit owner of the condominium or members of
36 his household;

37 (3) no act or omission by any unit owner, unless acting
38 within the scope of his authority on behalf of the association,
39 will void the policy or be a condition to recovery under the
40 policy; and

41 (4) if, at the time of a loss under the policy, there is
42 other insurance in the name of a unit owner covering the same
43 property covered by the policy, the policy is primary insurance not
44 contributing with the other insurance.

45 (d) Any loss covered by the property policy under subsection
46 (a)(1) shall be adjusted with the association, but the insurance
47 proceeds for that loss shall be payable to any insurance trustee

48 designated for that purpose, or otherwise to the association, and
49 not to any mortgagee or beneficiary under a deed of trust. The
50 insurance trustee or the association shall hold any insurance
51 proceeds in trust for unit owners and lien holders as their
52 interests may appear. Subject to the provisions of subsection (d),
53 the proceeds shall be disbursed first for the repair or restoration
54 of the damaged common elements and units, and unit owners and lien
55 holders are not entitled to receive payment of any portion of the
56 proceeds unless there is a surplus of proceeds after the common
57 elements and units have been completely repaired or restored, or
58 the condominium is terminated.

59 (e) An insurance policy issued to the association does not
60 prevent a unit owner from obtaining insurance for his own benefit.

61 (f) An insurer that has issued an insurance policy under this
62 section shall issue certificates or memoranda of insurance to the
63 association and, upon request, to any unit owner, mortgagee, or
64 beneficiary under a deed of trust. The insurance may not be
65 cancelled until [30] days after notice of the proposed cancellation
66 has been mailed to the association, each unit owner and each
67 mortgagee or beneficiary under a deed of trust to whom certificates
68 of insurance have been issued.

69 (g) Any portion of the condominium damaged or destroyed shall
70 be repaired or replaced promptly by the association unless (1) the
71 condominium is terminated, (2) repair or replacement would be
72 illegal under any state or local health or safety statute or

ordinance, or (3) [80] percent of the unit owners, including every owner of a unit or assigned limited common element which will not be rebuilt, vote not to rebuild. The cost of repair or replacement in excess of insurance proceeds and reserves is a common expense. If the entire condominium is not repaired or replaced, (1) the insurance proceeds attributable to the damaged common elements shall be used to restore the damaged area to a condition compatible with the remainder of the condominium, (2) the insurance proceeds attributable to units and limited common elements which are not rebuilt shall be distributed to the owners of those units and the owners of the units to which those limited common elements were assigned, and (3) the remainder of the proceeds shall be distributed to all the unit owners in proportion to their common element interest. If the unit owners vote not to rebuild any unit, that unit's entire common element interest, votes in the association, and common expense liability are automatically reallocated upon the vote as if the unit had been condemned under Section 1-107(a), and the association promptly shall prepare, execute, and record an amendment to the declaration reflecting the reallocations. Notwithstanding the provisions of this subsection, Section 2-120 governs the distribution of insurance proceeds if the condominium is terminated.

(h) The provisions of this section may be varied or waived in the case of a condominium all of whose units are restricted to non-residential use.

COMMENTS

1. Subsection (a) provides that the required insurance must be maintained only to the extent reasonably available. This permits the association to comply with the insurance requirements even if certain coverages are unavailable or unreasonably expensive.

2. Subsection (a) represents a significant departure from the present law in virtually all states by requiring that the association obtain and maintain property insurance on both the common elements and the units within the condominium. See Comment 3. While it has been common practice in many parts of the country (either by custom or as mandated by statute) for associations to maintain property insurance on the common elements, it has generally not been the practice for the property insurance policy to cover individual units as well. However, given the peculiarities of condominium ownership and particularly the great interdependence of the unit owners in the normal condominium situation, mandating property insurance for the entire condominium is the preferable approach. Moreover, such an approach will greatly simplify claims procedures, particularly where both common elements and portions of a unit have been destroyed. If common elements and units are insured separately, the insurors could be involved in disputes as to the coverage provided by each policy.

3. The distinction between what is a common element and what is a unit with respect to the insurance coverage required by this section is complex. The definitions of common elements and a unit in Section 1-103(4) and (22) are not sufficient for this purpose. To determine the distinction between the common elements and units in a specific condominium, one must refer first to the declaration's section on unit boundaries. That section will define the unit boundaries. If the declaration fails to do so, the provisions of Section 2-102 apply.

In summary, Section 2-102 provides that if the declaration is silent, all non-loadbearing and non-structural portions of the walls, floors and ceilings are part of the unit, while all load-bearing and structural portions of the walls, floors and ceilings are common elements. Further, with respect to any structure partially within and partially outside of the boundaries of a unit, any portion thereof serving only that unit is a limited common element (see definition in Section 1-103(16)), and any portion thereof serving more than one unit or any portion of the common elements is a part of the common elements. This treats and defines ownership of all portions of the electrical, plumbing and mechanical systems serving the condominium not entirely within the boundaries of a unit.

All spaces, interior partitions, electrical, plumbing and mechanical systems, and all other items within the boundaries of the unit which are attached to the unit boundaries, whether or not deemed fixtures under state law, are part of the unit.

Put simply, if any item is installed, constructed, repaired or replaced by the declarant or his successor in connection with the original sale of the unit, the item is insured by the association. Clearly, this does not include items of personal property easily movable within the unit or easily removable from the unit (whether or not deemed a fixture under state law), such as a vase, table or other furnishings. If installed by the unit owner, the item should be insured by the unit owner. Those items, installed by the unit owner and not covered by the association policy, are called "improvements and betterments".

4. Although conversion condominiums are not required to obtain "all risk" coverage, but merely fire and extended coverage, this is not intended to imply that such coverage is unnecessary. "All risk" coverage is not required because it may not be appropriate in the case of an unrenovated conversion where cost is a critical factor.

5. The minimum requirement as to the amount of insurance, which is 80 percent of the actual cash value, should not be viewed as a recommendation; rather, the 80 percent is a floor. Typically, many condominium documents require insurance in an amount equal to <u>100 percent of the replacement cost</u> of the insured property. The Act permits greater flexibility, however, inasmuch as different types of construction and varieties of projects may not require such total coverage with its attendant higher premium cost.

6. Subsection (a)(2) covers only the liability of the association, and unit owners as members, but does not cover the unit owner's individual liability for his acts or omissions or liability for occurrences within his unit.

7. Clause (1) of the third sentence of subsection (g) would operate as follows: (1) if the condominium consists of campsites, restoration after fire damage might consist of merely resodding the area damaged; (2) if the condominium consists of separate garden-type buildings, restoration after fire damage might consist of demolishing the remaining structure and paving or landscaping the area; and (3) if the condominium consists of a single high-rise building, restoration may not be required (if the building is substantially destroyed) inasmuch as "a condition compatible with the remainder of the condominium" would be damaged and unrestored.

8. The scheme of this section, as set forth in subsection (g), is that any damage or destruction to any portion of the

condominium must be repaired (if repairs can be made consistent with applicable safety and health laws) absent a decision to terminate the condominium or a decision by 80 percent of the unit owners (including the owners of any damaged units) not to rebuild. Unless a decision is made not to rebuild, any available insurance proceeds must be used to effecutate such repairs. For this reason, subsection (d) provides that any loss covered by the association's property insurance policy shall be adjusted with the association and that the proceeds for any loss shall be payable to the association or to any insurance trustee that may be designated for such purpose. Significantly, such insurance proceeds may not be paid to any mortgagee or other outside party. This provision is necessary to insure that insurance proceeds are available to effectuate any repairs or restoration to the condominium that may be required.

9. In the case of commercial or industrial condominiums, unit owners may prefer to act as self-insurers or make other arrangements with respect to property insurance. Accordingly, subsection (h) provides that the insurance requirements of this section may be varied or waived in the case of a condominium all of the units of which are reserved exclusively for non-residential use. Such waiver or modification is not possible in the case of a mixed-use condominium, some of the units of which are used for residential purposes.

1 SECTION 3-113. [Surplus Funds].

2 Unless otherwise provided in the declaration, any surplus
3 funds of the association remaining after payment of or provision
4 for common expenses and any prepayment of reserves must be credited
5 to the unit owners to reduce their future common expense
6 assessments.

COMMENTS

Surplus funds of the association are generally used first for the prepayment of reserves, and remaining funds are thereafter credited to the account of unit owners. In some cases, however, unit owners might prefer that surplus funds be used for other purposes (e.g., the purchase of recreational equipment). Accordingly, this section permits the declaration to specify any

other use of surplus funds.

1 SECTION 3-114. [Assessments for Common Expenses].

2 (a) Until the association makes a common expense assessment,
3 the declarant shall pay all the expenses of the condominium. After
4 any assessment has been made by the association, assessments shall
5 be made at least annually and shall be based on a budget adopted at
6 least annually by the association.

7 (b) Except for assessments under subsection (c), common
8 expenses shall be assessed against all the units in accordance with
9 the common expense liability allocated to each unit (Section
0 2-108). Any past due assessment or installment thereof shall bear
1 interest at the rate established by the association not exceeding
2 [18] percent per year.

3 (c) Except as provided by the declaration:

4 (1) any common expense associated with the maintenance,
5 repair, or replacement of a limited common element shall be
6 assessed in equal shares against the units to which that limited
7 common element was assigned at the time the expense was incurred;
8 and

9 (2) any common expense benefiting fewer than all of the
0 units shall be assessed exclusively against the units benefited.

1 (d) If common expense liabilities are reallocated, common
2 expense assessments and any installment thereof not yet due shall
3 be recalculated in accordance with the reallocated common expense

liabilities.

COMMENTS

1. This section contemplates that a declarant might find it advantageous, particularly in the early stages of condominium development, to pay all of the expenses of the condominium himself rather than assessing each unit individually. Such a situation might arise, for example, where a declarant owns most of the units in the condominium and wishes to avoid billing the costs of each unit separately and crediting payment to each unit. It might also arise in the case of a declarant who, although willing to assume all expenses of the condominium, is unwilling to make payments for replacement reserves or for other expenses which he expects will ultimately be part of the association's budget. Subsection (a) grants the declarant such flexibility while at the same time providing that once an assessment is made against any unit, all units, including those owned by the declarant, must be assessed for their full portion of the common expense liability.

2. Subsection (d) refers to those instances in which various provisions of this Act require that common expense liabilities be reallocated among the units of a condominium by amendment to the declaration. These provisions include Section 1-107 (eminent domain), Section 2-107(d) (expiration of certain leases), Section 2-111 (conversion and expansion of flexible condominiums), and Section 2-115(b) (subdivision or conversion of units).

1 SECTION 3-115. [Lien for Assessments].

2 (a) The association has a lien on a unit for any assessment
3 levied against that unit or fines imposed against its unit owner
4 from the time the assessment or fine becomes due. The
5 association's lien may be foreclosed in like manner as a mortgage
6 on real estate [or a power of sale under (insert appropriate state
7 statute)]. Unless the declaration otherwise provides, fees,
8 charges, late charges, fines, and interest charged pursuant to
9 Section 3-102(10), (11) and (12) are enforceable as assessments

under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.

(b) A lien under this section is prior to all other liens and encumbrances on a unit except (1) liens and encumbrances recorded before the recordation of the declaration, (2) mortgages and deeds of trust on the unit securing first mortgage holders and recorded before the due date of the assessment or the due date of the first installment payable on the assessment, and (3) liens for real estate taxes and other governmental assessments or charges against the unit. To the extent of the common expense assessments made under Section 3-114(b) due during the 6 months immediately preceding institution of an action to enforce the lien, the lien is also prior to the mortgages and deeds of trust described in clause (2) above. This subsection does not affect the priority of mechanics' or materialmen's liens. [The lien is not subject to the provisions of (insert appropriate reference to state homestead, dower and curtesy, or other exemptions).]

(c) Recording of the declaration constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment under this section is required.

(d) A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within [3] years after the assessments become payable.

(e) Nothing in this section shall be construed to prohibit

35 actions or suits to recover sums for which subsection (a) creates a
36 lien, or to prohibit an association from taking a deed in lieu of
37 foreclosure.

38 (f) A judgment or decree in any action or suit brought under
39 this section shall include costs and reasonable attorney's fees for
40 the prevailing party.

41 (g) The association shall furnish to a unit owner upon
42 written request a recordable statement setting forth the amount of
43 unpaid assessments currently levied against his unit. The
44 statement shall be furnished within [10] business days after
45 receipt of the request and is binding on the association, the
46 executive board, and every unit owner.

COMMENTS

1. Subsection (a) provides that the association's lien on a unit for unpaid assessments shall be enforceable in the same manner as mortgage liens. In addition, if the use of a power of sale pursuant to a mortgage is permitted in a particular state, the bracketed language (with an appropriate statutory citation inserted) may be used to ensure that the association's lien for unpaid assessments may also be enforced through the power of sale device.

2. To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens should enjoy statutory priority over most other liens. Accordingly, subsection (a) provides that the association's lien shall take priority over all other liens and encumbrances except those recorded prior to the recordation of the declaration and those imposed for real estate taxes or other governmental assessments or charges against the unit.

Further, the association's lien has priority over mortgages and deeds of trust on any unit securing first mortgage holders and recorded <u>before</u> the due date of the assessment, provided that such priority shall extend only to assessments due for 6 months

immediately preceding any action to enforce the association's lien. A significant departure from existing practice, this approach strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of mortgage lenders. As a practical matter, mortgage lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit. This is a reasonable result because mortgage lenders have greater resources than the association for collecting such debts from unit owners and because the mortgage lenders' interests are best served by having the assessments paid and the association solvent. If the mortgage lender wishes, an escrow for assessments can be required, much the same as with real estate taxes. Since this requirement may conflict with the provisions of some state statutes which forbid some lending institutions from making loans not secured by first priority liens, the law of each state should be reviewed and amended when necessary.

3. Subsection (e) makes clear that the association may have remedies short of foreclosure of its lien that can be used to collect unpaid assessments. The association, for example, might bring an action in debt or breach of contract against a recalcitrant unit owner rather than resorting to foreclosure.

4. In view of the association's powers to enforce its lien for unpaid assessments, subsection (f) provides unit owners with a method to determine the amount presently due and owing. A unit owner may obtain a statement of any unpaid assessment, including fines and other charges enforceable as assessments under subsection (a), currently levied against his unit. The statement is binding on the association, the executive board, and every unit owner in any subsequent action to collect such unpaid assessments.

1 SECTION 3-116. [Association Records].

2 The association shall keep financial records sufficiently
3 detailed to enable the association to comply with Section 4-107.
4 All financial and other records shall be made reasonably available
5 for examination by any unit owner and his authorized agents.

1 SECTION 3-117. [Association as Trustee].

2 With respect to a third person dealing with the association in
3 the association's capacity as a trustee, the existence of trust
4 powers and their proper exercise by the association may be assumed
5 without inquiry. A third person is not bound to inquire whether
6 the association has power to act as trustee or is properly
7 exercising trust powers and a third person, without actual
8 knowledge that the association is exceeding or improperly
9 exercising its powers, is fully protected in dealing with the
10 association as if it possessed and properly exercised the powers it
11 purports to exercise. A third person is not bound to assure the
12 proper application of trust assets paid or delivered to the
13 association in its capacity as trustee.

COMMENT

Based on Section 7 of the Uniform Trustees' Powers Act, this subsection is intended to protect an innocent third party in its dealings with the association only when the association is acting as a trustee for the unit owners, either under Section 3-112 for insurance proceeds, or Section 2-120 following termination.

ARTICLE 4

PROTECTION OF PURCHASERS

Section 4-101. [Applicability; Waiver].

4-102. [Public Offering Statement: General Provisions].

4-103. [Same; Time-Share Estates].

4-104. [Same; Conversion Condominiums].

4-105. [Same; Condominium Securities].

4-106. [Purchaser's Right to Cancel].

4-107. [Resales of Units].

4-108. [Escrow of Deposits].

4-109. [Release of Liens].

4-110. [Conversion Condominiums].

4-111. [Express Warranties of Quality].

4-112. [Implied Warranties of Quality].

4-113. [Exclusion or Modification of Implied Warranties of Quality].

4-114. [Statute of Limitations for Warranties].

4-115. [Effect of Violation on Rights of Action; Attorney's Fees].

4-116. [Labeling of Promotional Material].

4-117. [Declarant's Obligation to Complete and Restore].

ARTICLE 4

PROTECTION OF PURCHASERS

1 SECTION 4-101. [Applicability; Waiver].

2 (a) This Article applies to all units subject to this Act,
3 except as provided in subsection (b) and Section 4-113 or as
4 modified or waived by agreement of purchasers of units in a
5 condominium in which all units are restricted to non-residential
6 use.

7 (b) A public offering statement need not be prepared or
8 delivered in the case of:

9 (1) a gratuitous transfer of a unit;

0 (2) a disposition pursuant to court order;

1 (3) a disposition by a government or governmental
2 agency;

3 (4) a disposition by foreclosure or deed in lieu of
4 foreclosure;

5 (5) a disposition of a condominium situated wholly
6 outside this State pursuant to a contract executed wholly outside
7 this State; or

8 (6) a transfer to which Section 4-107 (Resales of Units)
9 applies.

COMMENTS

1. In the case of commercial and industrial condominiums,

the purchaser is often more sophisticated than the purchaser of residential units and thus better able to bargain for the protections he believes necessary. While this may not always be true, no objective test can be developed which easily distinguishes those commercial purchasers who are able to protect themselves from those who, in the ordinary course of business, have not developed such sophistication. At the same time, the cost of protection imposed by Article 4 may be substantial. Accordingly, subsection (a) permits waiver or modification of Article 4 protections in condominiums where all units are restricted to non-residential use, e.g., in the case of most commercial and industrial condominiums. However, except for certain waivers of implied warranties of quality (see Section 4-113) and certain exemptions from public offering statement requirements (see subsection (b)), no express waiver of the protections of this Article with respect to the purchasers of residential units is permitted by this subsection. Accordingly, by operation of Section 1-104, the rights provided by this Article may not be waived in the case of residential purchasers. Moreover, because of the interrelated rights of residential and commercial owners in mixed-use condominiums, waiver or modification of rights conferred by this Article is restricted to purchasers in wholly non-residential condominiums.

2. Subsection (b) describes those circumstances in which a public offering statement, otherwise required by Sections 4-102 through 4-104, need not be prepared or delivered to a purchaser. Subsection (b)(5) makes clear that a public offering statement need not be delivered in the case of a disposition of an out-of-state condominium pursuant to a contract executed wholly (i.e., by each party thereto) outside the enacting state. This subsection parallels the exclusion for out-of-state condominiums set forth in the definition of "offering" in Section 1-103(17) and the basic exclusion of out-of-state condominiums from the general provisions of the Act set forth in Section 1-102(c). These exclusions of out-of-state condominiums from certain provisions of the Act reflect the fact that there are practical as well as constitutional limits regarding the extent to which a state should or may extend its jurisdiction to out-of-state transactions. A state may, of course, properly exercise its authority to protect its citizens from false or misleading information relating to condominiums located in other states but sold in that state. However, where sales contracts are executed wholly outside the enacting state and relate to condominiums located outside the state, it seems more appropriate for the courts of the jurisdiction(s) in which the condominium is located and where the transaction occurs to have jurisdiction over the transaction.

3. The public offering statement requirements set forth in Sections 4-102 through 4-104 are designed to require the disclosure of pertinent information by declarants and not to impose an

additional burden upon individual unit owners wishing to resell their units. Accordingly, subsection (b)(6) specifically exempts transfers to which Section 4-107 (governing the resale of units) applies from the public offering statement requirements of the Act.

SECTION 4-102. [<u>Public Offering Statement: General Provisions</u>].

(a) Except as provided in subsection (b), a public offering statement must contain or fully and accurately disclose:

(1) the name and principal address of the declarant and of the condominium;

(2) a general description of the condominium, including without limitation the types, number, and declarant's schedule of commencement and completion of construction of all buildings, units, and amenities;

(3) the total number of additional units that may be included in the condominium and the proportion of units the declarant intends to rent or market in blocks of units to investors;

(4) a brief narrative description of any options reserved by a declarant to withdraw withdrawable real estate under Section 2-106(1) and the expected effects that withdrawal would have on the remaining portion of the condominium;

(5) copies and a brief narrative description of the significant features of the declaration (other than the plats and plans), the bylaws, and rules and regulations, copies of any contracts and leases to be signed by purchasers at closing, and a

:3 brief narrative description of any contracts or leases that will or
:4 may be subject to cancellation by the association under Section
:5 3-105;

:6 (6) any current balance sheet and a projected budget for
:7 the association, either within or as an exhibit to the public
:8 offering statement, for [one] year after the date of the first
:9 conveyance to a purchaser, and thereafter the current budget of the
.0 association, a statement of who prepared the budget, and a
.1 statement of the budget's assumptions concerning occupancy and
.2 inflation factors. The budget must include, without limitation:

.3 (i) a statement of the amount, or a statement that
.4 there is no amount, included in the budget as a reserve for repairs
.5 and replacement;

.6 (ii) a statement of any other reserves;

.7 (iii) the projected common expense assessment by
:8 category of expenditures for the association;

:9 (iv) the projected monthly common expense assessment
:0 for each type of unit;

:1 (7) any services not reflected in the budget that the
:2 declarant provides, or expenses that he pays, and that he expects
!3 may become at any subsequent time a common expense of the
!4 association and the projected common expense assessment
!5 attributable to each of those services or expenses for the
!6 association and for each type of unit;

!7 (8) any initial or special fee due from the purchaser at

48 closing, together with a description of the purpose and method of
49 calculating the fee;

50 (9) a description of any liens, defects, or encumbrances
51 on or affecting the title to the condominium;

52 (10) a description of any financing offered by the
53 declarant;

54 (11) the terms and significant limitations of any
55 warranties provided by the declarant, including statutory
56 warranties and limitations on the enforcement thereof or on
57 damages;

58 (12) A statement that:

59 (i) within 15 days after receipt of a public
60 offering statement a purchaser, before conveyance, may cancel any
61 contract for purchase of a unit from a declarant,

62 (ii) if a declarant fails to provide a public
63 offering statement to a purchaser before conveying a unit, that
64 purchaser may recover from the declarant [10] percent of the sales
65 price of the unit, and

66 (iii) if a purchaser receives the public offering
67 statement more than 15 days before signing a contract, he cannot
68 cancel the contract;

69 (13) a statement of any judgments against the
70 association, the status of any pending suits to which the
71 association is a party, and the status of any pending suits
72 material to the condominium of which a declarant has actual

73 knowledge;

74 (14) a statement that any deposit made in connection with
75 the purchase of a unit will be held in an escrow account until
76 closing and will be returned to the purchaser if the purchaser
77 cancels the contract pursuant to Section 4-106;

78 (15) any restraints on alienation of any portion of the
79 condominium;

80 (16) a description of the insurance coverage provided for
81 the benefit of unit owners;

82 (17) any current or expected fees or charges to be paid
83 by unit owners for the use of the common elements and other
84 facilities related to the condominium;

85 (18) the extent to which financial arrangements have been
86 provided for completion of all improvements labeled "MUST BE BUILT"
87 pursuant to Section 4-117 (Declarant's Obligation to Complete and
88 Restore); and

89 (19) all unusual and material circumstances, features,
90 and characteristics of the condominium and the units.

91 (b) If a condominium composed of not more than 12 units is
92 not a flexible condominium and no power is reserved to a declarant
93 to make the condominium part of a larger condominium, group of
94 condominiums, or other real estate, a public offering statement may
95 but need not include the information otherwise required by
96 paragraphs (3), (4), (10), (11), (16), (17), (18), and (19) of
97 subsection (a), and the narrative descriptions of documents

98 required by paragraph (a)(5).

99 (c) A declarant promptly shall amend the public offering

.00 statement to report any material change in the information required

.01 by this section.

COMMENTS

1. The best "consumer protection" that the law can provide to any purchaser is to insure that he has an opportunity to acquire an understanding of the nature of the product which he is purchasing. Such a result is difficult to achieve, however, in the case of the condominium purchaser because of the complex nature of the bundle of rights and obligations which each unit owner obtains. For this reason, the Act, adopting the approach of many so-called "second generation" condominium statutes, sets forth a lengthy list of information which must be provided to each purchaser before he contracts for a unit. This list includes a number of important matters not typically required in public offering statements under existing law. The requirement for providing the public offering statement appears in Section 4-106, which provides purchasers with cancellation rights and imposes civil penalties upon declarants not complying with the public offering statement requirements of the Act.

2. Paragraph (2) requires the declarant to provide a general description of the condominium and to set forth the declarant's schedule for commencement and completion of construction for all buildings, units, and amenities that will comprise portions of the condominium. Under Section 2-110, the declarant is obligated to label all improvements which may be made in the condominium as either "MUST BE BUILT" or "NEED NOT BE BUILT." Under Section 4-118, the declarant is obligated to complete all improvements labeled "MUST BE BUILT." The schedule of commencement and completion of construction dates provides a standard for judging whether a declarant has complied with the requirements of Section 4-118.

3. Paragraph (3) requires the disclosure of information which may be particularly important in the case of flexible condominiums which may be expanded to include additional units. First, the paragraph requires disclosure of the limit on the maximum size which the condominium may ever attain, thus indicating to earlier purchasers whether the amenities promised for the condominium will be adequate to serve the number of unit owners ultimately included in the project. Second, the paragraph requires

the declarant to disclose the proportion of the units which may be rented or marketed in blocks of units to investors. The latter information may be particularly important to purchasers, since condominiums with a high percentage of rental units may tend to have more transient resident populations than condominiums which are predominately owner occupied. Similarly, information concerning whether the developer is marketing blocks of units to investors may have major significance to purchasers concerned about the long-term unit sales prices and stability of the project.

4. Paragraph (5) requires the declarant to provide to purchasers copies of the declaration, bylaws, and rules and regulations of the condominium, as well as copies of any contracts or leases to be executed by the purchaser. In addition, the paragraph requires the declarant to provide a brief narrative description of the significant features of those documents, as well as of any management contract, leases of recreational facilities, and other sorts of contracts which may be subject to cancellation by the association after the period of declarant control expires, as provided in Section 3-105. This latter requirement is intended to encourage the preparation of brief summaries of all condominium documents in laymen's terms, i.e., the "brief narrative description" should be more than a simple explanation of what a declaration (or other document) is, but less than an extended legal analysis duplicating the contents of the documents themselves. The summary requirement is intended to alleviate the common problem of public offering statements being drafted in lawyers' terms and being no more comprehensible to laymen than the documents themselves.

5. The disclosure requirement of paragraph (7) is intended to eliminate the common deceptive sales practice known as "low-balling," a practice by which a developer intentionally underestimates the budget for the association by providing many of the services himself during the initial sales period. In such a circumstance, the developer commonly intends that, after a certain time, these services (which might include lawn maintenance, painting, security, bookkeeping, or other services) will become expenses of the association, thereby substantially increasing the periodic common expense assessments which association members must ultimately bear. By requiring the disclosure of these services (including the projected common expense assessment attributable to each) in paragraph (7), the Act seeks to minimize "lowballing". In order to comply fully with the provisions of paragraph (6), the declarant must calculate the budget on the basis of his best estimate of the number of units which will be part of the condominium during that budget year. This requirement as well operates to negate the effects of any attempted "lowballing."

6. Paragraph (10) requires disclosure of any financing

"offered" by the declarant. The paragraph contemplates that a declarant disclose any arrangements for financing that may have been made, including arrangements with any unaffiliated lender to provide mortgages to qualified purchasers.

7. Under paragraph (11), the declarant is required to disclose the terms of all warranties provided by the declarant (including the statutory warranties set forth in Section 4-112) and to describe any significant limitations on such warranties, the enforcement thereof, or damages which may be collectible as a result of a breach thereof. This latter requirement would necessitate a description by the declarant of any exclusions or modifications of statutory warranties undertaken pursuant to Section 4-113. The statute of limitations for warranties set forth at Section 4-114, together with any separate written agreement (as required by Section 4-114) providing for reduction of the period of such statute of limitations, must also be disclosed.

8. Paragraph (15) requires that the declarant disclose the existence of any right of first refusal or other restrictions on the uses for which or classes of persons to whom units may be sold.

9. Paragraph (16) corrects a defect common to many condominium statutes by requiring the declarant to describe the insurance coverage provided for the benefit of unit owners. See Section 3-112.

10. Under paragraph (17), the declarant is obligated to disclose any current or expected fees or charges which unit owners may be required to pay for the use of the common elements and other facilities related to the condominium. Such fees or charges might include swimming pool fees, golf course fees, or required membership fees for recreation associations. Such fees are often not disclosed to condominium purchasers and can represent a substantial addition to their monthly assessments.

11. The "financial arrangements" required to be disclosed by paragraph (18) may vary substantially from one condominium development to another. It is the intent of the paragraph to give purchasers as much information as possible with which to assess the declarant's ability to carry out his obligations to complete the improvements. For example, if a declarant has a commitment from a bank to provide construction financing for a swimming pool when 50 percent of the units in the condominium are completed, that fact should be disclosed to potential purchasers.

12. In addition to the information required to be disclosed by paragraphs (1) through (18), paragraph (19) requires that the declarant disclose all other "unusual and material circumstances, features, and characteristics" of the condominium and all units

therein. This requires only information which is both "unusual and material." Thus, the provision does not require the disclosure of "material" factors which are commonly understood to be part of the condominum, e.g., the fact that a condominium has a roof, walls, doors, and windows. Similarly, the provision does not require the disclosure of "unusual" information about the condominium which is not also "material," e.g., the fact that a condominium is the first condominium in a particular community. Information which would normally be required to be disclosed pursuant to paragraph (19) might include, to the extent that they are unusual and material, zoning requirements (both of the condominium and the surrounding area), environmental conditions affecting the use or enjoyment of the condominium, features of the location of the condominium e.g., near the end of an airport runway or a planned rendering plant, and the like.

13. The cost of preparing a public offering statement can be substantial and may, particularly in the case of small condominiums, represent a significant portion of the cost of a unit. For that reason, subsection (b) permits a declarant to exclude from a public offering statement certain information in the case of a small condominium (i.e., less than 12 units) which is not a flexible condominium and which is not potentially part of a larger condominium or group of condominiums. Essentially, subsection (b) permits a declarant to exclude from a public offering statement those materials which, as a practical matter, require extended preparation effort by an attorney or engineer in addition to the normal effort which must be exerted to provide the declaration, bylaws, plats and plans, or other documents required by the Act.

1 SECTION 4-103. [Same; Time-Share Estates].

2 (a) For purposes of this section, "time-share estate" means

3 either:

4 (1) an "interval estate", meaning a combination of (i)

5 an estate for years in a unit, during the term of which title to

6 the unit rotates among the time-share owners thereof, vesting in

7 each of them in turn for periods established by a fixed recorded

8 schedule, with the series thus established recurring regularly

9 until the term expires, coupled with (ii) a vested undivided fee

.0 simple interest in the remainder in that unit, the magnitude of
.1 that interest having been established by the declaration or by the
.2 deed creating the interval estate; or
.3 (2) a "time-span estate," meaning a combination of (i)
.4 an undivided interest in a present estate in fee simple in a unit,
.5 the magnitude of that interest having been established by the
.6 declaration or by the deed conveying the time-span estate, coupled
.7 with (ii) the exclusive right to possession and occupancy of that
8 unit during a regularly recurring period designated by that deed or
9 by a recorded document referred to therein.
0 (b) If the declaration provides that ownership or occupancy
1 of the units are or may be owned in time-shares, the public
2 offering statement shall disclose in addition to the information
3 required by Section 4-102:
4 (1) the total number of units in which time-share
5 estates may be created;
6 (2) the total number of time-share estates that may be
7 created in the condominium;
8 (3) the projected common expense assessment for each
9 time-share estate and whether those assessments may vary
0 seasonally;
1 (4) a statement of any services not reflected in the
2 budget which the declarant provides, or expenses which he pays, and
3 which he expects may become at any subsequent time a common expense
4 of the association, and the projected common expense assessment

35 attributable to each of those services or expenses for each time-
36 share estate;
37 (5) the extent to which the time-share owners of a unit
38 are jointly and severally liable for the payment of real estate
39 taxes and all assessments and other charges levied against that
40 unit;
41 (6) the extent to which a suit for partition may be
42 maintained against a unit owned in time-share estates; and
43 (7) the extent to which a time-share estate may become
44 subject to a tax or other lien arising out of claims against other
45 time-share owners of the same unit.

COMMENTS

1. Time-share estates have become increasingly important in recent years, particularly with respect to resort condominiums. In recognition of this fact, this section requires the disclosure of certain information with respect to two forms of time-sharing -- interval estates and time-span estates. Although other forms of time-sharing exist, such as vacation licenses, the section is limited to the forms of time-sharing in which the owners of all of the time-shares in a unit would (collectively) constitute a "unit owner" within the meaning of this Act. Since a person other than the time-sharers will normally be the unit owner of any unit subjected to other forms of time-sharing, those other forms do not generally warrant the types of disclosure contemplated by this section. However, if the declaration expressly provides for any non-ownership form of time-sharing, Section 4-102(a)(19) would require appropriate disclosure concerning it.

2. Virtually all existing state condominium statutes are silent with respect to time-share ownership. The inclusion of disclosure provisions for certain forms of time-sharing in this Act, however, does not imply that other law regulating time-sharing is affected in any way in a state merely because that state enacts this Act.

SECTION 4-104. [Same; Conversion Condominiums].

(a) The public offering statement of a conversion condominium must contain, in addition to the information required by Section 4-102:

(1) a statement by the declarant, based on a report prepared by an independent [registered] architect or engineer, describing the present condition of all structural components and mechanical and electrical installations material to the use and enjoyment of the condominium;

(2) a statement by the declarant of the expected useful life of each item reported on in paragraph (1) or a statement that no representations are made in that regard; and

(3) a list of any outstanding notices of uncured violations of building code or other municipal regulations, together with the estimated cost of curing those violations.

(b) This section applies only to units that may be occupied for residential use.

COMMENTS

1. In the case of a conversion condominium, the disclosure of additional information relating to the condition of the building is required in the public offering statement because of the difficulty inherent in a single purchaser attempting to determine the condition of what is likely to be an older building being renovated for the purpose of condominium sales.

2. Paragraph (a)(1) requires the declarant to retain an independent architect or engineer to report on the present condition of all structural components and fixed mechanical and electrical installations in the condominium. Such information is as useful to the declarant as to the purchaser since, under the

implied warranty provisions of Section 4-112, a declarant impliedly warrants all improvements made by any person to the building "before creation of the condominium" unless such improvements are specifically excluded from the implied warranty of quality pursuant to Section 4- 113(b).

3. *See* Comment 4 to Section 2-101 concerning the meaning of "structural components." Any material changes in the "present condition" of these systems must be reported by an amendment to the public offering statement.

4. Under paragraph (a)(3), the declarant is required to provide purchasers with a list of all outstanding notices of uncured violations of building codes or other municipal regulations. The literal wording of this provision does not oblige a declarant to advise purchasers of known violations of such building codes or municipal regulations (at least violations having no effect upon the structural components or fixed mechanical and electrical installations of the condominium) unless actual "notices" of such violations have been received. To the extent that outstanding notices of uncured violations do exist, the cost of curing such violations would become a liability of the unit owners or the association following transfer of the unit to a purchaser. For that reason, the estimated cost of curing any outstanding violations also must be disclosed.

5. For the same reasons set forth in Comment 1 to Section 4-101(a), this section does not apply to units which are restricted exclusively to non-residential use.

1 SECTION 4-105. [*Same; Condominium Securities*].

2 If an interest in a condominium is currently registered with
3 the Securities and Exchange Commission of the United States, a
4 declarant satisfies all requirements relating to the preparation of
5 a public offering statement in this Act if he delivers to the
6 purchaser [and files with the Agency] a copy of the public offering
7 statement filed with the Securities and Exchange Commission. [An
8 interest in a condominium is not a security under the provisions of
9 (insert appropriate state securities regulation statutes.)]

COMMENTS

1. Some condominiums are regarded as "investment contracts" or other "securities" under federal law because they exhibit certain investment features such as mandatory rental pools. See SEC Securities Act Release No. 5347 (January 1973). The purpose of this section is to permit the declarant to file or deliver, in lieu of a public offering statement specifically prepared to comply with the provisions of this Act, the prospectus filed with and distributed pursuant to the regulations of the United States Securities and Exchange Commission. Absent this provision, prospective purchasers of condominiums classified by the SEC as "securities" would have to be given two public offering statements, one prepared pursuant to this Act and the other prepared pursuant to the Securities Act of 1933. Not only would this result increase the declarant's costs (and thus the price) of units, it might also reduce the likelihood of either public offering statement actually being read by prospective purchasers.

2. The bracketed language in the first sentence of this section should be inserted by states which choose to adopt the agency provisions of Article 5 of the Act. The second sentence should also be inserted by states opting to incorporate Article 5 of the Act to avoid duplicative regulation of condominiums by the agency administering the State's securities regulation statutes.

1 SECTION 4-106. [Purchaser's Right to Cancel].

2 (a) Unless delivery of a public offering statement is not
3 required under Section 4-101(b), a declarant shall provide a
4 purchaser of a unit with a copy of the public offering statement
5 and all amendments thereto before conveyance of that unit, and not
6 later than the date of any contract of sale. Unless a purchaser
7 is given the public offering statement more than 15 days before
8 execution of a contract for the purchase of a unit, the purchaser,
9 before conveyance, may cancel the contract within 15 days after
10 first receiving the public offering statement.

11 (b) If a purchaser elects to cancel a contract pursuant to

.2 subsection (a), he may do so by hand-delivering notice thereof to
.3 the declarant or by mailing notice thereof by prepaid United States
.4 mail to the declarant or to his agent for service of process.
.5 Cancellation is without penalty, and all payments made by the
.6 purchaser before cancellation shall be refunded promptly.
.7 (c) If a declarant fails to provide a purchaser to whom a
.8 unit is conveyed with a public offering statement and all
.9 amendments thereto as required by subsection (a), the purchaser, in
:0 addition to any rights to damages or other relief, is entitled to
:1 receive from the declarant an amount equal to [10] percent of the
:2 sales price of the unit.

COMMENTS

1. The "cooling off" period provided to a purchaser in this section is similar to provisions in many current state condominium statutes.

2. Subsection (a) requires the declarant to provide each purchaser with both the public offering statement and all amendments thereto prior to the time that the unit is conveyed. If there is a contract for the sale of the unit, these documents must be provided not later than the date of the contract. The section makes clear that any amendments to the public offering statement prepared between the date of any contract and the date of conveyance must also be provided to the purchaser.

3. This section does not require the delivery of a public offering statement prior to the execution by the purchaser of an agreement pursuant to which the purchaser reserves the right to buy a unit but is not contractually bound to do so. Because such agreements (frequently referred to as "nonbinding reservation agreements") may be unilaterally cancelled at any time by a prospective purchaser without penalty, they do not constitute "contract[s] of sale" within the meaning of the section.

4. The requirement set forth in subsection (a) that a declarant provide subsequent amendments of the public offering

statement to a purchaser during the period between execution of the contract for purchase and conveyance of the unit does not, in itself, extend the "cooling off" period. Indeed, the delivery of such amendments is required even if the "cooling off" period has expired. The purpose of this requirement is to assure that purchasers of units are advised of any material change in the condominium which may affect their sales contracts under general law. While many such amendments will be merely technical and will not affect the bargain that the purchaser and declarant entered into, each purchaser should be permitted to judge for himself the materiality of any change in the nature of the condominium.

5. Under the scheme set forth in this section, it is at least theoretically possible for a declarant not to use a contract for the sale of the unit, and merely to provide a public offering statement at closing just prior to conveyance. However, the available evidence suggests that such practice would be rare, and that the provision of a public offering statement moments prior to conveyance would, in itself, tend to dampen the enthusiasm of the purchaser for immediate closing. In such circumstances, under subsection (a), the purchaser would, as a matter of right, be able to extend the date of closing for fifteen days from the time the public offering statement was provided. This fact, together with the generally unsatisfactory experience with mandatory "cooling off" periods such as that imposed under the federal Real Estate Settlement Procedures Act, supports the conclusion that it is inappropriate to require a minimum period of delay between delivery of a public offering statement and conveyance.

6. Under subsection (a), the failure of a declarant to deliver a public offering statement before conveyance does not result in a statutory right by the purchaser to cancel the conveyance or to reconvey the unit once conveyance has occurred. Any such cancellation or reconveyance right following an actual conveyance could create serious mechanical and title problems that could not be easily resolved. The failure of the Act to provide for such cancellation or reconveyance is not, however, intended to diminish any right which a purchaser may otherwise have under general state law. For example, where it appears that a seller, by deliberately failing to disclose certain material information with respect to a transaction, substantially changed the bargain which he and the purchaser entered into, it is possible under the common law in some states that reconveyance would be an available remedy.

Even absent such resort to general law, however, the penalty provisions of subsection (c) are designed to provide a sufficient incentive to the declarant to insure that the public offering statement is provided in the timely fashion required by the Act. The penalty sum specified in the subsection is in addition to any right a prevailing purchaser may have under Section 4-115 to

collect punitive damages and attorney's fees in connection with his action against the declarant.

1 SECTION 4-107. [Resales of Units].

2 (a) In the event of a resale of a unit by a unit owner other
3 than a declarant, the unit owner shall furnish to a purchaser
4 before execution of any contract for sale of a unit, or otherwise
5 before conveyance, a copy of the declaration (other than the plats
6 and plans), the bylaws, the rules or regulations of the
7 association, and a certificate containing:

8 (1) a statement disclosing the effect on the proposed
9 disposition of any right of first refusal or other restraint on the
10 free alienability of the unit;

11 (2) a statement setting forth the amount of the monthly
12 common expense assessment and any unpaid common expense or special
13 assessment currently due and payable from the selling unit owner;

14 (3) a statement of any other fees payable by unit
15 owners;

16 (4) a statement of any capital expenditures proposed by
17 the association for the current and 2 next succeeding fiscal years;

18 (5) a statement of the amount of any reserves for
19 capital expenditures and of any portions of those reserves
20 designated by the association for any specified projects;

21 (6) the most recent regularly prepared balance sheet
22 and income and expense statement, if any, of the association;

23 (7) the current operating budget of the association;

24 (8) a statement of any judgments against the
25 association and the status of any pending suits to which the
26 association is a party;

27 (9) a statement describing any insurance coverage
28 provided for the benefit of unit owners;

29 (10) a statement as to whether the executive board has
30 knowledge that any alterations or improvements to the unit or to
31 the limited common elements assigned thereto violate any provision
32 of the declaration;

33 (11) a statement as to whether the executive board has
34 knowledge of any violations of the health or building codes with
35 respect to the unit, the limited common elements assigned thereto,
36 or any other portion of the condominium; and

37 (12) a statement of the remaining term of any leasehold
38 estate affecting the condominium and the provisions governing any
39 extension or renewal thereof.

40 (b) The association, within 10 days after a request by a unit
41 owner, shall furnish a certificate containing the information
42 necessary to enable the unit owner to comply with this section. A
43 unit owner providing a certificate pursuant to subsection (a) is
44 not liable to the purchaser for any erroneous information provided
45 by the association and included in the certificate.

46 (c) A purchaser is not liable for any unpaid assessment or
47 fee greater than the amount set forth in the certificate prepared
48 by the association. A unit owner is not liable to a purchaser for

49 the failure or delay of the association to provide the certificate
50 in a timely manner, but the purchase contract is voidable by the
51 purchaser until the certificate has been provided and for [5] days
52 thereafter or until conveyance, whichever first occurs.

COMMENTS

1. In the case of the resale of a unit by a private unit owner who is not a declarant, a public offering statement need not be provided. See Section 4-101(b)(6). Nevertheless, there are important facts which a purchaser should have in order to make a rational judgment about the advisability of purchasing the particular condominium unit. Accordingly, each unit owner is required to furnish to a resale purchaser, before the execution of any contract of sale, a copy of the declaration, bylaws, and rules and regulations of the association and a variety of fiscal, insurance, and other information concerning the condominium and the unit.

2. While the obligation to provide the information required by this section rests upon each unit owner (since the purchaser is in privity only with that unit owner), the association has an obligation to provide the information to the unit owner within 10 days after a request for such information. Under Section 3-102(a)(12), the association is entitled to charge the unit owner a reasonable fee for the preparation of the certificate. Should the association fail to provide the certificate as required, the unit owner would have a right of action against the association pursuant to Section 4-115.

3. Under subsection (c), if a purchaser receives a resale certificate which fails to state the proper amount of the unpaid assessments due from the purchased unit, the purchaser is not liable for any amount greater than that disclosed in the resale certificate. Because a resale purchaser is dependent upon the association for information with respect to the outstanding assessments against the unit which he contemplates buying, it is altogether appropriate that the association should be prohibited from later collecting greater assessments than those disclosed prior to the time of the resale purchase.

1 SECTION 4-108. [Escrow of Deposits].

2 Any deposit made in connection with the purchase or
3 reservation of a unit from a declarant shall be placed in escrow
4 and held in this State in an account designated solely for that
5 purpose by [a title insurance company licensed in this State] [an
6 independent bonded escrow company or] an institution whose accounts
7 are insured by a governmental agency or instrumentality until (1)
8 delivered to the declarant at closing; (2) delivered to the
9 declarant because of purchaser's default under a contract to
0 purchase the unit; or (3) refunded to the purchaser.

COMMENTS

1. This section applies to the sale by a declarant of residential units, and of non-residential units unless waived pursuant to the provisions of Section 4-101. It does not apply, however, to resales of units between private parties. Escrow provisions are now part of the law in several jurisdictions.

2. The escrow requirements of this section apply in connection with any deposit made by a purchaser, whether such deposit is made pursuant to a binding contract or pursuant to a nonbinding reservation agreement (with respect to which no public offering statement is required under Section 4-103(a)).

3. One common problem with existing escrow provisions has been that escrows of deposits for out-of-state condominiums are frequently held in accounts in out-of-state banks, thus rendering them difficult for purchasers to reach. This section remedies that problem by requiring that, if the purchase or reservation of a unit takes place in the enacting state, the deposit must be escrowed and held in that state regardless of where the unit may be located. Similarly, the section requires all escrow funds to be held in a specially designated account in an insured institution (e.g., a bank, savings and loan association, or credit union). In some states, current practice permits escrows to be held by certain title insurance or escrow companies. Accordingly, the bracketed language should be included or deleted in accordance with local practice.

4. Under this section, any interest earned on an escrow deposit may, but need not, be credited to the purchaser at closing, added to any deposit forfeited to the seller, or added to any deposit refunded to the purchaser. In short, disposition of any interest is left to agreement of the parties.

5. In some states, such as New York, the substitution of a bond in place of a deposit escrow is permitted. The evidence indicates, however, that in many instances the use of the bonding device has forced purchasers to incur substantial costs and delay prior to obtaining refunds to which they are entitled. For this reason, this Act does not include bonding as an alternative to the required escrow of deposits.

1 SECTION 4-109. [Release of Liens].

2 (a) Before conveying a unit, other than by deed in lieu of
3 foreclosure, to a purchaser other than a declarant, a declarant
4 shall record or furnish to the purchaser, releases of all liens
5 affecting that unit and its common element interest which the
6 purchaser does not expressly agree to take subject to or assume, or
7 shall provide a surety bond or substitute collateral for or
8 insurance against the lien as provided for liens on real estate in
9 [insert appropriate references to general state law or Sections
10 5-211 and 5-212 of the State Uniform Simplification of Land
11 Transfers Act]. This subsection does not apply to any withdrawable
12 real estate in which no unit has been conveyed.

13 (b) Whether perfected before or after creation of the
14 condominium, if a lien other than a deed of trust or mortgage,
15 including a lien attributable to work performed or materials
16 supplied before creation of the condominium, becomes effective

17 against 2 or more units, the unit owner of an affected unit may pay
18 to the lienholder the amount of the lien attributable to his unit,
19 and the lienholder, upon receipt of payment, promptly shall deliver
20 a release of the lien covering that unit and its common element
21 interest. The amount of the payment must be proportionate to the
22 ratio which that unit owner's common expense liability bears to the
23 common expense liabilities of all unit owners whose units are
24 subject to the lien. After payment, the association may not assess
25 or have a lien against that unit owner's unit for any portion of
26 the common expenses incurred in connection with that lien.

COMMENTS

1. Subsection (a) requires that, before conveying a unit, a declarant must either record releases of all liens affecting the unit which the purchaser does not expressly agree to take subject to or assume, or must furnish the purchaser with such releases. Alternatively, this section permits the seller to provide a surety bond, insurance, or substitute collateral for the lien as provided under state law.

2. The exemption for withdrawable real estate set forth in subsection (a) is designed to preserve flexibility for the declarant in terms of financing arrangements. The exemption does not, however, result in any potential liability for unit owners, even if the declarant's option to withdraw the real estate subject to a lien expires prior to the release or satisfaction of the lien. In such a case, the lien would itself expire upon the expiration of the option to withdraw. This result follows from the provisions of Sections 1-105 and 2-108(d). When the option to withdraw expires, the real estate previously subject to the option is rendered part of the "ordinary" common elements which cannot be subjected to a lien or attached without the units to which they appertain. Accordingly, if a lienholder fails to require the exercise of the option of withdrawability prior to its expiration, the lien on the withdrawable real estate would expire. Such a result is perfectly reasonable since the lienor can obviously attach only the interest of his lienee and, in the present case, the only interest the declarant has in the withdrawable real estate is the right to

withdraw it in the manner and within the time period specified in the Act and the declaration.

A similar result would occur if a declarant constructed units in withdrawable real estate. In such a case, any lien on the withdrawable real estate would also attach to the units constructed. However, if the declarant (after complying with the requirements of this subsection with respect to the release of liens prior to sale of units) transferred ownership of one such unit to another person, then the option to withdraw the real estate (or that portion of it in which the transferred unit was located) would expire pursuant to Section 2-112(b). The lien would simultaneously expire.

3. Subsection (b) provides for the partial release of liens which are attributable to 2 or more units unless those liens are deeds of trusts or mortgages. This provision is desirable in order to facilitate the free marketability of units in condominiums. The reference in the second sentence to "the common expense liabilities of all unit owners whose units are subject to the lien" includes all units "subject to the lien" whether the lien has been perfected with respect to all such units or not. Thus, if a mechanic's lienor performed $10,000 worth of work on the common elements of a 100-unit condominium, all 100 units would be "subject to the lien" for purposes of this subsection, even if the lienor perfected the lien with respect to only one unit. Accordingly, each unit owner (assuming equal common expense liability for each unit) would be liable for only $100, notwithstanding the actions taken (or not taken) by the lienor to perfect his lien.

4. If a mechanic's lien, inchoate at the time the declarant conveys a unit, is subsequently perfected, the declarant is responsible under subsection (a) for any loss suffered by the unit owner as a result of a failure to furnish a release of that lien. In circumstances where the declarant is no longer solvent, this may create a loss against which the unit owner cannot protect himself, except through owner's title insurance. However, this problem is not unique to condominiums, and the Act does not vary state law governing inchoate mechanic's liens. The law governing mechanics' liens in each state should be reviewed in order to eliminate any inconsistencies between that law and this Act.

5. The last sentence of subsection (b) means that if a unit owner pays his share of the amount secured by a common lien, the association may not use funds attributable to that unit owner in paying off the balance. Suppose, for example, that a $10,000 lien has become effective against all units in a 100-unit condominium in which each unit owner has an equal common expense liability. One unit owner pays $100 to the lienholder to obtain a release of his unit from the lien. If the association subsequently pays off the

balance of $9,900 by utilizing a contingency reserve fund to which all unit owners had contributed equally, the last sentence of subsection (b) would be violated unless the unit owner who had already paid his own pro rata share is either reimbursed $99 by the association or given a $99 credit against future assessments.

1 SECTION 4-110. [Conversion Condominiums].

2 (a) A declarant of a conversion condominium shall give each of
3 the tenants and any subtenant in possession of buildings subject to
4 this Act notice of the conversion no later than 120 days before the
5 declarant will require the tenants and any subtenant in possession
6 to vacate. The notice must set forth generally the rights of
7 tenants and subtenants under this section and shall be hand-
8 delivered to the unit or mailed by prepaid United States mail to
9 the tenant and subtenant at the address of the unit or any other
0 mailing address provided by a tenant. No tenant or subtenant may
1 be required by the declarant to vacate upon less than 120 days'
2 notice, except by reason of nonpayment of rent, waste, or conduct
3 that disturbs other tenants' peaceful enjoyment of the premises,
4 and the terms of the tenancy may not be altered during that period.
5 Failure of a declarant to give notice as required by this section
6 is a defense to an action for possession.

7 (b) For [60] days after delivery or mailing of the notice
8 described in subsection (a), the declarant shall offer to convey
9 each unit or proposed unit occupied for residential use to the
0 tenant who leases that unit. If a tenant fails to purchase the
1 unit during that [60]-day period, the declarant may not offer to
2 dispose of an interest in that unit during the following [180] days

23 at a price or on terms more favorable to the offeree than the price
24 or terms offered to the tenant. This subsection does not apply to
25 any unit in a conversion condominium if that unit will be
26 restricted exclusively to non-residential use or the boundaries of
27 the converted unit do not substantially conform to the dimensions
28 of the residential unit before conversion.

29 (c) If a declarant, in violation of subsection (b), conveys a
30 unit to a purchaser for value who has no knowledge of the
31 violation, recordation of the deed conveying the unit extinguishes
32 any right a tenant may have under subsection (b) to purchase that
33 unit if the deed states that the seller has complied with
34 subsection (b), but does not affect the right of a tenant to
35 recover damages from the declarant for a violation of subsection
36 (b).

37 (d) If a notice of conversion specifies a date by which a
38 unit or proposed unit must be vacated, the notice also constitutes
39 a notice to vacate specified by (insert appropriate State summary
40 process statute).

41 (e) Nothing in this section permits termination of a lease by
42 a declarant in violation of its terms.

COMMENTS

1. One of the most controversial issues in the field of condominium development relates to conversion condominiums. Opponents of conversions point out that the frequent result of conversions, which occur principally in large urban areas, is to displace low-and moderate-income tenants and provide homes for more affluent persons able to afford the higher prices which the

converted apartments command. Indeed, studies indicate that the burden of conversion displacement falls most frequently on low- and moderate-income and elderly persons. At the same time, the conversion of a building to condominium ownership can lead to a substantial increase in property value, a result which proponents believe can be an important factor in curtailing the problem of declining urban tax bases. Proponents also point out that the conversion of rental units in inner-city areas to individual ownership frequently results in the stabilization of the buildings concerned, thus providing an important technique for use in neighborhood preservation and revitalization. This section, which seeks to balance these competing interests, is based principally on similar provisions set forth in the condominium statutes of Virginia and the District of Columbia.

2. In an attempt to strike a fair balance between the competing interests of rental tenants and prospective owners, subsection (b) provides the tenant a right for 60 days to purchase the unit which he leases at a price and on terms offered by the declarant. The subsection discourages unreasonable offers by declarants by providing that if the tenant fails to accept the terms offered, the declarant may not thereafter sell the unit at a lower price or upon more favorable terms to a third person for at least 180 days. However, the declarant is not required to offer residential tenants the right to purchase commercial units or to offer to sell to tenants where the dimensions of their previous apartments have been substantially altered. The reason for this exception is that, if an apartment is subdivided or if two apartments are merged into a single condominium unit, compliance with the requirements of subsection (b) would be impossible.

3. Jurisdictions with rent control statutes should consider whether amendments to this section are necessary to conform to the procedures or substantive requirements set out in the rent control laws or whether modifications to the rent control laws may be required as a result of the enactment of this section.

4. Except for the restrictions on permissible evictions stated in subsection (a), this Act does not change the law of summary process in a state. As a result, if a tenant refuses to vacate the premises following the 120 day notice, the usual provisions of the state's summary process statutes would apply, while any defenses available to a tenant would also be available.

1 SECTION 4-111. [Express Warranties of Quality].

2 (a) Express warranties made by any seller to a purchaser of a

3 unit, if relied upon by the purchaser, are created as follows:

(1) any affirmation of fact or promise which relates to the unit, its use, or rights appurtenant thereto, area improvements to the condominium that would directly benefit the unit, or the right to use or have the benefit of facilities not located in the condominium, creates an express warranty that the unit and related rights and uses will conform to the affirmation or promise;

(2) any model or description of the physical characteristics of the condominium, including plans and specifications of or for improvements, creates an express warranty that the condominium will conform to the model or description;

(3) any description of the quantity or extent of the real estate comprising the condominium, including plats or surveys, creates an express warranty that the condominium will conform to the description, subject to customary tolerances; and

(4) a provision that a buyer may put a unit only to a specified use is an express warranty that the specified use is lawful.

(b) Neither formal words, such as "warranty" or "guarantee", nor a specific intention to make a warranty, are necessary to create an express warranty of quality, but a statement purporting to be merely an opinion or commendation of the real estate or its value does not create a warranty.

(c) Any conveyance of a unit transfers to the purchaser all express warranties of quality made by previous sellers.

COMMENTS

1. This section, together with Sections 4-112, 4-113, and 4-114, are adapted from the real estate warranty provisions contained in the Uniform Land Transactions Act (ULTA).

2. This section, which parallels Section 2-308 of ULTA, deals with express warranties, that is, with the expectations of the purchaser created by particular conduct of the declarant in connection with inducement of the sale. It is based on the principle that, once it is established that the declarant has acted so as to create particular expectations in the purchaser, warranty should be found unless it is clear that, prior to the time of final agreement, the declarant has negated the conduct which created the expectation.

3. Subsection (b) makes it clear that no specific intention to make a warranty is necessary if any of the factors mentioned in subsection (a) are made part of the basis of the bargain between the parties. In actual practice, representations made by a declarant concerning condominium property during the bargaining process are typically regarded as a part of the description. Therefore, no particular reliance on the representation need be shown in order to weave them into the fabric of the agreement. Rather, the burden is on the declarant to show that representations made in the bargaining process were not relied upon by the purchaser at the time of contracting.

4. Subsection (a)(1) provides that representations as to improvements and facilities not located in the condominium may create express warranties. Declarants often assert that recreational facilities, such as swimming pools, golf courses, tennis courts, etc., will be constructed in the future and that unit owners will have the right to utilize such facilities once constructed. Such assertions are intended to be included within the language "have the benefit of facilities not located in the condominium." If, under the circumstances, such improvements would benefit the unit being sold, then the declarant may be liable for breach of express warranty if the improvements are not made or the facilities not completed. Such liability is distinct from the declarant's obligations, under Section 4-117, to complete all improvements labeled "MUST BE BUILT" on plats and plans.

5. Under subsection (a)(4), a contract provision permitting the purchaser to use a condominium unit only for a specified use or uses creates an express warranty that the unit may lawfully be used for that purpose. Therefore, if there is a limitation on use, the resulting express warranty could not be disclaimed by a disclaimer of implied warranties under Section 4-113.

6. The precise time when representations set forth in subsection (a) are made is not material. The sole question is whether the language or other representations of the declarant are fairly to be regarded as part of the contract between the parties.

7. Subsection (b) makes clear that it is not necessary to the existence of a warranty that the declarant have intended to assume a warranty obligation. On the other hand, mere statements of opinion or commendations by the declarant do not necessarily create warranties. Whether a particular statement purports to be merely opinion or commendation is basically a question of whether the purchaser could reasonably rely upon the statement as a meaningful representation or promise with respect to the condominium. That determination depends, in turn, not merely upon the words used but also upon the relative characteristics and skills of the parties. Thus, a representation by a declarant to a novice purchaser that a particular condominium unit is in "good condition" may be more than mere opinion or commendation, while the same statement by a novice seller to a professional buyer would likely be only opinion or commendation, and thus not a warranty.

8. The provision of subsection (c) that the conveyance of a unit transfers to the purchaser all express warranties made by prior declarants is intended, in part, to avoid the possibility that a declarant could negate his warranty obligations through the device of transferring a unit through a shell entity to the ultimate purchaser.

1 SECTION 4-112. [Implied Warranties of Quality].

2 (a) A declarant warrants that a unit will be in at least as
3 good condition at the earlier of the time of the conveyance or
4 delivery of possession as it was at the time of contracting,
5 reasonable wear and tear excepted.

6 (b) A declarant impliedly warrants that a unit and the
7 common elements in the condominium are suitable for the ordinary
8 uses of real estate of its type and that any improvements made or
9 contracted for by him, or made by any person before the creation of
10 the condominium, will be:

.1 (1) free from defective materials; and

.2 (2) constructed in accordance with applicable law,

.3 according to sound engineering and construction standards, and in a

.4 workmanlike manner.

.5 (c) In addition, a declarant warrants to a purchaser of a

.6 unit that may be used for residential use that an existing use,

.7 continuation of which is contemplated by the parties, does not

.8 violate applicable law at the earlier of the time of conveyance or

.9 delivery of possession.

:0 (d) Warranties imposed by this section may be excluded or

:1 modified as specified in Section 4-113.

:2 (e) For purposes of this section, improvements made or

:3 contracted for by an affiliate of a declarant (Section 1-103(2))

:4 are made or contracted for by the declarant.

:5 (f) Any conveyance of a unit transfers to the purchaser all

:6 of any declarant's implied warranties of quality.

COMMENTS

1. This section, which is based upon Section 2-309 of ULTA, overturns the rule still applied in many states that a professional seller of real estate makes no implied warranties of quality (the rule of "caveat emptor"). In recent years that rule has been increasingly recognized as a relic of an earlier age whose continued existence defeats reasonable expectations of purchasers. Since the 1930s, more and more courts have completely or partially abolished the caveat emptor rule, and it is clear that the judicial tide is now running in favor of seller liability.

2. The principal warranty imposed under this section is that of suitability of both the unit and common elements for ordinary uses of real estate of similar type, and of quality of construction. Both of these warranties, which arise under

subsection (b), are imposed only against declarants and not against unit owners selling their units to others.

3. Many recent cases have held that a seller of new housing impliedly warrants that the houses sold are habitable. The warranty of suitability under this Act is similar to the warranty of habitability. However, under the Act, the warranty of suitability applies to both units and common elements in both commercial and residential condominiums. If, for example, a commercial unit is sold for commercial use although it is not suitable for the ordinary uses of condominium units of that type, the warranty of suitability has been breached. Moreover, this warranty of suitability arises in the case of used, as well as new, buildings or other improvements in the condominium.

4. The warranty of suitability and of quality of construction arises only against a declarant. As in the case of sales of goods, a non-professional seller is liable, if at all, only for any express warranties made by him. However, if a non-declarant fails to disclose defects of which he is aware, he may be liable to the purchaser for fraud or misrepresentation under the common law of the state where the transaction occurred. Also, the warranties imposed by this section may be used to give content to a general "guarantee" by a non-declarant seller.

5. The warranty as to quality of construction for improvements made or contracted for by the declarant or made by any person before the creation of the condominium is broader than the warranty of suitability. Particularly, it imposes liability upon the declarant for defects which may not be so serious as to render the condominium unsuitable for ordinary purposes of real estate of similar type. Moreover, subsection (e) prevents a declarant from avoiding liability with respect to the quality of construction warranty by having an affiliated entity make the desired improvements.

6. Under subsection (c), a declarant also warrants to a residential purchaser that an existing use contemplated by the parties does not violate applicable law. The declarant, therefore, is liable for any violation of housing codes or other laws which renders any existing use of the condominium unlawful.

7. The issue of declarant liability for warranties is an important one in cases where a transfer of the declarant's rights occurs, either as an arms-length transaction, as a transfer to an affiliate, or as a transfer by foreclosure or a deed in lieu of foreclosure. Subsection (f) makes clear that a conveyance of a unit transfers to the purchaser all warranties of quality made by any declarant, and Section 3-104 (b)(1) makes clear that the original declarant remains liable for all warranties of quality

with respect to improvements made by him, even after he transfers all declarant rights, regardless of whether the unit is purchased from the declarant who made the improvements. If the successor declarant is an affiliate of the original declarant, it is clear under both Sections 3-104(b)(2) and 4-112(f), that the original declarant remains liable for warranties of quality or improvements made by his successor even after the declarant himself ceases to have any special declarant rights.

8. As to the liabilities of successor declarants for warranties of quality, a successor who is an affiliate of a declarant is liable, pursuant to Section 3-104(e)(1), for warranties or improvements made by his predecessor. However, any non-affiliated successor of the original declarant is liable only for warranties of quality for improvements made or contracted for by him, and is not liable for warranties which may lie against the original declarant even if the successor sells units completed by the original declarant to a purchaser. See Section 3-104(e)(2). In the case of a foreclosing lender, this is the same result as that reached under Section 2-309(f) of ULTA. The same result is also reached under ULTA in the case of a successor who, under ULTA Section 3-309(b), would be a seller in the business of selling real estate since under that subsection the seller is liable only for warranties or improvements made or contracted for by him.

1 SECTION 4-113. [Exclusion or Modification of Implied
2 Warranties of Quality].
3 (a) Except as limited by subsection (b) with respect to a
4 purchaser of a unit that may be used for residental use, implied
5 warranties of quality:
6 (1) may be excluded or modified by agreement of the
7 parties; and
8 (2) are excluded by expression of disclaimer, such as
9 "as is," "with all faults," or other language which in common
10 understanding calls the buyer's attention to the exclusion of
11 warranties.
12 (b) With respect to a purchaser of a unit that may be

.3 occupied for residential use, no general disclaimer of implied

.4 warranties of quality is effective, but a declarant may disclaim

.5 liability in an instrument signed by the purchaser for a specified

.6 defect or specified failure to comply with applicable law, if the

.7 defect or failure entered into and became a part of the basis of

.8 the bargain.

COMMENTS

1. This section parallels Sections 2-311(b) and (c) of ULTA.

2. Under this section, implied warranties of quality may be disclaimed. However, a warranty disclaimer clause, like any other contract clause, is subject to a possible court holding of unconscionability. Although the section imposes no requirement that a disclaimer be in writing, except in the case of residential units, an oral disclaimer might be ineffective under the law of parole and extrinsic evidence.

3. Except as against purchasers of residential units, there are no formal standards for the effectiveness of a disclaimer clause. All that is necessary under this section is that the disclaimer be calculated to effectively notify the purchaser of the nature of the disclaimer.

4. Under subsection (b), general disclaimers of implied warranties are not permitted with respect to purchasers of residential units. However, a declarant may disclaim liability for a specified defect or a specified failure to comply with applicable law in an instrument signed by such a purchaser. The requirement that the disclaimer as to each defect or failure be in a signed instrument is designed to insure that the declarant sufficiently calls each defect or failure to the purchaser's attention and that the purchaser has the opportunity to consider the effect of the particular defect or failure upon the bargain of the parties. Consequently, this section imposes a special burden upon the declarant who desires to make a "laundry list" of defects or failures by requiring him to emphasize each item on such a list and make its import clear to prospective purchasers. For example, the declarant of a conversion condominium might, consistent with this subsection, disclaim certain warranties for "all electrical wiring and fixtures in the building, the furnace, all materials comprising or supporting the roof, and all components of the air conditioning

system."

5. This section is not intended to be inconsistent with, or to prevent, the use of insured warranty programs offered by some home builders. However, under the Act, the implied warranty that a new condominium unit will be suitable for ordinary uses (*i.e.*, habitable) and will be constructed in a sound, workmanlike manner, and free of defective materials, cannot be disclaimed by general language.

1 SECTION 4-114. [Statute of Limitations for Warranties].

2 (a) A judicial proceeding for breach of any obligation
3 arising under Section 4-111 or 4-112 must be commenced within 6
4 years after the [claim for relief] [cause of action] accrues, but
5 the parties may agree to reduce the period of limitation to not
6 less than 2 years. With respect to a unit that may be occupied for
7 residential use, an agreement to reduce the period of limitation
8 must be evidenced by a separate instrument executed by the
9 purchaser.

10 (b) Subject to subsection (c), a [claim for relief] [cause
11 of action] for breach of warranty of quality, regardless of the
12 purchaser's lack of knowledge of the breach, accrues:

13 (1) as to a unit, at the time the purchaser to whom the
14 warranty is first made enters into possession if a possessory
15 interest was conveyed or at the time of acceptance of the
16 instrument of conveyance if a non-possessory interest was conveyed;
17 and

18 (2) as to each common element, at the time the common
19 element is completed or, if later, (i) as to a common element

20 within any additional or convertible real estate or portion
21 thereof, at the time the first unit therein is conveyed to a bona
22 fide purchaser, or (ii) as to a common element within any other
23 portion of the condominium, at the time the first unit in the
24 condominium is conveyed to a bona fide purchaser.

25 (c) If a warranty of quality explicitly extends to future
26 performance or duration of any improvement or component of the
27 condominium, the [claim for relief] [cause of action] accrues at
28 the time the breach is discovered or at the end of the period for
29 which the warranty explicitly extends, whichever is earlier.

COMMENTS

1. Under subsection (a), the parties may agree that the statute of limitations be reduced to as little as 2 years. However, such a contract provision (which, in the case of residential units, must be reflected in a separate written instrument executed by the purchaser) could, like other contract provisions, be subject to attack on grounds of unconscionability in particular cases.

2. Except for warranties of quality which explicitly refer to future performance or duration, a cause of action for breach of a warranty of quality would normally arise when the purchaser to whom it is first made enters into possession. Suit on such a warranty would thus have to be brought within 6 years thereafter. Even an inability to discover the breach would not delay the running of the statute of limitations in this regard.

3. Real estate sales frequently include warranties that certain components (*e.g.*, furnaces, hot water heaters, air conditioning systems, and roofs) will last for a particular period of time. In the case of such warranties, the statute of limitations would not start running until the breach is discovered, or if not discovered before the end of the warranty term, until the end of the term.

1 SECTION 4-115. [Effect of Violations on Rights of Action; 2 Attorney's Fees].

3 If a declarant or any other person subject to this Act 4 violates any provision thereof or any provision of the declaration 5 or bylaws, any person or class of persons adversely affected by the 6 violation has a claim for appropriate relief. Punitive damages may 7 be awarded in the case of a willful violation of the Act. The 8 court, in an appropriate case, may award reasonable attorney's 9 fees.

COMMENT

This section provides a general cause of action or claim for relief for violations of the Act by either a declarant or any other person subject to the Act's provisions. Such persons might include unit owners, persons exercising a declarant's rights of appointment pursuant to Section 3-103(c), or the association itself. A claim for appropriate relief might include damages, injunctive relief, specific performance, recission or reconveyance if appropriate under the law of the state, or any other remedy normally available under state law. The section specifically refers to "any person or class of persons" to indicate that any relief available under the state class action statute would be available in circumstances where a violation of this Act has occurred. This section specifically permits punitive damages to be awarded in the case of willful violations of the Act and also permits attorney's fees to be awarded in the discretion of the court to any party that prevails in an action.

1 SECTION 4-116. [Labeling of Promotional Material].

2 If any improvement contemplated in a condominium is required 3 by Section 2-110(b)(3) to be labeled "NEED NOT BE BUILT" on a plat 4 or plan, or is to be located within convertible real estate, no 5 promotional material may be displayed or delivered to prospective

6 purchasers which describes or depicts that improvement unless the
7 description or depiction of the improvement is conspicuously
8 labeled or identified as "NEED NOT BE BUILT."

COMMENTS

1. Section 2-110(b)(3) requires that the plats and plans for every condominium indicate whether or not any improvement that might be built in the condominium must be built. However, Section 4-102 does not require that copies of the plats and plans be provided to purchasers as part of the public offering statement. Consequently, this section requiring the labeling of improvements depicted on promotional material is necessary to assure that purchasers are not deceived with respect to which improvements the declarant is obligated to make in a particular condominium project.

2. Since no contemplated improvements on convertible real estate need be shown on plats and plans, additional labeling is required by this section to insure that if the declarant shows any contemplated improvements in his promotional material which are not shown on the plats and plans, those improvements must also be appropriately labeled.

1 SECTION 4-117. [Declarant's Obligation to Complete and
2 Restore].
3 (a) The declarant shall complete all improvements labeled
4 "MUST BE BUILT" on plats or plans prepared pursuant to Section
5 2-110.
6 (b) The declarant is subject to liability for the prompt
7 repair and restoration, to a condition compatible with the
8 remainder of the condominium, of any portion of the condominium
9 affected by the exercise of rights reserved pursuant to or created
.0 by Sections 2-111, 2-112, 2-117 and 2-118.

COMMENTS

1. Subsection (a) requires the declarant to complete any improvement which the plats or plans indicate, pursuant to the requirements of Section 2-110(b)(3), "MUST BE BUILT." This is a fundamental obligation of the declarant and is one with which a successor declarant is obligated to comply under Section 3-104.

2. Under subsection (b), in the event that a declarant exercises the right to use an easement which is created by Section 2-118, or in the event the declarant maintains model units or signs on the condominium, the declarant is obligated to restore the portions of the condominiuims used to a condition compatible with the remainder of the condominium.

[OPTIONAL]

ARTICLE 5

ADMINISTRATION AND REGISTRATION

Section 5-101. [Administrative Agency].

5-102. [Registration Required].

5-103. [Application for Registration; Approval of Uncompleted Units].

5-104. [Receipt of Application; Order of Registration].

5-105. [Cease and Desist Orders].

5-106. [Revocation of Registration].

5-107. [General Powers and Duties of Agency].

5-108. [Investigative Powers of Agency].

5-109. [Annual Report and Amendments].

5-110. [Agency Regulation of Public Offering Statement].

PREFATORY COMMENT TO ARTICLE 5

Administrative agencies have become an essential and accepted part of state government. Accordingly, the procedures by which those agencies adopt their rules and reach their decisions, as well as the powers of those agencies, have assumed great importance.

The existence of government regulation reflects the common belief that adequate enforcement of a particular field of law requires both public oversight of private compliance with law, and an ability in government to promulgate new regulations to meet new circumstances. Often, regulation also reflects the regulated industry's desires for certainty and for an administrative agency knowledgable of, and perhaps sympathetic to, the needs of the industry.

At the same time, in some states the public's response to administrative regulation has become increasingly negative. The adoption of so-called "sunshine" and "sunset" laws, consolidation or merger of many agencies, and abolition of some outmoded boards and commissions, reflect a growing public perception that administrative enforcement may at times be neither efficient nor effective.

The debate on the general desirability of state agency regulation is reflected in the question of regulation of

condominium development. While many states with widespread condominium activity, such as California, Florida, Virginia, and New York, have created agencies to regulate condominiums or have placed the regulation of condominiums in an existing governmental body, other states with substantial condominium activity, such as Illinois and Maryland, have chosen not to regulate condominiums, relying instead on the private market and lenders for consumer protection.

State administrative law does not demand uniformity between the States. For example, the Revised Model State Administrative Procedure Act (1961), noted that there was a demand for an act covering that subject, but that administrative procedure was a subject upon which uniformity between the states was neither necessary nor desirable. "Every student of administrative law recognizes that many of the procedural details involved in administrative action must necessarily vary more or less from state to state and even from agency to agency within the same state." Comment, Content of the Model State Administrative Procedure Act, 13 Uniform Laws Ann. (Pocket Part), at 137 (Master Ed. 1975).

The same reasoning applies to the law of condominiums. While uniform substantive law regarding condominiums and the protection to be provided to consumers is important, the means by which the substantive law is enforced does not require uniformity. Nevertheless, it appears desirable to provide the states the option

of choosing agency regulation of condominiums, as many states have already chosen to do, by providing an optional article on agency administration which is closely integrated with the Uniform Condominium Act.

Accordingly, Article 5 may or may not be adopted, depending on whether or not a state chooses to have agency regulation. The article has been drafted in such a way as to minimize the number of changes necessary in the body of the first four articles of the Act. However, in order to provide for close integration of Article 5 with the remainder of the Act, there are a number of sections in the Act where bracketed references to the agency or to Article 5 now exist. These sections are Sections 1-102(c), 1-103 (10)(b), 2-101(b), 2-101(c), 3-103(f), 3-104(e)(3), and 4-105. In the event that a state determines not to adopt Article 5, the bracketed clauses or provisions in each of the above sections which refer to Article 5 should be deleted. In the event a state adopts Article 5, the brackets should be removed and the clauses or provisions retained.

[OPTIONAL]

ARTICLE 5

ADMINISTRATION AND REGISTRATION

1 SECTION 5-101. [Administrative Agency].

2 As used in this Act, "agency" means [insert appropriate
3 administrative agency], which is an agency within the meaning of
4 [insert appropriate reference to state administrative procedure
5 act]. [Insert any related provisions on creation, selection, and
6 remuneration of personnel, budget, annual reports, fees, and other
7 administrative provisions appropriate to the particular state].

COMMENTS

1. Each state should insert in lieu of the bracketed language in the first sentence that agency, whether it be the Real Estate Commission, the Attorney General's Office, or any other existing or new agency, which the state deems appropriate for regulation of condominiums.

2. The Revised Model State Administrative Procedure Act (the "Model Act") had been adopted in 26 states and the District of Columbia by 1976. The appropriate reference in those states to the definition of "Agency" would be the statute adopting Section 1(1) of the Model Act. In those states which have not adopted the Model Act, reference to a similar statute should be made to insure that the procedures of the agency regulating condominiums are undertaken in accordance with the principles of procedural due process which underlie the Model Act. In those states which do not have an administrative procedure act, appropriate administrative procedures should be included, either in this section or elsewhere in this article, to provide for hearings, appellate review, regulations, and other administrative matters.

3. As indicated, Article 5 was not designed to solve all procedural matters which are appropriate for an agency. Rather, the Act relies on the cross reference to a state administrative procedure act. Even in such states, however, it may be appropriate to include other provisions, either in Section 5-101 or elsewhere in this article, which are necessary under state practice to insure the proper functioning of a state agency. This might include budget authority, salary levels, civil sevice requirements, and the

like. This may be particularly important when a new state agency is created.

1 SECTION 5-102 [Registration Required].

2 A declarant may not offer or dispose of a unit intended for
3 residential use unless the condominium and the unit are registered
4 with the agency, but a condominium that cannot contain more than 12
5 units is exempt from the requirements of this section and Section
6 5-103(a).

COMMENTS

1. Registration of a condominium is only required in the case of a condominium or unit intended for residential use. Commercial and industrial condominiums, accordingly, are exempt from registration under this Act. Also exempt from the requirement of registration is a small condominium containing 12 or fewer units. However, the small condominium and the industrial or commercial condominium are still subject to scrutiny by the agency under its general powers, despite the fact that registration is not required.

2. If Article 5 were adopted in a particular state, a declarant could not offer or dispose of a residential unit unless that unit were registered with the agency. However, he could offer and dispose of the unit after registration was approved but before the condominium was created, subject to the requirements of Sections 2-101 and 5-103.

1 SECTION 5-103. [Application for Registration; Approval of
2 Uncompleted Units].

3 (a) An application for registration must contain the
4 information and be accompanied by any reasonable fees required by
5 the agency's [rules] [regulations]. A declarant promptly shall
6 file amendments to report any actual or expected material change in

7 any document or information contained in his application.

8 (b) If a declarant files with the agency a declaration or
9 proposed declaration, or an amendment or proposed amendment to a
.0 declaration, describing units that are located in buildings not
.1 substantially completed in the manner required by Section 2-101(b),
.2 the declarant shall also file with the agency:

.3 (1) a verified statement showing all costs involved in
.4 completing the condominium;
.5 (2) a verified estimate of the time of completion of
.6 construction of the condominium;
.7 (3) satisfactory evidence of sufficient funds to cover all
.8 costs to complete the condominium;
.9 (4) a copy of the executed construction contract and any
:0 other contracts for the completion of the condominium;
:1 (5) a 100 percent payment and performance bond covering the
:2 entire cost of construction of the condominium;
:3 (6) if purchasers' funds are to be utilized for the
:4 construction of the condominium, an executed copy of the escrow
:5 agreement with an escrow company or financial institution
:6 authorized to do business within the state which provides that:

:7 (i) disbursements of purchasers' funds may be made from
:8 time to time to pay for construction of the condominium,
:9 architectural, engineering, finance, and legal fees, and other

0 costs for the completion of the condominium in proportion to the
1 value of the work completed by the contractor as certified by an
2 independent [registered] architect or engineer, on bills submitted
3 and approved by the lender of construction funds or the escrow
4 agent;

5 (ii) disbursement of the balance of purchasers' funds
6 remaining after completion of the condominium shall be made only
7 when the escrow agent or lender receives satisfactory evidence that
8 the period for filing mechanic's and materialman's liens has
9 expired, or that the right to claim those liens has been waived, or
0 that adequate provision has been made for satisfaction of any
1 claimed mechanic's or materialman's lien; and

2 (iii) any other restriction relative to the retention and
3 disbursement of purchasers' funds required by the agency; and

4 (7) any other materials or information the agency may require
5 by its [rules] [regulations].

6 The agency may not register the units described in the
7 declaration or the amendment unless the agency determines, on the
8 basis of the material submitted by declarant, that the units to be
9 added to the condominium will be completed.

COMMENTS

1. Subsection (a) is a general provision empowering the agency by regulation to develop requirements for information to be submitted to the agency, and for the imposition of reasonable fees by the agency. Such rules or regulations, under the Model Act, could be adopted only after providing notice to interested persons and an opportunity to be heard. See Section 3 of the Model Act. The article encourages, but does not require, development of uniform regulations between states adopting Article 5. See Section 5-107(e).

2. Subsection (b) departs from the provisions contained in Section 2-101 regarding conveyance of units. Under Section 2-101(b), neither a declaration, nor an amendment to a declaration adding units to a condominium, may be recorded (and thus no condominium may be created) unless the structural components of the buildings in which those units are located are substantially completed. Under Section 2-101(c), no unit in a condominium may be conveyed unless the unit itself is substantially completed. In addition, under Section 4-108, any deposit made in connection with the purchase or reservation of a unit must be held in escrow until closing. The combined effect of Sections 2-101 and 4-108 is to insure that any funds of a purchaser are held in escrow until his unit is substantially completed, and the purchaser has title.

The need for consumer protection suggests that substantial completion of a residential unit should be a prerequisite for adding that unit to the condominium or conveying the unit to a purchaser, in the absence of an agency to control and review condominium projects. Under subsection (b), however, a declarant may file a declaration or proposed declaration, or an amendment to a declaration, for the purpose of creating a condominium in which the buildings are not structurally completed. Subsection (b) contemplates that the agency might nevertheless register the units described in the declaration or amendment, if the agency were satisfied that the units would be completed. Registration would then permit the declarant to offer to sell and convey units which had not yet been built and to record the declaration.

In addition, paragraph (6) of Section 5-103(b) contemplates that purchaser's funds might be used, despite the language of Section 4-108, for construction of the condominium. Controls are imposed, however, to insure that disbursements are made in accordance with the value of work completed and approved by an escrow agent.

Note that the common elements in the condominium under the Act need not be completed at the time of the sale, even in the absence of an agency. Completion of common elements, however, is governed by Section 4-117 (Obligation to Complete and Restore).

3. The agency, by regulation, should determine the parties whom the payment and performance bond required under paragraph (b)(5) indemnifies.

1 SECTION 5-104. [Receipt of Application; Order of Registra-
2 tion].

3 (a) The agency shall acknowledge receipt of an application
4 for registration within [5] business days after receiving it.
5 Within [60] days after receiving the application, the agency shall
6 determine whether:

7 (1) the application and the proposed public offering
8 statement satisfy the requirements of this Act and the agency's
9 rules;

0 (2) the declaration and bylaws comply with this Act; and

1 (3) there is any reason to believe that the improvements
2 the declarant has undertaken to make cannot be completed as
3 represented.

4 (b) If the agency makes a favorable determination, it shall
5 issue promptly an order registering the condominium. Otherwise,
6 unless the declarant has consented in writing to a delay, the
7 agency shall issue promptly an order rejecting registration.

COMMENTS

1. This section provides reasonable deadlines for agency review of an application for registration, and describes the standards by which the application should be measured. The agency is directed to review the documents provided to the purchaser, and is given a greal deal of discretion in mandating the form and content of the public offering statement; see Section 5-110.

2. The agency is also charged with reviewing those common element improvements which a declarant has promised to make, and which would be labeled under Section 4-117 as "MUST BE BUILT," to determine whether the declarant has the financial capacity to build them.

3. In the event the agency were to issue an order rejecting registration under subsection (b), an important issue concerning judicial review of that order may arise in some states.

The order would appear to be a rejection of an application for a license, as defined in Section 1(3) of the Model Act; it would be a "contested case", however, within the meaning of Section 1(2) of the Model Act, only if "an opportunity for hearing" is provided. No right to a hearing, or right of appeal, is provided in the Act.

The order rejecting registration thus might not be appealable under Section 15 of the Model Act, because judicial review is provided under Section 15 only for "contested cases". While that section does not limit utilization of or the scope of judicial review available under other means of review, some courts have held that, in the absence of specific statutory authority to hear an appeal from an administrative decision, courts have no jurisdiction to entertain such an appeal. See, e.g., Rybinski v. State Employees' Retirement Comm., 173 Conn. 462 (1977.)

Accordingly, the law of each state should be carefully reviewed. In cases where the state administrative procedure act provides for appeals from decisions on licensing matters made by state agencies regardless of the availability of a hearing, no amendment would be required.

1 SECTION 5-105. [Cease and Desist Orders].

2 If the agency determines, after notice and hearing, that any
3 person has disseminated or caused to be disseminated orally or in
4 writing any false or misleading promotional materials in connection
5 with a condominium, or that any person has otherwise violated any
6 provision of this Act or the agency's [rules] [regulations] or
7 orders, the agency may issue an order to cease and desist from that
8 conduct, to comply with the provisions of this Act and the agency's
9 [rules] [regulations] and orders, or to take affirmative action to

.0 correct conditions resulting from that conduct or failure to
.1 comply.

1 SECTION 5-106. [Revocation of Registration].
2 (a) The agency, after notice and hearing, may issue an order
3 revoking the registration of a condominium upon determination that
4 a declarant or any officer or principal of a declarant has:
5 (1) failed to comply with a cease and desist order
6 issued by the agency affecting that condominium;
7 (2) concealed, diverted, or disposed of any funds or
8 assets of any person in a manner impairing rights of purchasers of
9 units in that condominium;
.0 (3) failed to perform any stipulation or agreement made
1 to induce the agency to issue an order relating to that
2 condominium; or
3 (4) misrepresented or failed to disclose a material fact
4 in the application for registration.
5 (b) A declarant shall not convey, cause to be conveyed, or
6 contract for the conveyance of any interest in a unit while an
7 order revoking the registration of the condominium is in effect,
8 without the consent of the agency.
9 (c) In appropriate cases the agency, in its discretion, may
0 issue a cease and desist order in lieu of an order or revocation.

COMMENTS

1. This section permits the agency, after notice and

hearing, to revoke a prior registration of a condominium. Under Section 15 of the Model Act, the revocation would not be effective until the last day for seeking review of the agency order. While the filing of the appeal would not stay the agency's decision, the agency or reviewing court could grant a stay of the revocation. Naturally, this result may vary in a particular state.

2. A declarant is prohibited from disposing of any interest in a unit when registration has been revoked, without consent of the agency.

1 SECTION 5-107. [General Powers and Duties of Agency].

2 (a) The agency may adopt, amend, and repeal [rules]
3 [regulations] and issue orders consistent with and in furtherance
4 of the objectives of this Act, but the agency may not interfere
5 with the internal activities of the association except to the
6 extent necessary to prevent violations of this Act. The agency may
7 prescribe forms and procedures for submitting information to the
8 agency.

9 (b) If it appears that any person has engaged, is engaging,
10 or is about to engage in any act or practice in violation of this
11 Act or any of the agency's rules or orders, the agency without
12 prior administrative proceedings may bring suit in the [appropriate
13 court] to enjoin that act or practice or for other appropriate
14 relief. The agency is not required to post a bond or prove that no
15 adequate remedy at law exists.

16 (c) The agency may intervene in any action or suit involving
17 the powers or responsibilities of a declarant in connection with
18 any condominium for which an application for registration is on
19 file.

20 (d) The agency may accept grants in aid from any governmental
21 source and may contract with agencies charged with similar
22 functions in this or other jurisdictions, in furtherance of the
23 objectives of this Act.

24 (e) The agency may cooperate with agencies performing similar
25 functions in this and other jurisdictions to develop uniform filing
26 procedures and forms, uniform disclosure standards, and uniform
27 administrative practices, and may develop information that may be
28 useful in the discharge of the agency's duties.

29 (f) In issuing any cease and desist order or order rejecting
30 or revoking registration of a condominium, the agency shall state
31 the basis for the adverse determination and the underlying facts.

32 (g) The agency, in its sound discretion, may require bonding,
33 escrow of portions of sales proceeds, or other safeguards it may
34 prescribe by its [rules] [regulations] to guarantee completion of
35 all improvements labeled "MUST BE BUILT" pursuant to Section 4-117
36 (Declarant's Obligation to Complete and Restore).

COMMENTS

1. Under subsection (a), the agency is empowered to adopt regulations and issue orders in furtherence of the objectives of this Act. Those objectives are the same as the underlying purposes of the Act described in Section 1-109. The agency, however, is prohibited from interfering with the internal activities of the association except to the extent necessary to prevent violations of this Act. The principal purpose of the agency is to regulate the behavior of the declarant, not the behavior of individual unit owners. If, however, the declarant is misusing the association by virtue of his power to control its activities, and thereby violating the Act, the agency may act to prevent the violation.

2. Subsection (g) empowers the agency to require bonding,

escrow, or other safeguards to guarantee completion of improvements labeled "MUST BE BUILT" (Sections 2-110, 4-117).

A substantive requirement for bonding is not included under Article 4 for all condominiums, in all circumstances. While some states have adopted bonding and escrow requirements for completion of the common elements, see, e.g., Section 47-74d, Conn. Gen. Stat., the available economic evidence indicates that a universal bonding requirement would increase the cost of condominiums, and that the cost of such provisions may not always be justified. The principal concern for consumer protection in this regard has been resolved in the Act by requiring substantial completion of all units prior to conveyance (Section 2-101) and by requiring labeling of all common elements as either "MUST BE BUILT" or "NEED NOT BE BUILT."

At the same time, particularly in the case of condominiums registered under Section 5-103(b), there may be individual cases where the agency, in its discretion, may find escrowing or bonding to be in the public interest. For that reason, this power is included only as a permissible power for the agency under Article 5.

1 SECTION 5-108. [Investigative Powers of Agency].

2 (a) The agency may initiate public or private investigations
3 within or outside this State to determine whether any
4 representation in any document or information filed with the agency
5 is false or misleading or whether any person has engaged, is
6 engaging, or is about to engage in any unlawful act or practice.

7 (b) In the course of any investigation or hearing, the agency
8 may subpoena witnesses and documents, administer oaths and
9 affirmations, and adduce evidence. If a person fails to comply
.0 with a subpoena or to answer questions propounded during the
.1 investigation or hearing, the agency may apply to the [appropriate
.2 court] for a contempt order or injunctive or other appropriate
.3 relief to secure compliance.

COMMENT

The enumerated powers are specifically granted to the agency because of judicial determinations in various states that, in the absence of such statutory powers, agencies have no authority to act.

1 SECTION 5-109. [Annual Report and Amendments].
2 (a) A declarant, within 30 days after the anniversary date of
3 the order of registration, annually shall file a report to bring
4 up-to-date the material contained in the application for
5 registration and the public offering statement. This provision
6 does not relieve the declarant of the obligation to file amendments
7 pursuant to subsection (b).
8 (b) A declarant promptly shall file amendments to the public
9 offering statement with the agency.
.0 (c) If an annual report reveals that a declarant owns or
.1 controls units representing less than [25] percent of the voting
.2 power in the association and that a declarant has no power to
.3 increase the number of units in the condominium, or to cause a
.4 merger or confederation of the condominium with other condominiums,
.5 the agency shall issue an order relieving the declarant of any
.6 further obligation to file annual reports. Thereafter, so long as
.7 the declarant is offering any units for sale, the agency has
.8 jurisdiction over the declarant's activities, but has no other
.9 authority to regulate the condominium.

COMMENTS

1. This section requires annual reports from a declarant to the agency in order to keep the information filed with the agency current. This requirement parallels the declarant's obligation to provide a current public offering statement to unit owners. *See* section 4-106.

2. Under subsection (c), if the period of declarant control has passed, the declarant is relieved of the obligation to continue to file an annual report. However, the obligation to continue to provide public offering statements is imposed on a declarant under Section 4-106 so long as he is offering any unit for sale. The agency would thus continue to have jurisdiction over the declarant's activities, but would have no other authority to regulate the condominium.

1 SECTION 5-110. [Agency Regulation of Public Offering
2 Statement].

3 (a) The agency at any time may require a declarant to alter
4 or supplement the form or substance of a public offering statement
5 to assure adequate and accurate disclosure to prospective
6 purchasers.
7 (b) The public offering statement may not be used for any
8 promotional purpose before registration and afterwards only if it
9 is used in its entirety. No person may advertise or represent that
10 the agency has approved or recommended the condominium, the
11 disclosure statement, or any of the documents contained in the
12 application for registration.
13 (c) In the case of a condominium situated wholly outside of
14 this State, no application for registration or proposed public
15 offering statement filed with the agency which has been approved by
16 an agency in the State where the condominium is located and

17 substantially complies with the requirements of this Act may be
18 rejected by the agency on the grounds of non-compliance with any
19 different or additional requirements imposed by this Act or by the
20 agency's [rules] [regulations]. However, the agency may require
21 additional documents or information in particular cases to assure
22 adequate and accurate disclosure to prospective purchasers.

COMMENTS

1. Subsection (c) attempts to facilitate interstate sales of condominiums by requiring the agency in the enacting state to accept an agency-approved public offering statement from the state where the condominium is located. This avoids the need for a different public offering statement in several states for the same condominium. If no agency exists in the state where the condominium is located, however, a public offering statement must be prepared and approved before offering an out-of-state condominium in an enacting state.

2. Because of Section 1-102(c), a foreign condominium must only be registered under this Article in an enacting state if a declarant is "offering" the condominium in the enacting state. Thus, general advertising which did not meet the definition of "offering" could be circulated in the enacting state without registration. If an "offering" is once made, however, then all of Article 5 applies to the foreign condominium. Any "disposition" of a foreign residential condominium in an enacting state, of course, would require delivery of a public offering statement even in the absence of an agency; see Section 1-102(c). If an agency exists in the enacting state, any disposition in that state would be illegal if the condominium were not registered in the enacting state; see Section 5-102.

STATE OF NEW HAMPSHIRE

CONDOMINIUM ACT
COMPREHENSIVE APPLICATION FOR REGISTRATION
PURSUANT TO RSA 356-B:51, I

Section I. Declarant and Condominium Information

Section II. Certificate of Resolution

Section III. Certificate of Appointment

Section IV. Applicant's Affidavit/Affirmation

Section V. Attorney Affirmation

Applicant must answer all questions and complete all sections. Any question which is not applicable shall be so designated. Additional pages may be added to permit complete and comprehensive answers. Applicant may provide such further information as is germane and material to describe the proposed offering fully. Please type or print clearly in ink.

A filing fee in the amount of $30 per lot, parcel, unit or interest, but no less than $300 nor more than $2,000 must accompany this application. The filing fee should be calculated on the basis of the interests being registered in this application only. Subsequent phases will require separate filing fees, in the amount of $30 per lot, parcel, unit or interest, but no less than $200 nor more than $2,000.

APPLICANT MUST IMMEDIATELY NOTIFY THE BUREAU OF ANY MATERIAL CHANGE IN INFORMATION CONTAINED IN THE REGISTRATION APPLICATION, MAKE APPROPRIATE AMENDMENT OF THE PUBLIC OFFERING STATEMENT AND RECEIVE PRIOR APPROVAL FROM THE BUREAU.

DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
CONSUMER PROTECTION AND ANTRITRUST BUREAU
33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301 TEL. (603) 271-3641

SECTION I

A. <u>IDENTIFICATION OF DECLARANT</u>

1. a. Name of <u>one</u> person to whom correspondence is to be directed during registration process:

b. Address:

c. Telephone:

2. Contact person for all other purposes:

Name:

Address:

3. a. Declarant's name:

b. Declarant's address:

c. Form of organization:

d. Date organized:

e. Jurisdiction where organized:

f. Address of each of Declarant's offices in New Hampshire (if other than above):

Submit as Appendix A a copy of each legal instrument pertaining to the organization of the business entity, including all amendments thereto, pursuant to RSA 356-B:51, I (q)—(t).

4. Is the Declarant, developer or agent properly registered with the Secretary of State of the State of New Hampshire to do business in the State? Yes ____ No___ _ If no, explain:

5. Is the Declarant, developer, or agent registered with the Secretary of State to use a trade name? Yes _____ No _____ If no, explain:

6. Has the Declarant filed, or made arrangements to file, required quarterly tax estimates relating to the business profits tax (RSA 77-A) with the Department of Revenue Administration of the State of New Hampshire? Yes _____ No _____ If no, explain:

7. Has the Declarant been affiliated or associated with any other subdivision or condominium, existing or proposed, in New Hampshire or elsewhere?
Yes ______ No _____. If yes, identify all such subdivisions and condominiums by name, location, and if applicable, N.H. Attorney General registration or exemption number:

8. Submit as Appendix B a completed form CPLC170 for each principal of the Declarant, as defined by Jus 1401.07.

9. What is the relationship of the Applicant to the condominium (e.g. Declarant, owner of record, developer, or agent)?

10. If other than Declarant, state:

a. Name of Applicant:

b. Address of Applicant:

B. DESCRIPTION OF CONDOMINIUM

11. Common promotional name:

12. Location: _______________________ ________________________
Street or Road City or Town

_______________________ ________________________
County State

____
Country

13. a. Does the condominium involve conversion of rental property?

Yes______ No______

b. Is the condominium a leasehold condominium?

Yes______ No______

c. Does the condominium contain:

1. convertible land? Yes______ No______

2. convertible space? Yes______ No______

3. withdrawable land? Yes______ No______

4. additional land? Yes______ No______

5. any nonresidential units? Yes______ No______

6. any time sharing interests? Yes______ No______

14. The maximum number of years of Declarant control, pursuant to RSA 356-B:36, I, is ______ years. Provisions relating to Declarant control are on page(s)_____ of the Declaration and/or page(s) _____ of the Bylaws.

15. Condition of title.

a. Submit as Appendix C a statement of the condition of title to the condominium, in the form of a title opinion of a licensed attorney, not under salary to the Declarant, or other evidence of title acceptable to the agency.

b. Is the Declarant currently the holder of legal title to the property upon which the condominium will be located?

Yes______ No______

If no, explain in Appendix C(1).

c. Will the Declarant be the holder of legal title to the condominium property at the time the condominium is created?

Yes______ No______

If no, explain in Appendix C(2).

16. Number of separate parcels of real estate included in this filing:______

17. a. Number of acres in condominium in this filing:______

b. Number of additional acres that later may be included by reason of future expansion or merger: ______

c. Total number of acres that the condominium ultimately may include:______

d. State whether any of the units in this filing have been offered or disposed of within the meaning of RSA 356-B:50, I. Disposition includes entry into a purchase and sale agreement. Yes _____ No _____. If yes, attach copies of purchase and sale agreements.

18. a. Number of units for which registration is requested in this filing:______(**Note: The Bureau will not grant registration unless adequate financing has been committed for completion of all promised improvements and units sought to be registered in this Application.)**

b. Number of additional units that may be included by reason of future conversion, expansion

or merger:_____.

c. Total number of units that the condominium ultimately may include:______

19. a. Number of time sharing interests involved in this filing:______

b. Total number of time sharing interests involved:______

20. a. Size of units in this filing: __________ __________ __________
minimum average maximum

21. List sequentially the units to be registered in this filing. Use the identifying numbers as they will appear on the site and floor plans to be recorded with the declaration.

C. <u>PLAN OF DEVELOPMENT FOR THE CONDOMINIUM</u>

22. <u>Submit as Appendix D(1) the Declaration of the condominium.</u>

<u>Submit as Appendix D(2) the Bylaws of the condominium.</u>

<u>Submit as Appendix D(3) the rules and regulations of the condominium.</u>

<u>Submit as Appendix D(4) the site and floor plans of the condominium</u>.

23. Have the plans been recorded? Yes______ No______

a. Date of Recording:

b. Location of Recording, including book and page reference:

24. Have the boundaries of the convertible lands, withdrawable lands, additional lands, common areas, limited common areas and any completed or proposed improvements thereon been laid out by a registered surveyor? Yes______ No______

a. Name of surveyor:

b. Address of surveyor:

c. Method used to depict boundaries:

D. IMPROVEMENTS (Complete information must be entered)

25. Improvements which have been completed:

Description	When Completed
Buildings	______________
Graded Roads	______________
Paved Roads	______________
Water System	______________
Sewerage System	______________
Drainage	______________
Sidewalks, Curbs, Street Lighting	______________
Electrical Supply	______________
Gas Supply	______________
Telephone Service	______________
Amenities/Recreational Facilities	______________

26. Improvements which are promised in this phase:

Description Of Improvement	Percent Completed	Estimated Cost To Complete	Anticipated Completion Date
Buildings	___________	___________	___________
Graded Roads	___________	___________	___________

Paved Roads	____________	____________	____________
Water System	____________	____________	____________
Sewerage System	____________	____________	____________
Drainage	____________	____________	____________
Sidewalks, Curbs, Street Lighting	____________	____________	____________
Electrical Supply	____________	____________	____________
Gas Supply	____________	____________	____________
Telephone Service	____________	____________	____________
Amenities/Recreational Facilities	____________	____________	____________

27. Is the condominium subject to approval of any local, state, or federal entity other than the registration to which this application relates? For example, such approval may include, but is not limited to, building permits and all other approvals granted by zoning boards of adjustment, planning boards, the Water Supply and Pollution Control Division, Wetlands Board, and Army Corps of Engineers.

Yes______ No______

a. If yes, <u>submit in Appendix E evidence of approval from the governmental entity.</u>

28. Has any existing tax, special tax, or assessment which affects the condominium been levied by any governmental entity? Yes______ No______

a. Are any such taxes proposed to be levied by any governmental entity?
Yes______ No______

b. If yes, describe in detail and include an explanation as to whether current use taxation (RSA 79-A) applies to the condominium.

29. State whether any bond has been posted, money placed in escrow, letter of credit issued, or other financial assurance has been provided to any government entity to assure the completion of these improvements.

Yes______ No______

a. If yes, attach copies of such assurances as Appendix F.

E. MAINTENANCE

30. Have arrangement been made to provide maintenance for the condominium?

Yes______ No______

a. If yes, specify those arrangements for maintenance.

31. Has any governmental entity agreed to accept maintenance of the improvements set forth in questions 25 and 26?

Yes______ No______

a. If yes, describe in detail:

32. State the relationship, if any, between the Declarant and managing agency.

33. Submit as Appendix G a projected budget for at least the first year of the condominium's operation. Include the projected monthly common expense assessments for each unit.

34. Have provisions been made in the budget for capital expenditures or major maintenance reserves? Yes______ No______

a. If yes, describe:

F. FINANCING

35. Submit as Appendix H a financial statement of the Declarant pursuant to Jus 1405.11.

36. Is financing being obtained from a lending institution?

Yes______ No______

a. Name of lending institution:

b. Address of institution:

c. Has the loan been finalized?

d. Total amount of the loan or mortgage:

e. Amount of loan or mortgage outstanding as of the date of this filing:

37. If the loan has not been finalized, has the lending institution provided a written commitment to lend?

Yes______ No______

a. State amount of commitment:

38. Identify any real or personal property providing security for the loan or mortgage:

39. Specify any arrangements for securing partial releases or total discharge of the loan or mortgage, if such loan or mortgage encumbers any unit which will be disposed of by the Declarant, or any common or limited common area of the condominium belonging to the purchasers.

40. Submit a copy as Appendix I of legal instruments or other evidence pertaining to the loan, mortgage, or commitment letter.

41. Is there any blanket encumbrance or lien, not identified in question 36, affecting any unit or any common or limited common area in the condominium?

Yes______ No______

a. If yes, state the consequences for a purchaser of the Declarant's failure to discharge such encumbrance or lien.

b. Have steps been taken to protect the purchaser in the case of such an eventuality? Yes______ No______ If so, describe any such steps.

42. Pursuant to Jus 1405.09, submit as Appendix J a statement of the plan of financing the improvements in the condominium and the maintenance thereof.

G. PROMOTIONAL PLAN

43. Describe the promotional plan for the disposition of the units or interests in the condominium:

44. Submit as Appendix K a copy of all promotional material.

45. Name and address of person who will operate the promotional plan:

a. Name:

b. Address:

46. Will all persons offering or selling the units be either the Declarant or its employees? Yes______ No______ If no, a real estate license must be obtained by each such person pursuant to RSA 331-A.

47. Name and address of escrow agent having responsibility for holding deposits pursuant to RSA 356-B:57:

a. Name:

b. Address:

H. RIGHTS AND OBLIGATIONS OF PURCHASER

48. Submit as Appendix L all legal instruments that will be delivered to a purchaser to evidence his interest in any unit, and any other agreement a purchaser is required to sign.

49. Are there any management contracts or other contracts, including leases, affecting the use, maintenance or administration of, or access to all or part of the condominium?

Yes______ No______

a. If yes, submit copies of such contracts as Appendix M.

50. Submit as Appendix N the Public Offering Statement required by RSA 356-B:52.

51. Will any improvements be required to be made by the purchaser in order to use the condominium unit in the manner represented by the Declarant?

Yes______ No______

a. If yes, describe any improvements to be made and the estimated costs thereof:

52. Submit as Appendix O a copy of all legal instruments relating to the Unit Owners Association.

(Note: All members of the Association must be advised of the requirements of RSA 356-B:58).

53. Describe any initial or recurring fee or charge the purchaser is required to pay arising from his purchase or use of any unit in the condominium, or from the maintenance and management of the condominium.

I. FILING WITH FEDERAL OR STATE AUTHORITIES

54. Has a registration or exemption been granted by any federal or state regulatory agency other than a New Hampshire agency? Yes ______ No ______

a. If yes or pending, list the jurisdiction, and state whether granted or pending.

55. Has any registration or exemption filing been rejected, suspended or revoked by any such regulatory agency? Yes______ No ______

a. If yes, identify the agency and describe the status:

SECTION II

CORPORATE
CERTIFICATE OF RESOLUTION

I, ______________________________________, of ______________________________
(Name and Title) (Declarant)

hereby certify that the following vote was adopted unanimously at a regularly (or specially) held

and

called meeting of the Board of Directors of said corporation held on

____

(Date and Year)

at ____, a quorum being present and voting
(Address)

throughout.

Voted: To authorize _________________________ to make and file an application for registration with the Office of the Attorney General, Consumer Protection and Antitrust Bureau, State of New Hampshire, pursuant to the provisions of RSA 356-B.

Voted: To authorize an Irrevocable Appointment of the Office of Attorney General, Consumer Protection and Antitrust Bureau, State of New Hampshire, to receive service of any legal process in any non-criminal proceeding arising under RSA 356-B against the Declarant or any of its personal representatives.

I, ________________________________, also hereby certify that the above vote has not been amended or altered and that it is presently in full force and effect.

Witness my hand and the seal of said corporation on this _____ day of ____________, 20___.

____
(Name/Title)

(Seal)

Subscribed and sworn to before me this ______ day of ____________________20______.

____
Justice of the Peace/Notary Public

(Seal)

PARTNERSHIP OR OTHER BUSINESS ORGANIZATION
CERTIFICATE OF RESOLUTION

I, ______________________________ of ______________________________________ ,
(Name/Title) (Declarant)

____, hereby certify that the following
(Address)

vote was adopted unanimously by the partners or the owners or principals, if

other form of business organization, at a meeting held on ___________________________
(Date and Year)

at ______________________________.
(Address)

Voted: To authorize______________________________to make and file an application for Registration with the Office of the Attorney General, Consumer Protection and Antitrust Bureau, State of New Hampshire, pursuant to the provisions of RSA 356-B.

Voted: To authorize the Irrevocable Appointment of the Office of the Attorney General, Consumer Protection and Antitrust Bureau, State of New Hampshire, to receive service of any legal process in any non-criminal proceeding arising under RSA 356-B against the Declarant or any of its personal representatives.

I,________________________________ , also hereby certify that the above vote has not been amended or altered and that it is presently in full force and effect.

Witness my hand on this ________ day of _____________________, 20_____

____
Name/Title

Subscribed and sworn to before me this ________ day of ______________ , 20 ____

____
Justice of the Peace/Notary Public

(Seal)

SECTION III

CERTIFICATE OF APPOINTMENT

Pursuant to RSA 356-B:51, I(a), ____
(Declarant)

hereby irrevocably appoints the Consumer Protection and Antitrust Bureau, Office of the Attorney General, State of New Hampshire, agent to receive service of any lawful process in any non-criminal proceeding arising under RSA 356-B against the Declarant or any of its personal representatives.

Witness my hand and seal, if any, of the grantor, on this____ day of _______________, 20__ .

____
Name/Title

Subscribed and sworn to before me this ___ day of________________________, 20_____.

____
Justice of the Peace/Notary Public

(Seal)

SECTION IV

APPLICANT'S AFFIDAVIT/AFFIRMATION

I, ________________________________, of ____________________________________,
(Address)

being duly sworn, depose and say that I am authorized to make and file this application for registration with the Office of the Attorney General, Consumer Protection and Antitrust Bureau, State of New Hampshire, and that I have examined said application and the information contained herein, including the documents attached hereto, and certify that the same is, to the best of my knowledge and belief, true, correct and complete in all respects.

__________________________________ ____
(Date) (Signature)

____
(Title)

STATE OF ___________________________________

COUNTY OF __________________________________

Subscribed and sworn to before me this ______ day of ____________________, 20_____.

____
Justice of the Peace/Notary Public

(Seal)

SECTION V

ATTORNEY AFFIRMATION

I, ______________________________, of ____________________________________,
(Name) (Business Address)

hereby certify that I am an attorney licensed to practice law in New Hampshire, and that the

condominium instruments and other legal documents for ____________________________________
(Condominium name)

located in ____
(City, State)

comply with the provisions of RSA 356-B and the administrative rules thereunder, and that I have

advised Declarant ____ of the obligations under
(Declarant's Name)

RSA 356-B and the administrative rules adopted thereunder.

_________________________ ____
(Date) (Name)

Subscribed and sworn to before me this _____ day of ___________________, 20______.

____
Justice of the Peace/Notary Public

THE NEW HAMPSHIRE CONDOMINIUM ACT

NEW HAMPSHIRE

REVISED STATUTES ANNOTATED

CHAPTER 356-B

Compliments of

MARCUS, ERRICO, EMMER & BROOKS, P.C.

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THE NEW HAMPSHIRE

CONDOMINIUM ACT

NEW HAMPSHIRE

REVISED STATUTES ANNOTATED

CHAPTER 356-B

CHAPTER 356-B

CONDOMINIUM ACT

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I. General Principles

356-B:1. Short Title.

This chapter shall be known and may be cited as the "Condominium Act."

356-B:2. Application.

I. This chapter shall apply to all condominiums and to all condominium projects. This chapter shall be deemed to supersede RSA 479-A, the New Hampshire Unit Ownership of Real Property Act; and no condominium shall be established under the latter on or after September 10, 1977. This chapter shall not be construed to affect the validity of any provision of any condominium instrument recorded prior to September 10, 1977. Nor shall this chapter, except as set forth in paragraphs II and III, be deemed to apply to any real estate, or any interest therein, submitted to the provisions of RSA 479-A prior to September 10, 1977.

II. Notwithstanding the provisions of paragraph I, this subdivision, General Principles, and subdivision IV, Administration and Enforcement, shall apply to any offer or disposition on or after November 1, 1981, of time sharing interests in condominium units established under RSA 479-A, regardless of the date on which such condominium units were created.

III. Notwithstanding the provisions of paragraph I, if any condominium instrument recorded under RSA 479-A prior to September 10, 1977, shall be amended after September 10, 1977, for the purpose of creating 10 or more additional units in any such condominium project, this subdivision, General Principles, and subdivision IV, Administration and Enforcement, shall apply to said additional units. If said amendment creates 10 or more, but less than 26, additional units, the applicant shall be permitted to make an abbreviated registration pursuant to RSA 356-B:51, II, and shall not be required to prepare a public offering statement pursuant to RSA 356-B:52; provided, however, this sentence shall not apply if time sharing interests are offered with respect to such additional units.

356-B:3. Definitions. In this chapter:

I. "Board of directors" means an executive and administrative entity, by whatever name denominated, designated in the condominium instruments as the governing body of the unit owners' association.

II. "Common area" or "common areas" means all portions of the condominium other than the units.

III. "Common expenses" means all expenditures lawfully made or incurred by or on behalf of the unit owners' association, together with all funds lawfully assessed for the creation and/or maintenance of reserves pursuant to the provisions of the condominium instruments; "future common expenses" shall mean common expenses for which assessments are not yet due and payable.

IV. "Common profits" means all income collected or accrued by or on behalf of the unit owners' association, other than income derived from assessments pursuant to RSA 356-B:45.

V. "Condominium" means real property, and any interests therein, lawfully submitted to this chapter by the recordation of condominium instruments pursuant to the provisions of this chapter. No project shall be deemed a condominium within the meaning of this chapter unless the undivided interests in the common area are vested in the unit owners.

VI. "Condominium instruments" is a collective term referring to the declaration, bylaws, and site plans and floor plans, recorded pursuant to the provisions of this chapter. Any exhibit, schedule, or certification accompanying a condominium instrument and recorded simultaneously therewith shall be deemed an integral part of that condominium instrument. Any amendment or certification of any condominium instrument shall, from the time of the recordation of such amendment or certification, be deemed an integral part of the affected condominium instrument, so long as such amendment or certification was made in accordance with the provisions of this chapter.

VII. "Condominium unit" means a unit together with the undivided interest in the common area appertaining to that unit.

VIII. "Contractable condominium" means a condominium from which one or more portions of the submitted land may be withdrawn in accordance with the provisions of the declaration and of this chapter. If such withdrawal can occur only by the expiration or termination of one or more leases, then the condominium shall not be deemed a contractable condominium within the meaning of this chapter.

IX. "Conversion condominium" means a condominium containing structures which before the recording of the declaration were wholly or partially occupied by someone other than the declarant or those who have contracted for the purchase of condominium units and those who occupy with the consent of such purchasers.

X. "Convertible land" means a building site which is a portion of the common area, within which additional units and/or a limited common area may be created in accordance with this chapter.

XI. "Convertible space" means a portion of a structure within the condominium which portion may be converted into one or more units and/or common area, including but not limited to limited common area, in accordance with this chapter.

XII. "Days" mean calendar days, unless modified by the word "business", in which case said term shall include all days except Saturdays, Sundays and legal holidays in the state of New Hampshire.

XIII. "Declarant" means all persons who execute or propose to execute the declaration or on whose behalf the declaration is executed or proposed to be executed. From the time of the recordation of any amendment to the declaration expanding an expandable condominium, all

persons who execute that amendment or on whose behalf that amendment is executed shall also come within this definition. Any successors of the persons referred to in this paragraph who come to stand in the same relation to the condominium as their predecessors did shall also come within this definition; provided, however, this definition shall not include any homeowners association which is not controlled by a declarant or any mortgage holder that forecloses on a declarant's interest in the condominium, provided that the foreclosing mortgagee refrains from exercising any of the rights reserved to the declarant by this chapter. A foreclosing mortgagee may transfer all such rights to a successor builder or developer without registration or exemption, provided that prior to such intended transfer, the mortgagee files an affidavit or with the attorney general identifying the intended transferee by name, address, and telephone number, and listing the number of units or interests remaining in the condominium, and the number of units or interests so transferred.

XIV. "Dispose" or "disposition" refers to any sale, contract, assignment, or any other voluntary transfer of a legal or equitable interest in a condominium unit, except as security for a debt.

XV. "Expandable condominium" means a condominium to which additional land may be added in accordance with the provisions of the declaration and of this chapter.

XVI. "Identifying number" means one or more letters and/or numbers that identify only one unit in the condominium.

XVII. "Institutional lender" means one or more commercial or savings banks, savings and loan associations, trust companies, credit unions, industrial loan associations, insurance companies, pension funds, or business trusts including but not limited to real estate investment trusts, any other lender regularly engaged in financing the purchase, construction, or improvement of real estate, or any assignee of loans made by such a lender, or any combination of any of the foregoing entities.

XVIII. "Interest in a unit" and "interest in a condominium unit", when not modified by the word "undivided," include without limitation any fee simple interest, leasehold interest for a term of more than 5 years, life estate and, for the purposes of this subdivision and subdivision IV, Administration and Enforcement, time sharing interest.

XIX. "Leasehold condominium" means a condominium in all or any portion of which each unit owner owns an estate for years in his unit, or in the land within which or on which that unit is situated, or both, with all such leasehold interests due to expire naturally at the same time. A condominium including leased land, or an interest therein, within which or on which no units are situated or to be situated shall not be deemed a leasehold condominium within the meaning of this chapter, nor shall a condominium be deemed to be a leasehold condominium solely because of the offering or disposition of time sharing interests therein.

XX. "Limited common area" means a portion of the common area reserved for the exclusive use of those entitled to the use of one or more, but less than all, of the units.

XXI. "Nonbinding reservation agreement" means an agreement between the declarant and a prospective purchaser which is in no way binding on the prospective purchaser and which may be cancelled without penalty at the sole discretion of the prospective purchaser by written notice, hand delivered or sent by United States mail, return receipt requested, to the declarant or to any agent of the declarant at any time prior to the formation of a contract for the sale or lease of any interest in a condominium unit. Such agreement shall not contain any provision for waiver or any other provision in derogation of the rights of the prospective purchaser as contemplated by this paragraph, nor shall any such provision be a part of any ancillary agreement.

XXII. "Offer" means any inducement, solicitation, or attempt to encourage any person or persons to acquire any legal or equitable interest in a condominium unit, except as security for a debt.

XXIII. "Officer" means any member of the board of directors or official of the unit owners' association.

XXIV. "Person" means a natural person, corporation, partnership, association, trust, or other entity capable of holding title to real property, or any combination thereof.

XXV. "Publicly held corporation," "subsidiary corporation," "closely held corporation," "hearing" and "broker" have the same meaning as set forth in the respective definitions of such terms in RSA 356-A:1; and "agent" and "blanket encumbrance" have the same meaning as set forth in the respective definitions of such terms in RSA 356-A:1, except that within such definitions references to "developer" or "subdivider" shall mean "declarant," references to "lot" or "lots" shall mean "unit" or "units" and references to "subdivision" shall mean "condominium project."

XXVI. "Purchaser" means any person or persons who acquires by means of a voluntary transfer a legal or equitable interest in a condominium unit, except as security for a debt.

XXVII. "Size" means the number of cubic feet, or the number of square feet of ground and/or floor space, within each unit as computed by reference to the floor plans and rounded off to a whole number. Certain spaces within the units including, without limitation, attic, basement, and/or garage space may but need not be omitted from such calculation or partially discounted by the use of a ratio, so long as the same basis of calculation is employed for all units in the condominium, and so long as that basis is described in the declaration.

XXVIII. "Time sharing interest" means the exclusive right to occupy one or more units for less than 60 days each year for a period of more than 5 years from the date of execution of an instrument for the disposition of such right, regardless of whether such right is accompanied by a fee simple interest or a leasehold interest, or neither of them, in a condominium unit. Time sharing interest shall include "interval ownership interest," "vacation license" or any other similar term.

XXIX. "Unit" shall mean a portion of the condominium designed and intended for individual ownership and use. For the purposes of this chapter, a convertible space shall be treated as a unit in accordance with RSA 356-B:24, IV.

XXX. "Unit owner" means one or more persons who owns a condominium unit, or, in the case of a leasehold condominium, whose leasehold interest or interests in the condominium extend for the entire balance of the unexpired term or terms.

XXXI. "Value" means a number of dollars or points assigned to each unit by the declaration. Substantially identical units shall be assigned the same value, but units located at substantially different heights above the ground, or having substantially different views, or having substantially different amenities or other characteristics that might result in differences in market value, may, but need not, be considered substantially identical within the meaning of this paragraph. If value is stated in terms of dollars, that statement shall not be deemed to reflect or control the sales price or fair market value of any unit, and no opinion, appraisal, or fair market transaction at a different figure shall affect the value of any unit, or any undivided interest in the common area, voting rights in the unit owners' association, liability for common expenses, or rights to common profits, assigned on the basis thereof.

356-B:4. Separate Titles and Taxation.

Each condominium unit shall constitute for all purposes a separate parcel of real property, distinct from all other condominium units. If there is any unit or units owned by any person other than the declarant, each such unit or units shall be subject to separate assessment and taxation by each assessing authority and special district for all types of taxes authorized by law. Each unit in which time sharing interests, as defined in RSA 356-B:3, XXVIII, have been created shall be valued for purposes of real property taxation as if such unit were owned by a single taxpayer. Condominium units in which time sharing interests have been created shall be taxed as wholly owned condominium units. The total cumulative purchase price paid for time sharing interests in any such unit shall not be determinative of the unit's assessed value. No taxes shall be assessed against the individual owner of a time sharing interest but shall be assessed against the record owner of such unit, the owners' association, trustee, or managing agent, as appropriate.

356-B:5. Municipal Ordinances.

No zoning or other land use ordinance shall prohibit condominiums as such by reason of the form of ownership inherent therein. Neither shall any condominium be treated differently by any zoning or other land use ordinance which would permit a physically identical project or development under a different form of ownership. No subdivision ordinance in any city or town shall apply to any condominium or to any subdivision of any convertible land, convertible space, or unit unless such ordinance is by its express terms made applicable thereto. Nevertheless, cities and towns may provide by ordinance that proposed conversion condominiums and the use thereof which do not conform to the zoning, land use and site plan regulations of the respective city or town in which the property is located shall secure a special use permit, a special exception, or variance, as the case may be, prior to becoming a conversion condominium. In the

event of an approved conversion to condominiums, cities, towns, village districts, or other political subdivisions may impose such charges and fees as are lawfully imposed by such political subdivisions as a result of construction of new structures to the extent that such charges and fees, or portions of such charges and fees, imposed upon property subject to such conversions may be reasonably related to greater or additional services provided by the political subdivision as a result of the conversion.

356-B:6. Eminent Domain.

I. If any portion of the common area is taken by eminent domain, the award therefor shall be allocated to the unit owners in proportion to their respective undivided interests in the common area; provided, however, that the portion of the award attributable to the taking of any permanently assigned limited common area shall be allocated by the decree to the unit owner of the unit to which that limited common area was so assigned at the time of the taking. If that limited common area was permanently assigned to more than one unit at the time of the taking, then the portion of the award attributable to the taking thereof shall be allocated in equal shares to the unit owners of the units to which it was so assigned or in such other shares as the condominium instruments may specify for this express purpose. A permanently assigned limited common area is a limited common area which cannot be reassigned or which can be reassigned only with the consent of the unit owner or owners of the unit or units to which it is assigned. In the event of a taking or acquisition of a part or all of the common areas by a condemning authority, the statutory notices of hearing shall be served on the unit owners' association acting on behalf of all of the unit owners at least 30 days prior to such hearing, and the award or proceeds of settlement shall be payable to the unit owners' association for the use and benefit of the unit owners and their mortgagees as their interest may appear in accordance with this section. The unit owners' association shall represent the unit owners in any condemnation proceedings or in negotiations, settlements and agreements with the condemning authorities for acquisition of the common areas or any part thereof and the unit owners' association shall act as attorney-in-fact for each unit owner for the purposes of this section.

II. If one or more units are taken by eminent domain, the undivided interest in the common area appertaining to any such unit shall thenceforth appertain to the remaining units, being allocated to them in proportion to their respective undivided interests in the common area. The court shall enter a decree reflecting the reallocation of undivided interests produced thereby, and the award shall include, without limitation, just compensation to the unit owner of any unit taken for his undivided interest in the common area as well as for his unit.

III. If portions of any unit are taken by eminent domain, the court shall determine the fair market value of the portions of such unit not taken and the undivided interest in the common area appertaining to any such units shall be reduced, in the case of each such unit, in proportion to the diminution in the fair market value of such unit resulting from the taking. The portions of undivided interest in the common area thereby divested from the unit owners of any such units shall be reallocated among those units and the other units in the condominium in proportion to their respective undivided interests in the common area, with any units partially taken participating in such reallocation on the basis of their undivided interests as reduced in accordance with the preceding sentence. The court shall enter a decree reflecting the reallocation

of undivided interests produced thereby, and the award shall include, without limitation, just compensation to the unit owner of any unit partially taken for that portion of his undivided interest in the common area divested from him by operation of the first sentence of this paragraph and not revested in him by operation of the following sentence, as well as for that portion of his unit taken by eminent domain.

IV. If, however, the taking of a portion of any unit makes it impractical to use the remaining portion of that unit for any lawful purpose permitted by the condominium instruments, then the entire undivided interest in the common area appertaining to that unit shall thenceforth appertain to the remaining units, being allocated to them in proportion to their respective undivided interests in the common area, and the remaining portion of that unit shall thenceforth be common area. The court shall enter a decree reflecting the reallocation of undivided interests produced thereby, and the award shall include, without limitation, just compensation to the unit owner of such unit for his entire undivided interest in the common area and for his entire unit.

V. Votes in the unit owners' association, rights to future common profits, and liabilities for future common expenses not specially assessed, appertaining to any unit or units taken or partially taken by eminent domain, shall thenceforth appertain to the remaining units, being allocated to them in proportion to their relative voting strength in the unit owners' association, with any units partially taken participating in such reallocation as though their voting strength in the unit owners' association has been reduced in proportion to their reduction in their undivided interests in the common area, and the decree of the court shall provide accordingly.

VI. The decree of the court shall require recordation thereof in the registry of deeds of the county in which the condominium is located.

II. Condominium Instruments

356-B:7. Creation of Condominium.

No condominium shall come into existence except by the recordation of condominium instruments pursuant to this chapter. No condominium instruments shall be recorded unless all units located or to be located on any portion of the submitted land, other than within the boundaries of any convertible lands, are depicted on site plans and floor plans that comply with RSA 356-B:20, I and II. The foreclosure of any mortgage, deed of trust, or other lien shall not be deemed, in and of itself, to terminate the condominium. Notwithstanding any provision of law to the contrary, if a rent increase is made in accordance with RSA 356-C:3, I(a)(12), application for condominium conversion shall not be made until 3 months after such increase.

356-B:8. Release of Liens.

I. At the time of the conveyance to the first purchaser of each condominium unit following the recordation of the declaration, every mortgage, deed of trust, any perfected mechanics' or materialmen's liens, or any other perfected lien, affecting all of the condominium or a greater portion thereof than the condominium unit conveyed, shall be paid and satisfied of record, or the declarant shall forthwith have the said condominium unit released of record from

all such liens not so paid and satisfied. This paragraph shall not apply, however, to any withdrawable land in a contractible condominium, nor shall any provision of this paragraph be construed to prohibit the unit owners' association from mortgaging or causing a deed of trust to be placed on any portion of the condominium within which no units are located, so long as any time limit specified pursuant to RSA 356-B:36 has expired, and so long as the bylaws authorize the same.

II. Subsequent to recording the declaration as provided in this chapter, no lien or encumbrance shall thereafter arise against the condominium as a whole, but only against each unit and the percentage of undivided interest in the common areas appurtenant to such unit, in the same manner and under the same conditions in every respect as liens or encumbrances may arise or be created upon or against any other separate parcel of real property subject to individual ownership; provided that no labor performed or materials furnished with the consent or at the request of a unit owner or his agent or his contractor or subcontractor shall be the basis for the filing of a lien pursuant to the lien law against the unit or any other property of any other unit owner not expressly consenting to or requesting the same, except that such express consent shall be deemed to be given by the owner of any unit in the case of emergency repairs thereto. Labor performed or materials furnished for the common areas, if duly authorized by the association of unit owners or board of directors in accordance with this chapter, the declaration or bylaws, shall be deemed to be performed or furnished with the express consent of each unit owner and shall be the basis for the filing of a lien pursuant to the lien law against each of the units and shall be subject to the provisions of this section. In the event a lien against 2 or more units becomes effective, the unit owners of the separate units may remove their unit and the percentage of undivided interest in the common areas appurtenant to such unit from the lien by payment of the fractional or proportional amounts attributable to each of the units affected. Such individual payment shall be computed by reference to the percentages appearing on the declaration. Subsequent to any such payment, discharge or other satisfaction, the unit and the percentage of undivided interest in the common areas appurtenant thereto shall thereafter be free and clear of the lien so paid, satisfied or discharged. Such partial payment, satisfaction or discharge shall not prevent the lienor from proceeding to enforce his rights against any unit and the percentage of undivided interest in the common areas appurtenant thereto not so paid, satisfied or discharged. This paragraph shall not be construed to prohibit the declarant from mortgaging or causing a deed of trust to be placed on any portion of convertible lands for the purpose of financing construction thereon.

356-B:9. Description of Condominium Units.

After the creation of the condominium, no description of a condominium unit shall be deemed vague, uncertain, or otherwise insufficient or infirm which sets forth the identifying number of that unit, the name of the condominium, the name of the town or city and county wherein the condominium is situated, and the deed book and page number where the first page of the declaration is recorded. Any such description shall be deemed to include the undivided interest in the common area appertaining to such unit even if such interest is not defined or referred to therein.

356-B:10. Execution of Condominium Instruments.

The declaration and bylaws and any amendments to either made pursuant to RSA 356-B:33 shall be duly executed by or on behalf of all of the owners and lessees of the submitted land. But the phrase "owners and lessees" in the preceding sentence and in RSA 356-B:25 does not include, in their capacity as such, any mortgagee, any trustee or beneficiary under a deed of trust, any other lien holder, any person having an inchoate dower or curtesy interest, any person having an equitable interest under any contract for the sale and/or lease of a condominium unit, or any lessee whose leasehold interest does not extend to any portion of the common area.

356-B:11. Recordation of Condominium Instruments.

All amendments and certifications of condominium instruments shall set forth the name of the condominium, the name of the town or city and county in which the condominium is located, and the deed book and page number where the first page of the declaration is recorded. All condominium instruments, and all amendments and certifications thereof, shall be recorded in the registry of deeds of every county wherein any portion of the condominium is located, and shall set forth the name and address of the condominium.

356-B:12. Construction of Condominium Instruments.

Except to the extent otherwise provided by the condominium instruments:

I. The terms defined in RSA 356-B:3 shall be deemed to have the meanings therein specified wherever they appear in the condominium instruments unless the context otherwise requires.

II. To the extent that walls, floors, and/or ceilings are designated as the boundaries of the units or of any particular units without further specification, all doors and windows therein, and all lath, wallboard, plaster, paneling, tiles, wallpaper, paint, finished flooring, and any other materials constituting any part of the finished surfaces thereof, shall be deemed a part of such units, while all other portions of such walls, floors, and/or ceilings shall be deemed a part of the common area.

III. If any chutes, flues, ducts, conduits, wires, bearing walls, bearing columns, or any other apparatus lie partially within and partially outside of the designated boundaries of a unit, any portions thereof serving only that unit shall be deemed a part of that unit, while any portions thereof serving more than one unit or any portion of the common area shall be deemed a part of the common area.

IV. Subject to the provisions of paragraph III of this section, all space, interior partitions, and other fixtures and improvements within the boundaries of a unit shall be deemed a part of that unit.

V. Any shutters, awnings, window boxes, doorsteps, porches, balconies, patios, and any other apparatus designed to serve a single unit, but located outside the boundaries thereof, shall be deemed a limited common area appertaining to that unit exclusively.

356-B:13. Complementarily of Condominium Instruments.

The condominium instruments shall be construed together and shall be deemed to incorporate one another to the extent that any requirement of this chapter as to the content of one shall be deemed satisfied if the deficiency can be cured by reference to any of the others. In the event of any conflict between the condominium instruments, the declaration shall control; but particular provisions shall control more general provisions, except that a construction conformable with the statute shall in all cases control over any construction inconsistent therewith.

356-B:14. Validity of Condominium Instruments.

I. All provisions of the condominium instruments shall be deemed severable, and any unlawful provision thereof shall be voided.

II. No provision of the condominium instruments shall be deemed void by reason of the rule against perpetuities.

III. No restraint on alienation shall discriminate or be used to discriminate against any person in violation of RSA 354-A.

IV. Subject to the provisions of paragraph III of this section, the rule of property law known as the rule restricting unreasonable restraints on alienation shall not be applied to defeat any provision of the condominium instruments restraining the alienation of condominium units.

356-B:15. Compliance with Condominium Instruments.

I. The declarant, the board of directors, every unit owner, and all those entitled to occupy a unit shall comply with all lawful provisions of this chapter and all provisions of the condominium instruments. Any lack of such compliance shall be grounds for an action or suit to recover sums due, for damages or injunctive relief, or for any other remedy available at law or in equity, maintainable by the unit owners' association, or by its board of directors or any managing agent on behalf of such association, or, in any proper case, by one or more aggrieved unit owners on their own behalf or as a class action.

II. The prevailing party shall be entitled to all costs and attorneys' fees incurred in any proceeding under RSA 356-B:15, I.

356 B:16. Contents of Declaration.

I. The declaration for every condominium shall contain the following:

(a) The name of the condominium, which name shall include the word "condominium" or be followed by the words "a condominium";

(b) The name of the town or city and county in which the condominium is located;

(c) A legal description by metes and bounds of the land submitted to this chapter;

(d) A description or delineation of the boundaries of the units, including the horizontal boundaries, if any, as well as the vertical boundaries;

(e) A description or delineation of the limited common areas, if any, showing or designating the unit or units to which each is assigned;

(f) A description or delineation of all common areas not within the boundaries of any convertible lands which may subsequently be assigned as limited common areas, together with a statement that they may be so assigned and a description of the method whereby any such assignments shall be made in accordance with RSA 356-B:19;

(g) The allocation to each unit of an undivided interest in the common areas in accordance with RSA 356-B:17;

(h) A statement of the purposes for which the condominium and each of the units are intended and restricted as to use;

(i) A description of the manner of determining appropriate action following damage to any portion of the condominium by fire or other casualty; and

(j) Such other matters as the declarant deems appropriate.

II. If the condominium contains any convertible land, the declaration shall also contain the following:

(a) A legal description by metes and bounds of each convertible land within the condominium;

(b) A statement of the maximum number of units that may be created within each such convertible land;

(c) A statement, with respect to each such convertible land, as to whether or not any portion of such convertible land will not be restricted to residential use, and, if not, the nature of the permitted uses, and the maximum percentage of the aggregate land and aggregate

floor area of all units that may be created which will not be restricted exclusively to residential use;

(d) A statement of the extent to which any structure erected on any convertible land will be compatible with structures on other portions of the submitted land in terms of quality of construction, the principal materials to be used, and architectural style;

(e) A description of all other improvements that may be made on each convertible land within the condominium;

(f) A statement that any units created within each convertible land will be substantially identical to the units on other portions of the submitted land, or a statement describing in detail any differences in design, layout, size, quality or other significant characteristics of the units that may be created therein; and

(g) A description of the declarant's reserved right, if any, to create limited common areas within any convertible land, and/or to designate common areas therein which may subsequently be assigned as limited common areas in terms of the types, sizes, and maximum number of such areas within each such convertible land.

Provided, that site plans and floor plans may be recorded with the declaration and identified therein to supplement information furnished pursuant to subparagraphs II(a), (d), (e), (f) and (g), and that subparagraph II(c) need not be complied with if none of the units on other portions of the submitted land are restricted exclusively to residential use.

III. If the condominium is an expandable condominium, the declaration shall also contain the following:

(a) The explicit reservation of an option to expand the condominium;

(b) A statement of any limitations on that option, including, without limitation, a statement as to whether the consent of any unit owners shall be required, and, if so, a statement as to the method whereby such consent shall be evidenced; or a statement that there are no such limitations;

(c) A time limit, not exceeding 7 years from the recording of the declaration, upon which the option to expand the condominium shall expire, provided, however, that the time limit contained in the declaration may be extended by not more than 7 years by an amendment to the declaration adopted pursuant to RSA 356-B:54, V, together with a statement of the circumstances, if any, which will terminate that option prior to the expiration of the time limit so specified;

(d) A legal description by metes and bounds of all land that may be added to the condominium, henceforth referred to as "additional land";

(e) A statement as to whether, if any of the additional land is added to the condominium, all of it or any particular portion of it must be added, and, if not, a statement of any limitations as to what portions may be added or a statement that there are no such limitations;

(f) A statement as to whether portions of the additional land may be added to the condominium at different times, together with any limitations fixing the boundaries of those portions by legal descriptions setting forth the metes and bounds thereof and/or regulating the order in which they may be added to the condominium;

(g) A statement of any limitations as to the locations of any improvements that may be made on any portions of the additional land added to the condominium, or a statement that no assurances are made in that regard;

(h) A statement of the maximum number of units that may be created on the additional land. If portions of the additional land may be added to the condominium and the boundaries of those portions are fixed in accordance with subparagraph III(f), the declaration shall also state the maximum number of units that may be created on each such portion added to the condominium. If portions of the additional land may be added to the condominium and the boundaries of those portions are not fixed in accordance with subparagraph III(f), then the declaration shall also state the maximum number of units per acre that may be created on any such portion added to the condominium;

(i) A statement, with respect to the additional land and to any portion or portions thereof that may be added to the condominium, as to whether or not any portion of such expandable land will not be restricted to residential use, and, if not, the nature of the permitted uses and the maximum percentage of the aggregate land and aggregate floor area of all units that may be created thereon which will not be restricted exclusively to residential use;

(j) A statement of the extent to which any structures created on any portion of the additional land added to the condominium will be compatible with structures on the submitted land in terms of quality of construction, the principal materials to be used, and architectural style, or a statement that no assurances are made in those regards;

(k) A description of all other improvements that will be made on any portion of the additional land added to the condominium or a statement of any limitations as to what other improvements may be made thereon, or a statement that no assurances are made in that regard;

(l) A statement that any units created on any portion of the additional land added to the condominium will be substantially identical to the units on the submitted land, or a statement of any limitations as to what differences in design, layout, size, quality or other significant characteristics of the units may be created thereon, or a statement that no assurances are made in that regard; and

(m) A description of the declarant's reserved right, if any, to create limited common areas within any portion of the additional land added to the condominium, and/or to designate common areas therein which may subsequently be assigned as limited common areas in terms of types, sizes, and maximum number of such areas within each such portion, or a statement that no assurances are made in those regards.

Provided, that site plans and floor plans may be recorded with the declaration and identified therein to supplement information furnished pursuant to subparagraphs III(d), (e), (f), (g), (j), (k), (l) and (m), and that subparagraph III(i) need not be complied with if none of the units on the submitted land is restricted exclusively to residential use.

IV. If the condominium is a contractible condominium, the declaration shall also contain the following:

(a) The explicit reservation of an option to contract the condominium;

(b) A statement of any limitations on that option, including, without limitation, a statement as to whether the consent of any unit owners shall be required, and, if so, a statement as to the method whereby such consent shall be evidenced; or a statement that there are no such limitations;

(c) A time limit, not exceeding 7 years from the recording of the declaration, upon which the option to contract the condominium shall expire, provided, however, that the time limit contained in the declaration may be extended by not more than 7 years by an amendment to the declaration adopted pursuant to RSA 356-B:54, V, together with a statement of the circumstances, if any, which will terminate that option prior to the expiration of the time limit so specified;

(d) A legal description by metes and bounds of all land that may be withdrawn from the condominium, henceforth referred to as "withdrawable land";

(e) A statement as to whether portions of the withdrawable land may be withdrawn from the condominium at different times, together with any limitations fixing the boundaries of those portions by legal descriptions setting forth the metes and bounds thereof and/or regulating the order in which they may be withdrawn from the condominium; and

(f) A legal description by metes and bounds of all of the submitted land to which the option to contract the condominium does not extend. Provided, that site plans may be recorded with the declaration and identified therein to supplement information furnished pursuant to subparagraphs IV(d), (e) and (f), and that subparagraph IV(f) shall not be construed in derogation of any right the declarant may have to terminate the condominium in accordance with RSA 356-B:33.

V. If the condominium is a leasehold condominium, then with respect to any ground lease or other leases the expiration or termination of which will or may terminate or contract the condominium, the declaration shall set forth the county wherein the same are recorded and the

deed book and page number where the first page of each such lease is recorded; and the declaration shall also contain the following:

(a) The date upon which each such lease is due to expire;

(b) A statement as to whether any land and/or improvements will be owned by the unit owners in fee simple, and, if so, either (a) a description of the same, including without limitation a legal description by metes and bounds of any such land, or (b) a statement of any rights the unit owners shall have to remove such improvements within a reasonable time after the expiration or termination of the lease or leases involved, or a statement that they shall have no such rights; and

(c) A statement of the rights the unit owners shall have to redeem the reversion or any of the reversions, or a statement that they shall have no such rights.

Provided, that after the recording of the declaration, no lessor who executed the same, and no successor in interest to such lessor, shall have any right or power to terminate any part of the leasehold interest of any unit owner who makes timely payment of his share of the rent to the person or persons designated in the declaration for the receipt of such rent and who otherwise complies with all covenants which, if violated, would entitle the lessor to terminate the lease. Acquisition or reacquisition of such a leasehold interest by the owner of the reversion or remainder shall not cause a merger of the leasehold and fee simple interests unless all leasehold interests in the condominium are thus acquired or reacquired.

VI. Wherever this section requires a legal description by metes and bounds of land that is submitted to this chapter or that may be added to or withdrawn from the condominium, such requirement shall be deemed satisfied by any legally sufficient description and shall be deemed to require a legally sufficient description of any easements that are submitted to this chapter or that may be added to or withdrawn from the condominium, as the case may be. In the case of each such easement, the declaration shall contain the following:

(a) A description of the permitted use or uses;

(b) If less than all of those entitled to the use of all of the units may utilize such easement, a statement of the relevant restrictions and limitations on utilization; and

(c) If any persons other than those entitled to the use of the units may utilize such easement, a statement of the rights of others to utilization of the same.

VII. Wherever this section requires a legal description by metes and bounds of land that is submitted to this chapter or that may be added to or withdrawn from the condominium, an added requirement shall be a separate legally sufficient description of all lands in which the unit owners shall or may be tenants in common or joint tenants with any other persons, and a separate legally sufficient description of all lands in which the unit owners shall or may be life tenants. No units shall be situated on any such lands, however, and the declaration shall describe the

nature of the unit owner's estate therein. No such lands shall be shown on the same site plans showing other portions of the condominium, but shall be shown instead on separate site plans.

356-B:17. Allocation of Interests in the Common Areas.

I. The declaration may allocate to each unit depicted on site plans and floor plans that comply with RSA 356-B:20, I and II an undivided interest in the common areas proportionate to either the size or value of each unit.

II. Otherwise, the declaration shall allocate to each such unit an equal undivided interest in the common areas subject to the following exception: each convertible space so depicted shall be allocated an undivided interest in the common areas proportionate to the size of each such space, vis-a-vis the aggregate size of all units so depicted, while the remaining undivided interests in the common areas shall be allocated equally to the other units so depicted.

III. The undivided interests in the common areas allocated in accordance with paragraph I or II shall add up to one if stated as fractions or 100 percentum if stated as percentages.

IV. If, in accordance with paragraph I or II, an equal undivided interest in the common areas is allocated to each unit, the declaration may simply state that fact and need not express the fraction or percentage so allocated.

V. Otherwise, the undivided interest allocated to each unit in accordance with paragraph I or II shall be reflected by a table in the declaration, or by an exhibit or schedule accompanying the declaration and recorded simultaneously therewith, containing 3 columns. The first column shall identify the units, listing them serially or grouping them together in the case of units to which identical undivided interests are allocated. Corresponding figures in the second and third columns shall set forth the respective areas or values of those units and the fraction or percentage of undivided interest in the common areas allocated thereto.

VI. Except to the extent otherwise expressly provided by this chapter, the amount of undivided interest in the common areas allocated to any unit shall not be altered, and any purported transfer, encumbrance or other disposition of that interest without the unit to which it appertains shall be void.

VII. The common areas shall not be subject to any suit for partition until and unless the condominium is terminated.

356-B:18. Reallocation of Interests in the Common Areas.

I. If a condominium contains any convertible land or is an expandable condominium, then the declaration shall not allocate undivided interests in the common areas on the basis of value unless the declaration:

(a) Prohibits the creation of any units not substantially identical to the units depicted on the site plans and floor plans recorded pursuant to RSA 356-B:20, I and II; or

(b) Prohibits the creation of any units not described pursuant to RSA 356-B:16, II(f) (in the case of convertible lands) and RSA 356-B:16, III(l) (in the case of additional land), and contains from the outset a statement of the value that shall be assigned to every such unit that may be created.

II. Interests in the common areas shall not be allocated to any units to be created within any convertible land or within any additional land until site plans and floor plans depicting the same are recorded pursuant to RSA 356-B:20, III. But simultaneously with the recording of such site plans and floor plans the declarant shall execute and record an amendment to the declaration reallocating undivided interests in the common areas so that the units depicted on such site plans and floor plans shall be allocated undivided interests in the common areas on the same basis as the units depicted on the site plans and floor plans recorded simultaneously with the declaration pursuant to RSA 356-B:20, I and II.

III. If all of a convertible space is converted into common areas, including without limitation limited common areas, then the undivided interest in the common areas appertaining to such space shall thenceforth appertain to the remaining units, being allocated among them in proportion to their undivided interests in the common areas. The principal officer of the unit owners' association, or such other officer or officers as the condominium instruments may specify, shall forthwith prepare, execute, and record an amendment to the declaration reflecting the reallocation of undivided interests produced thereby.

IV. In the case of a leasehold condominium, if the expiration or termination of any lease causes a contraction of the condominium which reduces the number of units, then the undivided interest in the common areas appertaining to any units thereby withdrawn from the condominium shall thenceforth appertain to the remaining units, being allocated among them in proportion to their undivided interests in the common areas. The principal officer of the unit owners' association, or such other officer or officers as the condominium instruments may specify, shall forthwith prepare, execute, and record an amendment to the declaration reflecting the reallocation of undivided interests produced thereby.

356-B:19. Assignments of Limited Common Areas.

I. All assignments and reassignments of limited common areas shall be reflected by the condominium instruments. No limited common area shall be assigned or reassigned except in accordance with this chapter. No amendment to any condominium instrument shall alter any rights or obligations with respect to any limited common area without the consent of all unit owners adversely affected thereby as evidenced by their execution of such amendment, except to the extent that the condominium instruments expressly provided otherwise prior to the first assignment of that limited common area.

II. Unless expressly prohibited by the condominium instruments, a limited common area may be reassigned upon written application of the unit owners concerned to the principal officer of the unit owners' association, or to such other officer or officers as the condominium instruments may specify. The officer or officers to whom such application is duly made shall forthwith prepare and execute an amendment to the declaration reassigning all rights and obligations with respect to the limited common area involved. Such amendment shall be delivered forthwith to the unit owners of the units concerned upon payment by them of all reasonable costs for the preparation and acknowledgment thereof. Said amendment shall become effective when the unit owners of the units concerned have executed and recorded it.

III. A common area not previously assigned as a limited common area shall be so assigned only pursuant to RSA 356-B:16, I(f) or limited common areas may be created pursuant to an amendment to the condominium instruments consented to by 2/3 of the votes in the unit owners association and then thereafter assigned as there provided. The amendment to the declaration making such an assignment shall be prepared and executed by the principal officer of the unit owners' association, or by such other officer or officers as the condominium instruments may specify. Such amendment shall be delivered to the unit owner or owners of the unit or units concerned upon payment by them of all reasonable costs for the preparation and acknowledgment thereof. Said amendment shall become effective when the aforesaid unit owner or owners have executed and recorded it, and the recordation thereof shall be conclusive evidence that the method prescribed pursuant to RSA 356-B:16, I(f) was adhered to. The creation of limited common areas pursuant to this subsection shall not alter the amount of undivided interest in the common areas allocated to any unit.

356-B:20. Contents of the Site Plans and Floor Plans.

I. There shall be recorded simultaneously with the declaration one or more site plans of survey showing the location and dimensions of the submitted land, the location and dimensions of any convertible lands within the submitted land, the location and dimensions of any existing improvements, the intended location and dimensions of any contemplated improvements which are to be located on any portion of the submitted land other than within the boundaries of any convertible lands, and, to the extent feasible, the location and dimensions of all easements appurtenant to the submitted land or otherwise submitted to this chapter as a part of the common areas. If the submitted land is not contiguous, then the site plans shall indicate the distance between the parcels constituting the submitted land. The site plans shall label every convertible land as a convertible land, and if there be more than one such land the site plans shall label each such land with one or more letters or numbers or both different from those designating any other convertible land and different also from the identifying number of any unit. The site plans shall show the location and dimensions of any withdrawable lands, and shall label each such land as a withdrawable land. If, with respect to any portion or portions, but less than all, of the submitted land, the unit owners are to own only an estate for years, the site plans shall show the location and dimensions of any such portions, and shall label each such portion as a leased land. If there is more than one withdrawable land, or more than one leased land, the site plans shall label each such land with one or more letters or numbers or both different from those designating any convertible land or other withdrawable or leased land, and different also from the identifying number of any unit. The site plans shall show all easements to which the

submitted land or any portion thereof is subject, and shall show the location and dimensions of all such easements to the extent feasible. The site plans shall also show all encroachments by or on any portion of the condominium. In the case of any improvements located or to be located on any portion of the submitted land other than within the boundaries of any convertible lands, the site plans shall indicate which, if any, have not been begun by the use of the phrase "(NOT YET BEGUN)" and which, if any, have been begun but have not been substantially completed by the use of the phrase "(NOT YET COMPLETED)." In the case of any units the vertical boundaries of which lie wholly or partially outside of structures for which floor plans pursuant to paragraph II are simultaneously recorded, the site plans shall show the location and dimensions of such vertical boundaries to the extent that they are not shown on such floor plans, and the units or portions thereof thus depicted shall bear their identifying numbers. Each site plan shall be certified as to its accuracy and compliance with the provisions of this paragraph by a registered land surveyor, and the said surveyor shall certify that all units or portions thereof depicted on any portion of the submitted land other than within the boundaries of any convertible lands have been substantially completed. The specification within this paragraph of items that shall be shown on the site plans shall not be construed to mean that the site plans shall not also show all other items customarily shown or hereafter required for land title surveys.

II. There shall also be recorded, simultaneously with the declaration, floor plans of every structure which contains or constitutes all or part of any unit or units, and which is located on any portion of the submitted land other than within the boundaries of any convertible lands. The floor plans shall show the location and dimensions of the vertical boundaries of each unit to the extent that such boundaries lie within or coincide with the boundaries of such structures, and the units or portions thereof thus depicted shall bear their identifying numbers. In addition, each convertible space thus depicted shall be labeled a convertible space. The horizontal boundaries of each unit having horizontal boundaries shall be identified on the floor plans with reference to established datum. Unless the condominium instruments expressly provide otherwise, it shall be presumed that in the case of any unit not wholly contained within or constituting one or more such structures, the horizontal boundaries thus identified extend, in the case of each such unit, at the same elevation with regard to any part of such unit lying outside of such structures, subject to the following exception: in the case of any such unit which does not lie over any other unit other than basement units, it shall be presumed that the lower horizontal boundary, if any, of that unit lies at the level of the ground with regard to any part of that unit lying outside of such structures. The floor plans shall be certified as to their accuracy and compliance with the provisions of this paragraph by a registered architect, registered engineer or licensed land surveyor, and such architect, engineer or land surveyor shall certify that all units or portions of units depicted on the floor plan as completed have been substantially completed.

III. When converting all or any portion of any convertible land, or adding additional land to an expandable condominium, the declarant shall record new site plans of survey conforming to the requirements of paragraph I. (In any case where less than all of a convertible land is being converted, such site plans shall show the location and dimensions of the remaining portion or portions of such land in addition to otherwise conforming with the requirements of paragraph I.) At the same time, the declarant shall record, with regard to any structures on the land being converted, or added, either floor plans conforming to the requirements of

paragraph II, or certifications, conforming to the certification requirements of said subsection, of floor plans previously recorded pursuant to RSA 356-B:21.

IV. When converting all or any portion of any convertible space into one or more units or limited common areas, or both, the declarant shall record, with regard to the structure or portion of such structure constituting that convertible space, floor plans showing the location and dimensions of the horizontal and vertical boundaries of each unit or limited common areas, or both, formed out of such space. Such plans shall be certified as to their accuracy and compliance with the provisions of this paragraph by a registered architect, registered engineer or licensed land surveyor.

V. For the purposes of paragraphs I, II and III, all provisions and requirements relating to units shall be deemed equally applicable to limited common areas. The limited common areas shall be labeled as such, and each limited common area depicted on the site plans and floor plans shall bear the identifying number or numbers of the unit or units to which it is assigned, if it has been assigned, unless the provisions of RSA 356-B:12, V, make such designations unnecessary.

356-B:21. Preliminary Recordation of Floor Plans.

Floor plans previously recorded pursuant to the provisions set forth in RSA 356-B:16, II and III may be used in lieu of new floor plans to satisfy in whole or in part the requirements of RSA 356-B:18, II, RSA 356-B:23, II and/or RSA 356-B:25 if certifications thereof are recorded by the declarant in accordance with RSA 356-B:20, II; and if such certifications are so recorded, the floor plans which they certify shall be deemed recorded pursuant to RSA 356-B:20, III, within the meaning of RSA 356-B:18, II, RSA 356-B:23, II and/or RSA 356-B:25.

356-B:22. Easement for Encroachments.

To the extent that any unit or common area encroaches on any other unit or common area, whether by reason of any deviation from the site plans and floor plans in the construction, repair, renovation, restoration, or replacement of any improvement, or by reason of the settling or shifting of any land or improvement, a valid easement for such encroachment shall exist. The purpose of this section is to protect the unit owners, except in cases of willful and intentional misconduct by them or their agents or employees, and not to relieve the declarant or any contractor, subcontractor, or materialman of any liability which any of them may have by reason of any failure to adhere strictly to the site plans and floor plans.

356-B:23. Conversion of Convertible Lands.

I. The declarant may convert all or any portion of any convertible land into one or more units or limited common areas, or both, subject to any restrictions and limitations which the condominium instruments may specify. Any such conversion shall be deemed to have occurred at the time of the recordation of appropriate instruments pursuant to paragraph II and RSA 356-B:20, III.

II. Simultaneously with the recording of site plans and floor plans pursuant to RSA 356-B:20, III, the declarant shall prepare, execute, and record an amendment to the declaration describing the conversion. Such amendment shall assign an identifying number to each unit formed out of a convertible land and shall reallocate undivided interests in the common areas in accordance with RSA 356-B:18, II. Such amendment shall describe or delineate the limited common areas formed out of the convertible land, showing or designating the unit or units to which each is assigned.

III. All convertible lands shall be deemed a part of the common areas except for such portions thereof as are converted in accordance with the provisions of this section. Until the expiration of the period during which conversion may occur or until actual conversion, whichever occurs first, real estate taxes shall be assessed against the declarant rather than the unit owners as to both the convertible land and any improvements thereon. No such conversion shall occur after 5 years from the recordation of the declaration, or such shorter period of time period as the declaration may specify, provided, however, that the time limit contained in the declaration may be extended by not more than 5 years by an amendment to the declaration adopted pursuant to RSA 356-B:54, V.

356-B:24. Conversion of Convertible Spaces.

I. The declarant may convert all or any portion of any convertible space into one or more units or common areas, or both, including, without limitation, limited common areas, subject to any restrictions and limitations which the condominium instruments may specify. Any such conversion shall be deemed to have occurred at the time of the recordation of appropriate instruments pursuant to paragraph II and RSA 356-B:20, IV.

II. Simultaneously with the recording of site plans and floor plans pursuant to RSA 356-B:20, IV, the declarant shall prepare, execute, and record an amendment to the declaration describing the conversion. Such amendment shall assign an identifying number to each unit formed out of a convertible space and shall allocate to each unit a portion of the undivided interest in the common areas appertaining to that space. Such amendment shall describe or delineate the limited common areas formed out of the convertible space, showing or designating the unit or units to which each is assigned.

III. If all or any portion of any convertible space is converted into one or more units in 0accordance with this section, the declarant shall prepare and execute, and record simultaneously with the amendment to the declaration, an amendment to the bylaws. The amendment to the bylaws shall reallocate votes in the unit owners' association, rights to future common profits, and liabilities for future common expenses not specially assessed, all as in the case of the subdivision of a unit in accordance with RSA 356-B:32, IV.

IV. Any convertible space not converted in accordance with the provisions of this section, or any portion or portions thereof not so converted, shall be treated for all purposes as a single unit until and unless it is so converted, and the provisions of this chapter shall be deemed applicable to any such space, or portion or portions thereof, as though the same were a unit.

356-B:25. Expansion of the Condominium.

No condominium shall be expanded except in accordance with the provisions of the declaration and of this chapter. Any such expansion shall be deemed to have occurred at the time of the recordation of site plans and floor plans pursuant to RSA 356-B:20, III, together with an amendment to the declaration, duly executed by the declarant, including, without limitation, all of the owners and lessees of the additional land added to the condominium. Such amendment shall contain a legal description by metes and bounds of the land added to the condominium, and shall reallocate undivided interests in the common areas in accordance with RSA 356-B:18, II. A merger of 2 condominiums the land of which abuts and which is merged by consent of all existing unit owners shall not be considered an "expansion."

356-B:26. Contraction of the Condominium.

No condominium shall be contracted except in accordance with the provisions of the declaration and of this chapter. Any such contraction shall be deemed to have occurred at the time of the recordation of an amendment to the declaration, executed by the declarant, containing a legal description by metes and bounds of the land withdrawn from the condominium. If portions of the withdrawable land were described pursuant to RSA 356-B:16, IV(e), then no such portion shall be so withdrawn after the conveyance of any unit on such portion. If no such portions were described, then none of the withdrawable land shall be withdrawn after the first conveyance of any unit thereon.

356-B:27. Easement to Facilitate Conversion and Expansion.

Subject to any restrictions and limitations the condominium instruments may specify, the declarant shall have a transferable easement over and on the common areas for the purpose of making improvements on the submitted land and any additional land pursuant to the provisions of those instruments and of this chapter, and for the purpose of doing all things reasonably necessary and proper in connection therewith.

356-B:28. Easement to Facilitate Sales.

The declarant and his duly authorized agents, representatives, and employees may maintain sales offices or model units, or both, on the submitted land if and only if the condominium instruments provide for the same and specify the rights of the declarant with regard to the number, size, location and relocation thereof. Any such sales office or model unit which is not designated a unit by the condominium instruments shall become a common area as soon as the declarant ceases to be a unit owner, and the declarant shall cease to have any rights with regard thereto unless such sales office or model unit is removed forthwith from the submitted land in accordance with a right reserved in the condominium instruments to make such removal.

356-B:29. Declarant's Obligation to Complete and Restore.

I. No covenants, restrictions, limitations, or other representations or commitments in the condominium instruments with regard to anything that is or is not to be done on the additional land, the withdrawable land, or any portion of either shall be binding as to any portion of either lawfully withdrawn from the condominium or never added thereto except to the extent that the condominium instruments so provide. But in the case of any covenant, restriction, limitation, or other representation or commitment in the condominium instruments or in any other agreement requiring the declarant to add all or any portion of the additional land or to withdraw any portion of the withdrawable land, or imposing any obligations with regard to anything that is or is not to be done thereon or with regard thereto, or imposing any obligations with regard to anything that is or is not to be done on or with regard to the condominium or any portion thereof, this paragraph shall not be construed to nullify, limit, or otherwise affect any such obligation.

II. The declarant shall complete all improvements labeled "(NOT YET COMPLETED)" on site plans recorded pursuant to the requirements of this chapter unless the condominium instruments expressly exempt the declarant from such obligation, and shall, in the case of every improvement labeled "(NOT YET BEGUN)" on such site plans, state in the declaration either the extent of the obligation to complete the same or that there is no such obligation.

III. To the extent that damage is inflicted on any part of the condominium by any person or persons utilizing the easements reserved by the condominium instruments or created by RSA 356-B:27 and 28, the declarant together with the person or persons causing the same shall be jointly and severally liable for the prompt repair thereof and for the restoration of the same to a condition compatible with the remainder of the condominium.

356-B:30. Alterations Within Units.

I. Except to the extent prohibited by the condominium instruments, and subject to any restrictions and limitations specified therein, any unit owner may make any improvements or alterations within his unit that do not impair the structural integrity of any structure or otherwise lessen the support of any portion of the condominium. But no unit owner shall do anything which would change the exterior appearance of his unit or of any other portion of the condominium except to such extent and subject to such conditions as the condominium instruments may specify.

II. If a unit owner acquires an adjoining unit, or an adjoining part of an adjoining unit, then such unit owner shall have the right to remove all or any part of any intervening partition or to create doorways or other apertures therein, notwithstanding the fact that such partition may in whole or in part be a common area, so long as no portion of any bearing wall or bearing column is weakened or removed and no portion of any common area other than that partition is damaged, destroyed, or endangered. Such creation of doorways or other apertures shall not be deemed an alteration of boundaries within the meaning of RSA 356-B:31.

356-B:31. Relocation of Boundaries Between Units.

I. If the condominium instruments expressly permit the relocation of boundaries between adjoining units, then the boundaries between such units may be relocated in accordance with (a) the provisions of this section and (b) any restrictions and limitations not otherwise unlawful which the condominium instruments may specify. The boundaries between adjoining units shall not be relocated unless the condominium instruments expressly permit it.

II. If the unit owners of adjoining units whose mutual boundaries may be relocated desire to relocate such boundaries, then the principal officer of the unit owners' association, or such other officer or officers as the condominium instruments may specify, shall, upon written application of such unit owners, forthwith prepare and execute appropriate instruments pursuant to paragraphs III, IV and V.

III. An amendment to the declaration shall identify the units involved and shall state that the boundaries between those units are being relocated by agreement of the unit owners thereof, which amendment shall contain conveyancing between those unit owners. If the unit owners of the units involved have specified in their written application a reasonable reallocation as between the units involved of the aggregate undivided interest in the common areas appertaining to those units, the amendment to the declaration shall reflect that reallocation.

IV. If the unit owners of the units involved have specified in their written application a reasonable reallocation as between the units involved of the aggregate number of votes in the unit owners' association allocated to those units, an amendment to the bylaws shall reflect that reallocation and a proportionate reallocation of liability for common expenses and rights to common profits as between those units.

V. Such site plans and floor plans as may be necessary to show the altered boundaries between the units involved together with their other boundaries shall be prepared, and the units depicted thereon shall bear their identifying numbers. Such site plans and floor plans shall indicate the new dimensions of the units involved, and any change in the horizontal boundaries of either as a result of the relocation of their boundaries shall be identified with reference to established datum and shall state which established datum is used. Such site plans and floor plans shall be certified as to their accuracy and compliance with the provisions of this paragraph by a licensed land surveyor in the case of any site plan and by a registered architect, licensed land surveyor or registered engineer in the case of any floor plan.

VI. When appropriate instruments in accordance with paragraphs III, IV and V have been prepared, executed, and acknowledged, they shall be delivered forthwith to the unit owners of the units involved upon payment by them of all reasonable costs for the preparation and acknowledgment thereof. Said instruments shall become effective when the unit owners of the units involved have executed and recorded them, and the recordation thereof shall be conclusive evidence that the relocation of boundaries thus effectuated did not violate any restrictions or limitations specified by the condominium instruments and that any reallocations made pursuant to paragraphs III and IV were reasonable.

VII. Any relocation of boundaries between adjoining units shall be governed by this section and not by RSA 356-B:32. RSA 356-B:32 shall apply only to such subdivisions of units as are intended to result in the creation of 2 or more new units in place of the subdivided unit.

356-B:32. Subdivision of Units.

I. If the condominium instruments expressly permit the subdivision of any units, then such units may be subdivided in accordance with (a) the provisions of this section and (b) any restrictions and limitations not otherwise unlawful which the condominium instruments may specify. No unit shall be subdivided unless the condominium instruments expressly permit it.

II. If the unit owner of any unit which may be subdivided desires to subdivide a unit, then the principal officer of the unit owners' association, or such other officer or officers as the condominium instruments may specify, shall, upon written application of the subdivider, as such unit owner shall henceforth be referred to in this section, forthwith prepare and execute appropriate instruments pursuant to paragraphs III, IV and V.

III. An amendment to the declaration shall assign new identifying numbers to the new units created by the subdivision of a unit and shall allocate to those units, on a reasonable basis acceptable to the subdivider, all of the undivided interest in the common areas appertaining to the subdivided unit. The new units shall jointly share all rights, and shall be equally liable jointly and severally for all obligations, with regard to any limited common areas assigned to the subdivided unit except to the extent that the subdivider may have specified in his written application that all or any portions of any limited common area assigned to the subdivided unit exclusively should be assigned to one or more, but less than all of the new units, in which case the amendment to the declaration shall reflect the desires of the subdivider as expressed in such written application.

IV. An amendment to the bylaws shall allocate to the new units, on a reasonable basis acceptable to the subdivider, the votes in the unit owners' association allocated to the subdivided unit and shall reflect a proportionate allocation to the new units of the liability for common expenses and right to common profits formerly appertaining to the subdivided unit.

V. Such site plans and floor plans as may be necessary to show the boundaries separating the new units together with their other boundaries shall be prepared, and the new units depicted on such plans shall bear their new identifying numbers. Such site plans and floor plans shall indicate the dimensions of the new units, and the horizontal boundaries of such units, if any, shall be identified on such plans with reference to established datum. Such site plans and floor plans shall be certified as to their accuracy and compliance with the provisions of this paragraph by a licensed land surveyor in the case of any site plan and by a registered architect, licensed land surveyor or registered engineer in the case of any floor plan.

VI. When appropriate instruments in accordance with paragraphs III, IV and V have been prepared, executed, and acknowledged, they shall be delivered forthwith to the subdivider upon payment by the subdivider of all reasonable costs for the preparation and acknowledgment thereof. Said instruments shall become effective when the subdivider has executed and recorded

them, and the recordation thereof shall be conclusive evidence that the subdivision thus effectuated did not violate any restrictions or limitations specified by the condominium instruments and that any reallocations made pursuant to paragraphs III and IV were reasonable.

VII. Notwithstanding the provisions of RSA 356-B:24, IV, this section shall have no application to convertible spaces, and no such space shall be deemed a unit for the purposes of this section. However, this section shall apply to any units formed by the conversion of all or any portion of any such space, and any such unit shall be deemed a unit for the purposes of this section.

356-B:33. Termination of Condominium or Amendment of Instruments Before Conveyance of Unit.

If there is no unit owner other than the declarant, the declarant may unilaterally terminate the condominium or amend the condominium instruments, and any such termination or amendment shall become effective upon the recordation thereof if the same has been executed by the declarant. But this section shall not be construed to nullify, limit, or otherwise affect the validity or enforceability of any agreement renouncing or to renounce, in whole or in part, the right hereby conferred.

356-B:34. Termination of Condominium or Amendment of Instruments After Conveyance of Unit.

I. If there is any unit owner other than the declarant, then the condominium shall be terminated only by the agreement of unit owners of units to which $\frac{4}{5}$ of the votes in the unit owners' association appertain, or such larger majority as the condominium instruments may specify.

II. If there is any unit owner other than the declarant, then the condominium instruments shall be amended only by agreement of unit owners of units to which $\frac{2}{3}$ of the votes in the unit owners' association appertain, or such larger majority as the condominium instruments may specify, except in cases for which this chapter provides different methods of amendment. The procedures established in RSA 356-B:54, V shall be followed for amendments to extend the time limits for conversion, expansion, or contraction of a condominium.

III. If none of the units in the condominium is restricted exclusively to residential use, then the condominium instruments may specify majorities smaller than the minimums specified by paragraphs I and II.

IV. Agreement of the required majority of unit owners to termination of the condominium or to any amendment of the condominium instruments shall be evidenced by their execution of the termination agreement or amendment, or by execution of the president and treasurer of the association accompanied by certification of vote of the clerk or secretary, and the same shall become effective only when such agreement is so evidenced of record. For the purposes of this section and RSA 356-B:33, an instrument terminating a condominium shall be deemed a condominium instrument subject to the provisions of RSA 356-B:11, and for the

purposes of this section, any ratification of such an amendment shall also be deemed such an instrument.

V. Except to the extent expressly permitted or expressly required by other provisions of this chapter, no amendment to the condominium instruments shall change the boundaries of any unit, the undivided interest in the common areas appertaining thereto, the liability for common expenses or rights to common profits appertaining thereto, or the number of votes in the unit owners' association appertaining thereto.

VI. Upon recordation of an instrument terminating a condominium, all of the property constituting the same shall be owned by the unit owners as tenants in common in proportion to their respective undivided interests in the common areas immediately prior to such recordation. But as long as such tenancy in common lasts, each unit owner or the heirs, successors, or assigns thereof shall have an exclusive right of occupancy of that portion of said property which formerly constituted his unit.

VII. Upon recordation of an instrument terminating a condominium, any rights the unit owners may have to the assets of the unit owners' association shall be in proportion to their respective undivided interests in the common areas immediately prior to such recordation, except that common profits shall be distributed in accordance with RSA 356-B:44.

VIII. No provision of this chapter shall be construed in derogation of any requirement of the condominium instruments that all or a specified number of the beneficiaries of mortgages or deeds of trust encumbering the condominium units approve specified actions contemplated by the unit owners' association.

356-B:34-a Division of Condominium.

Notwithstanding the provisions of RSA 356-B:34, a condominium shall be deemed to have been terminated if it is terminated in accordance with the following provisions:

I. A condominium containing 50 or more residential units may be terminated and divided into separate and smaller condominiums by amendment to the condominium instruments pursuant to a written agreement consented to by the unit owners to which 4/5 of the votes in the existing unit owners association and 4/5 of the votes in each resulting unit owners association appertain, as such votes are allocated in accordance with RSA 356-B:39 and the condominium instruments of the existing condominium, and with any consent of mortgagees holding interests in the condominium units as may be required under the condominium instruments of the existing condominium for any action of the unit owners association to terminate the condominium or to subdivide the common areas thereof.

II. Agreement of the required number of unit owners to divide the condominium shall be evidenced by their execution of an agreement or by execution by the president and treasurer of the existing unit owners association accompanied by a certification by the clerk or secretary of the association that the requisite number of unit owners has executed the agreement or has voted in favor thereof either at a meeting duly called for such purpose or by written

consent in lieu of such a meeting and the same shall become effective only when such agreement and an effectuating amendment to the condominium instruments in accordance with paragraph III is placed on record at the registry of deeds.

III. An amendment to the condominium instruments adopted pursuant to this section shall establish a separate declaration of condominium with respect to each condominium resulting from the division and shall:

(a) Conform to all applicable provisions of RSA 356-B.
(b) Reallocate the interests in the common areas in accordance with the agreement of unit owners.
(c) Establish easements or other rights of entry, access, egress, usage, or sharing of utilities or other common facilities in accordance with the agreement of unit owners.
(d) Provide for the division of the assets and liabilities of the existing condominium in accordance with the agreement of the unit owners.
(e) Describe any rights to common profits or liability for common expenses which may be shared among any condominiums resulting from the division.
(f) Permit the election by unit owners whose units shall be within such resulting condominiums of representatives of the unit owners associations resulting from the division who shall be authorized to execute condominium instruments for such resulting condominiums.
(g) Contain any and all other provisions necessary or desirable for the equitable division of the condominium.
(h) Be signed by the president and treasurer of the existing unit owners association.

IV. (a) An amendment to the condominium instruments adopted pursuant to this section shall be deemed a material change requiring submission to the consumer protection bureau, office of the attorney general, of an application for approval of the division by or on behalf of the unit owners association, executed by the president or treasurer of the existing unit owners association, which shall provide the following information on a form to be prescribed by the attorney general:

(1) The required consent that was obtained.
(2) The date upon which the required consent was obtained.
(3) The number of units in the existing condominium.
(4) The number of units that are substantially completed in the existing condominium.
(5) The number of units in each resulting condominium specifying the number which are substantially complete or not.
(6) A delineation of any expandable or withdrawable land in the existing or resulting condominiums.
(7) The agreement of the unit owners executed in accordance with this section.

(8) The amendment required by this section, including all necessary condominium instruments executed by the authorized representatives of the resulting unit owners associations.

(9) A certification by the president or treasurer of the existing unit owners association that all required approvals or other actions, including municipal planning board or zoning board approvals, exceptions or variances, and all approvals required under this section, have been obtained.

(10) A certification by the president or treasurer of the existing unit owners association that notice has been provided to the unit owners of the filing of the application for approval, and that any unit owner may submit comments to the attorney general regarding the application.

(11) A certification by the president or treasurer of the existing unit owners association that mortgagees have consented to the division, if and to the extent required by this section.

(b) A fee of $1000 shall be submitted to the attorney general at the time of the filing of the application.

V. (a) The attorney general shall review the application for approval submitted pursuant to this section and shall approve the application upon determination that:

(1) The amendment conforms to the requirements of this section.

(2) The condominium instruments submitted with respect to each resulting condominium conform to the provisions of RSA 356-B.

(3) There is a rational basis for the proposed division.

(4) The proposed division is in furtherance of a lawful purpose.

(5) The amendment and condominium instruments are not unfair or inequitable to unit owners.

(b) The attorney general may require submittal of such additional information as may be reasonably necessary to make such determinations.

(c) Within 120 days after receipt of the complete application and statutory fee submitted pursuant to this section, the attorney general shall notify the submitting party that the division of the condominium is approved or shall state in writing the reasons for objection. Any such non-approval shall not prevent the resubmission of the application. Failure by the attorney general to notify the applicant within this period shall be deemed approval, and the applicant may record a certificate so attesting.

(d) No amendment adopted pursuant to this section shall be placed on record until approved by the attorney general.

VI. Nothing in this section shall limit or derogate the statutory authority of any municipality over subdivisions, zoning, land use, or planning.

VII. Nothing in this section shall be construed to limit the ability of a unit owners association to adopt a provision in its condominium instruments expressly waiving the right to avail itself of the procedures set forth in this section to terminate the condominium and divide it into separate and smaller condominiums.

VIII. This section shall apply to all condominiums within the state declared after the effective date of this section.

III. Unit Owners' Associations

356-B:35. Contents of the Bylaws.

I. There shall be recorded simultaneously with the declaration a set of bylaws providing for the self-government of the condominium by an association of all the unit owners. The unit owners' association may be incorporated.

II. The bylaws shall provide whether or not the unit owners' association shall elect a board of directors. If there is to be such a board, the bylaws shall specify the powers and responsibilities of the same and the number and terms of its members. The bylaws may delegate to such board, among other things, any of the powers and responsibilities assigned by this chapter to the unit owners' association. The bylaws shall also specify which, if any, of its powers and responsibilities the unit owners' association or its board may delegate to a managing agent.

III. In any case where an amendment to the declaration is required by RSA 356-B:18, II, III or IV, the person or persons required to execute the same shall also prepare and execute, and record simultaneously with such amendment, an amendment to the bylaws. The amendment to the bylaws shall allocate votes in the unit owners' association to new units on the same basis as was used for the allocation of such votes to the units depicted on site plans and floor plans recorded pursuant to RSA 356-B:20, I and II, or shall abolish the votes appertaining to former units, as the case may be. The amendment to the bylaws shall also reallocate rights to future common profits, and liabilities for future common expenses not specially assessed, in proportion to relative voting strengths as reflected by the said amendment.

IV. The bylaws shall provide that the unit owners' association shall act on behalf of each unit owner in condemnation proceedings against the common areas of the condominium.

356-B:36. Control by the Declarant.

I. The condominium instruments may authorize the declarant, or a managing agent or some other person or persons selected or to be selected by the declarant, to appoint and remove some or all of the officers of the unit owners' association or its board of directors, or both, or to exercise powers and responsibilities otherwise assigned by the condominium instruments and by this chapter to the unit owners' association, the officers, or the board of directors. But no amendment to the condominium instruments shall increase the scope of such authorization if there is any unit owner other than the declarant, and no such authorization shall be valid after the

time limit set by the condominium instruments or after units to which ¾ of the undivided interests in the common areas appertain have been conveyed, whichever occurs first. The time limit initially set by the condominium instruments shall not exceed 5 years in the case of an expandable condominium, 3 years in the case of a condominium containing any convertible land, or 2 years in the case of any other condominium.

II. If entered into during the period of control contemplated by paragraph I, no management contract, lease of recreational areas or facilities, or any other contract or lease executed by or on behalf of the unit owners' association, its board of directors, or the unit owners as a group, shall be binding after such period of control unless then renewed or ratified with the consent of unit owners of units to which a majority of the votes in the unit owners' association appertain.

III. If the unit owners' association is not in existence or does not have officers at the time of the creation of the condominium, the declarant shall, until there is such an association with such officers, have the power and the responsibility to act in all instances where this chapter requires action by the unit owners' association, its board of directors, or any officer or officers.

IV. This section shall be strictly construed to protect the rights of the unit owners.

356 B:37. Meetings.

I. Meetings of the unit owners' association shall be held in accordance with the provisions of the condominium instruments at least once each year after the formation of said association. The bylaws shall specify an officer who shall, at least 21 days in advance of any annual or regularly scheduled meeting, and at least 7 days in advance of any other meeting, send to each unit owner notice of the time, place, and purpose or purposes of such meeting. Such notice shall be sent by first class United States mail to all unit owners of record at the address of their respective units and to such other addresses as any of them may have designated to such officer. The secretary or other duly authorized officer of the unit owners' association, who shall also be a member of the board of directors of the unit owners' association, shall prepare an affidavit which shall be accompanied by a list of the addresses of all unit owners currently on file with the association and shall attest that notice of the association meeting was mailed to all unit owners on that list by first class mail. A copy of the affidavit and mailing list shall be available at the noticed meeting for inspection by all owners then in attendance and shall be retained with the minutes of that meeting. The affidavit required in this section shall be available for inspection by unit owners for at least 3 years after the date of the subject meeting.

II. The board of directors shall make copies of the minutes of board meetings available to the unit owners within 60 days of the board meeting or 15 days of the date such minutes are approved by the board, whichever occurs first. The unit owner shall be responsible for any copying costs, except that, if the association chooses to make the minutes available electronically, there shall be no charge to the unit owner.

356-B:38. Quorums.

I. Unless the condominium instruments otherwise provide, a quorum shall be deemed to be present throughout any meeting of the unit owners' association until adjourned if persons entitled to cast more than 33 ⅓ percent of the votes are present at the beginning of such meeting. The bylaws may provide for a larger percentage, or for a smaller percentage not less than 25 percent.

II. Unless the condominium instruments specify a larger majority, a quorum shall be deemed to be present throughout any meeting of the board of directors if persons entitled to cast ½ of the votes in that body are present at the beginning of such meeting.

356-B:39. Voting.

I. The bylaws may allocate to each unit depicted on site plans and floor plans that comply with RSA 356-B:20, I and II, a number of votes in the unit owners' association proportionate to the undivided interest in the common areas appertaining to each such unit.

II. Otherwise, the bylaws shall allocate to each such unit an equal number of votes in the unit owners' association, subject to the following exception: each convertible space so depicted shall be allocated a number of votes in the unit owners' association proportionate to the size of each such space, vis-a-vis the aggregate size of all units so depicted, while the remaining votes in the unit owners' association shall be allocated equally to the other units so depicted.

III. Since a unit owner may be more than one person, if only one of such persons is present at a meeting of the unit owners' association, that person shall be entitled to cast the votes appertaining to that unit. But if more than one of such persons is present, the vote appertaining to that unit shall be cast only in accordance with their unanimous agreement unless the condominium instruments expressly provide otherwise, and such consent shall be conclusively presumed if any one of them purports to cast the votes appertaining to that unit without protest being made forthwith by any of the others to the person presiding over the meeting. Since a person need not be a natural person, the word "person" shall be deemed for the purposes of this paragraph to include, without limitation, any natural person having authority to execute deeds on behalf of any person, excluding natural persons, which is, either alone or in conjunction with another person or persons, a unit owner.

IV. (a) The votes appertaining to any unit may be cast pursuant to a proxy or proxies duly executed by or on behalf of the unit owner, or, in cases where the unit owner is more than one person, by or on behalf of all such persons. The proxy or proxies shall list the name of the person who is to vote. No such proxy shall be revocable except by actual notice to the person presiding over the meeting, by the unit owner or by any of such persons, that it be revoked. Any proxy shall be void if it is not dated or if it purports to be revocable without notice as aforesaid.

The proxy of any person shall be void if not signed by a person having authority, at the time of the execution thereof, to execute deeds on behalf of that person. Any proxy shall terminate automatically upon the adjournment of the first meeting held on or after the date of that proxy. The board of directors of the unit owners' association shall devise procedures to assure that all proxies voted at any meeting are valid and were duly executed by association members having the right to vote. Those procedures shall include one of the following:

(1) The board of directors shall deliver to the unit owners, together with their notice of meeting and agenda, proxy forms bearing a control number which the board of directors shall correlate to the list of all unit owners then entitled to vote. At the noticed meeting, the board of directors shall recover all proxies and compare them to the control list maintained for that purpose. Any proxies which are on a form other than that provided by the board of directors or which do not correlate with the control list maintained by the board of directors shall be disregarded for purposes of determining whether a quorum was present at the meeting and for purposes of casting any vote at that meeting; or

(2) The board of directors shall recover at any duly noticed meeting all original proxies delivered to any person for purposes of voting at that meeting. The board of directors shall then independently confirm the validity of those proxies by selecting a random sample of not less than 10 percent of all original proxies returned to the board of directors at the meeting and confirm with the granting owners in writing that the proxy was voluntarily given and duly signed.

(b) The board of directors shall retain all proxies delivered to the board of directors and all independent written confirmation of any such proxies for inspection by the unit owners for a period of not less than 3 years from the date of the subject owners' association meeting.

V. If 50 percent or more of the votes in the unit owners' association appertain to 25 percent or less of the units, then in any case where a majority vote is required by the condominium instruments or by this chapter, the requirement for such a majority shall be deemed to include, in addition to the specified majority of the votes, assent by the unit owners of a like majority of the units.

VI. Anything in this section to the contrary notwithstanding, no votes in the unit owners' association shall be deemed to appertain to any condominium unit during such time as the unit owner thereof is the unit owners' association.

356-B:40. Officers.

I. If the condominium instruments provide that any officer or officers must be unit owners, then any such officer who disposes of all of his units in fee and/or for a term or terms of more than one year shall be deemed to have disqualified himself from continuing in office unless the condominium instruments otherwise provide, or unless he acquires or contracts to acquire

another unit in the condominium under terms giving him a right of occupancy thereto effective on or before the termination of his right of occupancy under such disposition or dispositions.

II. If the condominium instruments provide that any officer or officers must be unit owners, then notwithstanding the provisions of RSA 356-B:12, I, the term "unit owner" in such context shall, unless the condominium instruments otherwise provide, be deemed to include, without limitation, any director, officer, partner in, or trustee of any person which is, either alone or in conjunction with another person or persons, a unit owner. Any officer who would not be eligible to serve as such were he not director, officer, partner in, or trustee of such a person shall be deemed to have disqualified himself from continuing in office if he ceases to have any such affiliation with that person, or if that person would itself have been deemed to have disqualified itself from continuing in such office under paragraph I were it a natural person holding such office.

III. Any officer is a suitable person to receive service of process in any proceeding against the association.

IV. For the purpose of receipt of notification by a municipality of a local land use board hearing, the officers shall be responsible for serving as agents of the unit owners' association.

356-B:40-a Disclosure of Fees by Managing Agent and Contractors.

I. If the unit owners' association or the board of directors has delegated certain powers and duties to a managing agent, the managing agent shall disclose any referral fees received from contract work performed on behalf of the association to the board of directors prior to the next regularly scheduled board meeting, unless the terms of any referral fees are disclosed in the managing agent's contract with the unit owners' association, in which case disclosure of fees actually received shall not be required.

II. The managing agent also shall disclose to the board of directors the amount and purpose of any fees, other than maintenance fees, received from a unit owner, unless the terms of any such fees are disclosed in the managing agent's contract with the unit owners' association, in which case disclosure of fees actually received shall not be required.

III. Any contractor licensed by the state of New Hampshire who performs work for a unit owner shall disclose on the bill any referral fee charged by the contractor.

356-B:40-b Unit Owners' Association Records.

Upon written request from the unit owners' association, its board of directors, the president of the association, or the association's attorney to the managing agent, sent by first class mail, facsimile, or electronically, the managing agent shall, irrespective of any language to the contrary in any management contract, return to the board of directors, president, or the association's attorney, any and all association records held by the managing agent within 30 days from the date of the request for such records. The managing agent shall have the right, at its own expense, to copy any and all association records it wishes to keep for its own records but shall

comply with the requirement of returning all records to the association within the 30-day period. If the managing agent fails to return all association records within the 30-day period and the association institutes a lawsuit for purposes of recovering the association's records, then any judgment or order in favor of the association shall include the association's reasonable legal fees and costs as determined by the court.

356-B:41. Upkeep of the Condominium; Warranty Against Structural Defects.

I. Except to the extent otherwise provided by the condominium instruments, all powers and responsibilities with regard to maintenance, repair, renovation, restoration, and replacement of the condominium shall belong (a) to the unit owners' association in the case of the common areas, and (b) to the individual unit owner in the case of any unit or any part thereof.

I-a. No unit owners' association, its agents, or its employees shall willfully enter into the unit of a unit owner without providing prior notice to the owner, other than for emergency purposes.

I-b. No unit owner, tenant, or other person occupying a condominium unit shall willfully refuse the unit owners' association, its agents, or its employees access through a condominium unit as is necessary to enable them to exercise and discharge their respective powers and responsibilities at a reasonable time after notice which is adequate under the circumstances. But to the extent that damage is inflicted on the common areas or any unit through which access is taken, the unit owner causing the same, or the unit owners' association if it caused the same, shall be liable for the prompt repair thereof.

II. Notwithstanding anything in this section to the contrary, the declarant shall warrant or guarantee, against structural defects, each of the units for one year from the date each is conveyed, and all of the common areas for one year. The one year referred to in the preceding sentence shall begin as to each of the common areas whenever the same has been completed or if later, (a) as to any common area within any additional land or portion thereof, at the time the first unit therein is conveyed, (b) as to any common area within any convertible land or portion thereof, at the time the first unit therein is conveyed, and (c) as to any common area within any other portion of the condominium at the time the first unit therein is conveyed. For the purposes of this paragraph, no unit shall be deemed conveyed unless conveyed to a bona fide purchaser. For the purposes of this paragraph, structural defects shall be those defects in components constituting any unit or common area which reduce the stability or safety of the structure below accepted standards or restrict the normal intended use of all or part of the structure and which require repair, renovation, restoration, or replacement. Nothing in this paragraph shall be construed to make the declarant responsible for any items of maintenance relating to the units or common areas.

356-B:42. Control of the Common Areas.

I. Except to the extent prohibited by the condominium instruments, and subject to any restrictions and limitations specified therein, the unit owners' association shall have the power to:

(a) Employ, dismiss, and replace agents and employees to exercise and discharge the powers and responsibilities of the said association arising under RSA 356-B:41;

(b) Make or cause to be made additional improvements on and as a part of the common areas;

(c) Grant or withhold approval of any action by one or more unit owners or other persons entitled to the occupancy of any unit which would change the exterior appearance of any unit or of any other portion of the condominium, or elect or provide for the appointment of an architectural control committee, the members of which must have the same qualifications as officers, to grant or withhold such approval; and

(d) Acquire, hold, convey and encumber title to real property, including but not limited to condominium units, whether or not the association is incorporated.

II. Except to the extent prohibited by the condominium instruments, and subject to any restrictions and limitations specified therein, the board of directors of the unit owners' association, if any, and if not, then the unit owners' association itself, shall have the irrevocable power as attorney-in-fact on behalf of all the unit owners and their successors in title to grant easements through the common areas and accept easements benefiting the condominium or any portion thereof.

III. This section shall not be construed to prohibit the grant, by the condominium instruments, of other powers and responsibilities to the unit owners' association or its board of directors.

356-B:43. Insurance.

I. The condominium instruments shall require the unit owners association, or the board of directors or managing agent on behalf of such association, to obtain:

(a) A master casualty policy affording fire and extended coverage in an amount equal to the full replacement value of the structures within the condominium, or of such structures that in whole or in part comprise portions of the common areas;

(b) A master liability policy, in an amount specified by the condominium instruments, covering the unit owners' association, the board of directors, if any, the managing agent, if any, all persons acting or who may come to act as agents or employees of any of the foregoing with respect to the condominium, and all unit owners and other persons entitled to occupy any unit or other portion of the condominium; and

(c) Such other policies as may be required by the condominium instruments, including, without limitation, workers' compensation insurance, liability insurance on motor vehicles owned by the association, and specialized policies covering lands or improvements in which the unit owners' association has or shares ownership or other rights.

II. When any policy of insurance has been obtained by or on behalf of the unit owners' association, written notice of the obtainment thereof and of any subsequent changes therein or termination thereof shall be promptly furnished to each unit owner by the officer required to send notices of meetings of the unit owners' association. Such notices shall be sent in accordance with the provisions of the last sentence of RSA 356-B:37.

III. Unless the unit owners vote to terminate the condominium under RSA 356-B:34, the proceeds of the master casualty policy shall be used to repair, replace or restore the structure or common area damaged by casualty.

356-B:44. Rights to Common Profits.

The common profits shall be applied to the payment of common expenses, and rights in any surplus remaining shall accrue to the condominium units in proportion to the number of votes in the unit owners' association appertaining to each such unit. Any such surplus shall be distributed accordingly to the unit owners, except to such extent as the condominium instruments may require the same to be added to reserves maintained pursuant to those instruments.

356-B:45. Liabilities for Common Expenses.

I. Except to the extent that the condominium instruments provide otherwise, any common expenses associated with the maintenance, repair, renovation, restoration, or replacement of any limited common area shall be specially assessed against the condominium unit to which that limited common area was assigned at the time such expenses were made or incurred. If the limited common area involved was assigned at that time to more than one condominium unit, however, such expenses shall be specially assessed against each such condominium unit equally so that the total of such special assessments equals the total of such expenses, except to the extent that the condominium instruments provide otherwise.

II. To the extent that the condominium instruments expressly so provide, any other common expenses benefiting less than all of the condominium units, or caused by the conduct of less than all those entitled to occupy the same or by their licensees or invitees, shall be specially assessed against the condominium unit or units involved, in accordance with such reasonable provisions as the condominium instruments may make for such cases.

III. The amount of all common expenses not specially assessed pursuant to paragraphs I and II, less the amount of all common profits, shall be assessed against the condominium units in proportion to the number of votes in the unit owners association appertaining to each such unit. Such assessments shall be made by the unit owners' association annually, or more often if the condominium instruments so provide. No change in the number of votes in the unit owners' association appertaining to any condominium unit shall enlarge, diminish, or otherwise affect any liabilities arising from assessments made prior to such change.

356-B:46. Lien for Assessments.

I. (a) The unit owners' association shall have a lien on every condominium unit for unpaid assessments levied against that condominium unit in accordance with the provisions of this chapter and all lawful provisions of the condominium instruments, if perfected as hereinafter provided. The said lien, once perfected, shall be prior to all other liens and encumbrances except (1) real estate tax liens on that condominium unit, (2) liens and encumbrances recorded prior to the recordation of the declaration, and (3) sums unpaid on any first mortgages or first deeds of trust encumbering that condominium unit and securing institutional lenders.

(b) The provisions of this paragraph shall not affect the priority of mechanics' and materialmen's liens.

(c) Notwithstanding subparagraph (a), the lien for regular monthly common assessments unpaid with respect to a residential condominium unit during the 6-month period immediately preceding the filing of the memorandum specified in paragraph III, together with all costs of collection, including reasonable attorney's fees, shall be prior to the first mortgage; provided that the unit owners' association sends, within 70 days of the occurrence of any delinquency, the unit owner and the institutional lender holding the first mortgage written notice of the delinquency by certified mail and first class mail that the account is at least 60 days delinquent; and additionally, sends such lender notice by certified mail and first class mail, at least 30 days prior, of its intent to file said memorandum of lien. The lien shall not include any amounts attributable to special assessments, late charges, fines, penalties, or interest assessed by the unit owners' association, nor shall the lien apply to regular assessments or costs of collection coming due prior to the effective date of this section. In giving the foregoing notices, the unit owners' association may rely on the records of the applicable registry of deeds as to the address of the first institutional lender unless such lender has notified the unit owners' association by certified mail of a different address.

(d) The priority lien rights established under subparagraph (c) shall not entitle or permit the unit owners' association to assert more than one priority lien unless and until the existing priority lien is first discharged by the unit owners' association. The priority lien rights established under subparagraph (c) also shall not apply to any mortgage executed prior to the effective date of this section.

(e) After notification to the first mortgage institutional lender of a delinquency, in addition to any previously agreed to or required escrow amounts, the institutional lender may also require a residential unit owner to place an amount equal to not more than 6 months of current regular assessments in escrow to cover the cost of any delinquency.

II. Notwithstanding any other provision of this section, or any other provision of law, all memoranda of liens arising under this section shall be recorded in the registry of deeds in each county in which any part of the condominium is located. Such memorandum shall be indexed in the general index to deeds, and such general index shall identify the lien as a lien for condominium assessments.

III. The unit owners' association, in order to perfect the lien given by this section, shall file, before the expiration of 6 months from the time such assessment became due and payable in the registry of deeds in the county in which such condominium is situated, a memorandum, verified by the oath of the principal officer of the unit owners' association, or such other officer or officers as the condominium instruments may specify, which contains the following:

(a) A description of the condominium unit in accordance with RSA 356-B:9;

(b) The name or names of the persons constituting the unit owners of that condominium unit;

(c) The amount of unpaid assessments currently due or past due together with the date when each fell due; and

(d) The date of issuance of the memorandum.

It shall be the duty of the register in whose office such memorandum shall be filed as hereinabove provided to record and index the same as provided in paragraph II, in the names of the persons identified therein as well as in the name of the unit owners' association. The cost of recording such memorandum shall be taxed against the person found liable in any judgment or decree enforcing such lien.

IV. No suit to enforce any lien perfected under paragraph III shall be brought after 6 years from the time when the memorandum of lien was recorded; provided, however, that the filing of a petition to enforce any such lien in any suit wherein such petition may be properly filed shall be regarded as the institution of a suit under this section; and provided further that nothing herein shall extend the time within which any such lien may be perfected.

V. The judgment or decree in an action brought pursuant to this section shall include, without limitation, reimbursement for costs and attorneys' fees, together with interest at the maximum lawful rate for the sums secured by the lien from the time such sum became due and payable.

VI. When payment or satisfaction is made of a debt secured by the lien perfected by paragraph III, said lien shall be released in the same manner as required by RSA 479:7 for mortgages. For the purposes of this section, the principal officer of the unit owners' association, or such other officer or officers as the condominium instruments may specify, shall be deemed the duly authorized agent of the lien creditor and shall discharge said lien.

VII. Nothing in this section shall be construed to prohibit actions at law to recover sums for which paragraph I creates a lien, maintainable pursuant to RSA 356-B:15.

VIII. Any unit owner or purchaser of a condominium unit, having executed a contract for the disposition of the same, shall be entitled upon request to a recordable statement setting forth the amount of unpaid assessments currently levied against that unit. Such request shall be in writing, directed to the principal officer of the unit owners' association or to such other officer as the condominium instruments may specify. Failure to furnish or make available such a statement within 10 business days from the receipt of such request shall extinguish the lien created by paragraph I as to the condominium unit involved. Such statement shall be binding on the unit owners' association, the board of directors, and every unit owner. Payment of a fee not exceeding $10 may be required as a prerequisite to the issuance of such a statement if the condominium instruments so provide.

IX. Notwithstanding any law, rule, or provision of the condominium declaration, bylaws, or rules to the contrary, the unit owners' association may authorize, pursuant to RSA 356-B, its board of directors to, after 30 days' prior written notice to the unit owner and unit owner's first mortgagee of nonpayment of common assessments, terminate the delinquent unit's common privileges and cease supplying a delinquent unit with any and all services normally supplied or paid for by the unit owners' association. Any terminated services and privileges shall be restored upon payment of all assessments.

X. The unit owners' association may collect an amount of up to 6 months' common expense assessments in advance from unit owners and hold the amount so collected in escrow and, upon default by any unit owner in the payment of common expense assessments, apply the same to cure such default.

356-B:46-a. Rent Collection Upon Delinquency in Payment of Common Expenses.

I. If a unit owner fails to pay the common expenses assessed to the unit by the unit owners’ association within 60 days of the date it was due, the unit owners association may, as a separate and additional remedy, subject to the existing rights of a holder of a first mortgage of record as provided in this section, collect from any tenant renting the unit any rent then or thereafter due to the owner of such unit. The unit owners’ association shall apply such rent collected against the amount owed to it by the unit owner. Prior to taking any action under this paragraph, the unit owners’ association shall give to the delinquent unit owner written notice of its intent to collect the rent owed. Such notice shall be sent by both first class and certified mail, shall set forth the exact amount the unit owners’ association claims is due and owing by the unit owner, and shall indicate the intent of the association to collect such amount from rent, along with any other amounts which become due within the current fiscal year and which remain unpaid. A copy of such notice shall be provided to any first mortgagee of record on such unit who has previously requested in writing that the unit owners' association notify it of any delinquency in the payment of amounts due to it by the owner of such unit.

II. The unit owner shall have 30 days from the date of mailing of such notice to pay the amounts due, including collection costs, or to provide proof of the prior payment of the assessments due. No unit owner shall be entitled to withhold payment of assessments due, off-set against the same, or make any deduction therefrom without first obtaining a determination by a court of competent jurisdiction that the assessment was unlawful.

III. If the unit owner fails to timely file a response in compliance with paragraphs I and II, the unit owners' association may notify and direct each tenant renting such unit from such owner to pay all or a portion of the rent otherwise due by such owner to the association, such rent or portion of such rent to be in the amount of the association claimed is due on its notice to the unit owner or the full rent, whichever is less. The association shall have a continuing right to collect any rent otherwise payable by the tenant to such unit owner until such amount, plus any charges thereafter becoming due, are satisfied in full. Nothing in this section shall preclude the unit owner from seeking equatable relief from a court of competent jurisdiction or seeking a judicial determination of the amount owed. Nothing in this section shall prevent the unit owners' association from bringing an action under this chapter or to otherwise establish the amount owed to it by the unit owner or otherwise to seek and obtain an order requiring the tenant in such unit, or tenants in other units owned by the unit owner in the condominium, to pay to the association rent otherwise due to the unit owner otherwise limit the unit owner's association's rights at common law.

IV. In no event shall a unit owner take any retaliatory action against any tenant who pays rent, or any portion of rent, to the unit owners' association as provided in this section. Any tenant so paying rent shall not be deemed in default on the rent to the extent of the payment to the association. Any waiver of the provisions of this section in any lease or rental agreement shall be void and unenforceable as against public policy.

V. Notwithstanding any other provision of this chapter, a vote of a majority of those attending an annual meeting of the unit owner's association, in person or by proxy, shall be necessary to adopt the provisions of this section as a part of the association's declaration or bylaws or both.

356-B:47. Restraints on Alienation.

If the condominium instruments create any rights of first refusal or other restraints on free alienability of the condominium units, such rights and restraints shall be void unless the condominium instruments make provision for promptly furnishing to any unit owner or purchaser requesting the same a recordable statement certifying to any waiver of, or failure or refusal to exercise, such rights and restraints, in all cases where such waiver, failure, or refusal does in fact occur. Failure or refusal to furnish promptly such a statement in such circumstances in accordance with the provisions of the condominium instruments shall make all such rights and restraints inapplicable to any disposition of a condominium unit in contemplation of which such statement was requested. Any such statement shall be binding on the association of unit owners, the board of directors, and every unit owner. Payment of a fee not exceeding $25 may be required as a prerequisite to the issuance of such a statement if the condominium instruments so provide.

356-B:47-a Flag Display.

Pursuant to the Freedom to Display the American Flag Act of 2005, Public Law 109-243, and notwithstanding any provision in the condominium instruments to the contrary, the unit owners' association shall not prohibit the outdoor display of the United States flag in a manner consistent with the United States flag code and RSA 3-E. The association may adopt reasonable rules regarding the size of the flag and the manner in which the flag is displayed. When a flag is flown from the unit owner's balcony or deck, from a bracket, the flag may extend over the vertical line of the unit owner's outboard deck line, which would put the flag into the common area, versus the unit owner's private space.

IV. Administration and Enforcement

356-B:48. Administration; Enforcement.

The provisions of this chapter shall be administered and enforced by the consumer protection and antitrust bureau, department of justice, established in RSA 21-M:9.

356-B:49. Exemptions.

I. Unless the method of disposition is adopted for the purpose of evasion of this chapter, the provisions of this subdivision do not apply to offers or dispositions of any interest in a condominium unit:

(a) If not more than 10 units are included in the condominium; provided, however, this exemption shall not apply to a condominium involving time sharing interests;

(b) If all of the units are restricted to commercial, industrial or other nonresidential use;

(c) Pursuant to court order; and

(d) By any government or government agency.

II. Unless the method of disposition is adopted for the purpose of evasion of this chapter, the provisions of RSA 356-B:50-55; 56, I; 56, III, and 58 do not apply to offers by the declarant in connection with efforts to obtain nonbinding reservation agreements; provided, however, that any such declarant shall first have notified the attorney general in writing of its intention to conduct such efforts.

III. The attorney general may from time to time, in accordance with rules adopted by him pursuant to RSA 541-A, exempt from any one or more of the provisions of this chapter any condominium if he finds that the enforcement of this chapter with respect to such project is not

necessary in the public interest and for the protection of purchasers by reason of the small amount involved or the limited character of the offering, or because such condominium has been registered and approved pursuant to the laws of any other state. Applications for exemption shall be filed in a form prescribed by the attorney general and shall be accompanied by an application fee of $200.

356-B:50. Limitations on Dispositions of Units. Unless exempt by RSA 356-B:49:

I. No declarant may offer or dispose of any interest in a condominium unit located in this state, nor offer or dispose in this state of any interest in a condominium unit located without this state prior to the time the condominium including such unit is registered in accordance with this chapter;

II. No declarant, except as provided in RSA 356-B:52, IV, may dispose of any interest in a condominium unit unless he delivers to the purchaser a current public offering statement by the time of such disposition and such disposition is expressly and without qualification or condition subject to cancellation by the purchaser within 5 days after the contract date of the disposition, or delivery of the current public offering statement, whichever is later. If the purchaser elects to cancel, he may do so by notice thereof hand-delivered or deposited in the United States mail, return receipt requested, within the 5 day period, to the declarant or to any agent of the declarant; provided, however, that if the purchaser elects to mail the notice of cancellation, he must also provide the declarant with telephonic notice of cancellation within the 5 day period. Such cancellation shall be without penalty, and any deposit made by the purchaser shall be refunded in its entirety no later than 10 days after the receipt of such written notice of cancellation. "Contract date" shall not refer to the closing or settlement date, but shall refer to the creation of a binding obligation for consideration.

III. No person, other than the declarant or regular employee thereof, shall act in this state as an agent of said declarant for the sale or disposition of any interest in a condominium unit subject to the provisions of this chapter unless he is licensed pursuant to RSA 331-A.

IV. No person shall, in connection with the offer or disposition of any interest in a condominium unit located in this state or in connection with the offer or disposition in this state of any interest in a condominium unit located without this state, conduct or participate in any type of lottery or contest or offer prizes or gifts for the purpose of inducing or encouraging any person to visit a condominium, attend any meeting at which a condominium will be discussed, or acquire any interest in a condominium unit; provided, however, that this paragraph shall not prohibit the reimbursement of a prospective purchaser for reasonable travel expenses or the offering, in a manner not dependent upon or connected with chance, of tangible personal property which will be delivered to the offeree not later than the time of the offeree's visit to a condominium or attendance at a meeting at which a condominium will be discussed.

356-B:51. Application for Registration; Fee.

I. The application for registration of the condominium shall be filed in a form prescribed by the attorney general and shall contain the following documents and information:

(a) An irrevocable appointment of the attorney general to receive service of any lawful process in any noncriminal proceeding arising under this chapter against the declarant or his personal representative;

(b) Site and floor plans which comply with RSA 356-B:20, except that the certificates required with respect thereto need not be signed prior to approval of said application;

(c) The states or jurisdictions in which an application for registration or similar document has been filed, and any adverse order, judgment, or decree entered in connection with the condominium by the regulatory authorities in each jurisdiction or by any court;

(d) The declarant's name, address, and the form, date, and jurisdiction of organization, and the address of each of its offices in this state;

(e) The name, address, and principal occupation for the past 5 years of every officer of the declarant or person occupying a similar status or performing similar functions; the extent and nature of his interest in the declarant or the condominium as of a specified date within 30 days of the filing of the application;

(f) If the declarant is a closely held corporation, partnership, joint stock company, trust or sole proprietorship, the name, address, and principal occupation of each trustee, stockholder, partner, or person having any beneficial interest therein;

(g) If the declarant is a publicly held corporation, the name, address and principal occupation of each stockholder owning more than 10 percent of the shares outstanding;

(h) If the declarant is a subsidiary corporation, the name, address and principal occupation of each stockholder or person having a beneficial interest therein, and the name, address and principal occupation of each stockholder owning more than 10 percent of the shares outstanding in the corporation or corporations to which it is subsidiary;

(i) A statement of the condition of the title to the condominium, including all easements, conditions, covenants, restrictions, liens and other encumbrances, if any, affecting the condominium property owned by the declarant, with appropriate recording data, as of a specified date within 30 days of the date of application, which statement shall be in the form of a title opinion of a licensed attorney, not under salary to the declarant, or other evidence of title acceptable to the attorney general;

(j) Copies of the instruments which will be delivered to a purchaser to evidence his interest in the unit and of the contracts and other agreements which a purchaser will be required to agree to or sign;

(k) Copies of the declaration and bylaws and of any management contracts or other contracts, including leases, affecting the use, maintenance or administration of, or access to, all or a part of the condominium;

(l) if there is a blanket encumbrance or lien affecting more than one unit, a statement of the consequences for a purchaser of failure to discharge the blanket encumbrance or lien and the steps, if any, taken to protect the purchaser in case of this eventuality;

(m) A statement of the zoning, subdivision, and other governmental approvals, if any, affecting the condominium, including building permits and their status, and also, if known, any existing tax and existing or proposed special taxes or assessments which affect the condominium;

(n) A statement of the existing provisions for access, sewage disposal, water, and other public utilities in the condominium; a statement of any improvements or amenities which may be constructed, an estimate of their cost and the schedule for their completion, provided, however, that if the declarant will give no assurances as to the construction or completion of said improvements or amenities, a statement that no assurance will be given must be included; and a statement of the plan for financing the construction of said improvements or amenities and the maintenance of the condominium;

(o) A description of the promotion plan for the disposition of the units in the condominium;

(p) The proposed public offering statement;

(q) If the declarant is a corporation, a copy of its articles of incorporation with all amendments thereto;

(r) If the declarant is a trust, a copy of all instruments by which the trust is created together with all amendments thereto;

(s) If the declarant is a partnership, unincorporated association, joint stock company, or any other form or organization, a copy of its articles of partnership or association and all other papers pertaining to its organization, including all amendments thereto;

(t) If the declarant is not the holder of legal title, copies of the appropriate documents required by subparagraphs I(q), (r) or (s) shall be submitted for the holder of legal title;

(u) Any other information including any current financial statement, which the attorney general by rules reasonably requires for the protection of purchasers. If the declarant is a corporation, limited liability company, or other entity, personal financial statements from all

principals holding more than a 25 percent ownership interest in the declarant, certified as true and complete by the individual principals, accompanied by federal income tax returns for the 2 most recent full calendar years, may be submitted in lieu of financial statements for the declarant. Financial information filed with the attorney general shall not be disclosed publicly except in connection with a hearing, civil action, or criminal action involving the party who submitted the information.

II. A declarant of a condominium of no more than 25 units may make an abbreviated registration, in lieu of these requirements, which shall contain only the documents and information required by RSA 356-B:51, I(a), (c)-(h), (k), (m), (n), (o) and (u); provided, however, that this section shall not apply to a condominium in which time sharing interests are offered.

III. A declarant of a condominium which has been registered under the federal Interstate Land Sales Full Disclosure Act may file, in lieu of the documents and information required by RSA 356-B:51, I(b)-(e) and (i)-(t) and RSA 356-B:52, I, a copy of an effective statement of record, a property report, and any exhibits requested by the agency, filed with the secretary of housing and urban development.

IV. The submission of documents and information required by RSA 356-B:51, I, may be satisfied by the documents and information contained in or attached to the public offering statement.

V. If the declarant registers additional units to be offered for disposition in the same condominium, he may consolidate the subsequent registration with any earlier registration offering units in the condominium for disposition under the same promotional plan.

VI. At any time the attorney general has reasonable cause to believe that the declarant may be unable to complete the development of a condominium, or provide for its maintenance, if responsibility therefor is assumed by the declarant, as represented in its application for registration due to:

(a) Its failure to commence or complete the development of the condominium according to schedules set forth in the application;

(b) Its failure to commence or complete the development of any other condominium or subdivided lands, as defined in RSA 356-A:1, VI, according to representations authorized and made by the declarant or subdivider in connection with the offering or disposing of any interest therein;

(c) Its failure to set forth a reasonable plan to obtain adequate financing to commence or complete the development of the condominium or provide for its maintenance; or

(d) Its commission of any false, deceptive or misleading acts in connection with the offering or disposing of any interest in any condominium or subdivided lands, as defined above;

he may require the declarant to post a bond in favor of the state or to provide evidence of financial security in such amount as the attorney general determines to be necessary to provide reasonable assurance of the commencement and completion of the development of the condominium. Such bond shall not be accepted unless it is with a surety company authorized to do business in this state. Any person aggrieved by the failure of the declarant to complete the condominium as represented in the application may proceed on such bond against the declarant or surety or both to recover damages.

VII. Each application shall be accompanied by a fee in an amount equal to $30 per unit, except that the initial application fee shall be not less than $300 nor more than $2,000, and the fee for any application for registration of additional units shall be not less than $200 nor more than $2,000.

356-B:52. Public Offering Statement.

I. A public offering statement shall be in a form prescribed by the attorney general and shall include the following:

(a) The name and principal address of the declarant and the condominium;

(b) A general description of the nature of the condominium and of the plan of its development, including the total number of units, and interests in such units, in the offering; the total number of units, and interests in such units, planned to be sold and rented by the declarant; the total number of units, and interests in such units, that may be included in the condominium by reason of future expansion or merger of the project by the declarant; and the maximum period of time the declarant will control the unit owners' association of the condominium;

(c) Copies of the declaration and bylaws;

(d) Copies of any management contract or other contracts, including leases, affecting the use, maintenance, or administration of, or access to, all or any part of the condominium with a projected budget for at least the first year of the condominium's operation (including projected common expense assessments for each unit), a statement of whether any provisions have been made in the budget for capital expenditures or major maintenance reserves, and the relationship, if any, between the declarant and the managing agent or firm;

(e) A general description of any improvements or amenities which may be constructed, including a statement whether or not assurances are given as to their construction or completion, the status of construction, zoning requirements, and an itemization of all governmental approvals obtained by the declarant affecting the condominium;

(f) A list of any encumbrances, easements, liens and matters of title affecting the condominium, and a statement that a copy of the legal documents pertaining to the same will be available on request;

(g) A list of any express warranties provided by the declarant on the units and the common area, other than the warranty prescribed by RSA 356-B:41, II, and a statement that documents evidencing such warranties will be provided to the purchaser at the time of sale;

(h) A statement of the cancellation rights set forth in RSA 356-B:50, II; and

(i) Additional information required by rules adopted by the attorney general, pursuant to RSA 541-A, to assure full and fair disclosure to prospective purchasers.

II. The public offering statement shall not be used for any promotional purposes until it is approved by the attorney general. The attorney general may, in his discretion, authorize the use of such statement prior to its approval of the registration of the condominium under such conditions as he deems appropriate. No person may advertise or represent that the attorney general approves or recommends the condominium or disposition thereof. No portion of the public offering statement may be underscored, italicized, or printed in larger or heavier or different type than the remainder of the statement unless the attorney general requires it, and no statement may be used unless in its entirety.

III. The attorney general may require the declarant at any time to alter or amend the proposed public offering statement in order to assure full and fair disclosure to prospective purchasers. A public offering statement is not current unless all amendments are incorporated.

IV. Any declarant permitted to make an abbreviated registration pursuant to RSA 356-B:51, II, and any declarant of a condominium which has been registered under the federal Interstate Land Sales Full Disclosure Act, is not required to prepare a public offering statement to be used in connection with the offer or disposition of any unit of the condominium.

356-B:53. Inquiry and Investigation.

I. Upon receipt of an application for registration in proper form, the attorney general shall forthwith initiate an investigation to determine:

(a) That the declarant can or can reasonably be expected to be able to convey or cause to be conveyed the interests in the units offered for disposition if the purchaser complies with the terms of the offer and when appropriate, the release clauses, conveyances in trust or other safeguards have been provided;

(b) That there is reasonable assurance that all uncompleted improvements and amenities will be completed as represented. Reasonable assurance includes, but is not limited to, institutional financing in the form of a revolving line of credit in an amount equal to one-fourth of the total cost of constructing the units being registered, so long as (i) the loan documents provide (a) that funds may be re-advanced during the term of the loan to construct the units, and (b) that the institutional lender shall notify the attorney general in the event that the revolving line of credit is cancelled and (ii) in addition to the funds allocated to unit construction, the applicant shall provide evidence of adequate funds to complete any infrastructure, such as roads and utilities, necessary to service the units being registered. This subparagraph shall not prohibit

the attorney general from finding other forms of financing to provide reasonable assurance. If the attorney general determines that a revolving line of credit has been cancelled, or is no longer adequate to pay for the cost of constructing the units that have been registered, the attorney general may issue a temporary cease and desist order pursuant to RSA 356-B:61;

(c) That the promotional plan is not false or misleading and complies with the standards prescribed by the attorney general in his rules and affords full and fair disclosure;

(d) Whether the declarant has not, or, if a corporation, its officers, and principals have not, been convicted of a crime involving condominium unit dispositions or any aspect of the land sales business or any other felony in this state, the United States, or any other state or foreign country within the past 10 years and has not been subject to any injunction or administrative order restraining a false or misleading promotional plan involving land dispositions; and

(e) That the public offering statement requirements of this chapter have been satisfied.

II. All reasonable expenses incurred by the attorney general in carrying out the examination required by paragraph I shall be paid by the declarant, and no order registering the condominium shall be entered until such expenses have been fully paid.

356-B:54. Notice of Filing and Registration.

I. Upon receipt of the application for registration in proper form, the attorney general shall, within 10 business days, issue a notice of filing to the declarant. Within 60 days from the date of the notice of filing, the attorney general shall enter an order registering the condominium or rejecting the registration. If no order of rejection is entered within 60 days from the date of notice of filing, the condominium shall be deemed registered unless the declarant has consented in writing to a delay.

II. If the attorney general affirmatively determines, upon inquiry and examination, that the requirements of this subdivision have been met, he shall enter an order registering the condominium.

III. If the attorney general determines upon inquiry and examination that any of the requirements of this subdivision have not been met, the attorney general shall notify the declarant that the application for registration must be corrected in the particulars specified within 15 days. If the requirements are not met within the time allowed, the attorney general shall enter an order rejecting the registration, which shall include the findings of fact upon which the order is based. During said 15 day period the declarant may petition for reconsideration and shall be entitled to a hearing within 15 days of receipt by the attorney general of said petition. The attorney general shall enter his findings on said petition within 10 days of said hearing. The attorney general shall not order a rejection of the registration until such time as the hearing, once requested, has taken place and the attorney general has entered his findings thereon, or such petition is withdrawn; provided, however, that if by the time that said findings are entered, all of the particulars specified in the attorney general's notice have been corrected or, as a result of the

attorney general's reconsideration and hearing, have been met to the attorney general's satisfaction, the attorney general shall order registration of the condominium.

IV. The declarant shall not make any material change in the plan of disposition or development of the condominium contained in an application for registration without notifying the attorney general, obtaining his prior approval and making appropriate amendment of the public offering statement.

V. (a) Any extension of a time limit set forth in a declaration and relating to RSA 356-B:16, III(c), RSA 356-B:16, IV(c) or RSA 356-B:23, III shall be effective upon the recordation of an amendment reflecting the agreement of owners of substantially completed units to which 2/3 of the votes in the unit owners' association appertain, or such larger majority as the condominium instruments may specify and if the existing rights to expand or contract the condominium or to exercise convertible land rights have expired, such an amendment shall also require a 4/5 vote of all unit owners of substantially completed units who are present or voting by proxy at a duly called and noticed meeting of the unit owners' association. The amendment shall be deemed a material change requiring submission to agency of both a copy of the amendment and a certification to include the following information:

(1) The necessary vote that was obtained.
(2) The date that the declaration was originally recorded.
(3) The date that the amendment under this section was recorded.
(4) The number of units that are substantially completed.
(5) The number of units that may be added to the condominium by reason of conversion or expansion.

(b) The certification shall be filed on a specific form made available by the attorney general upon request. Any amendment made pursuant to this section shall be clearly and conspicuously disclosed in any public offering statement that is required for the condominium. A copy of such disclosure shall be submitted to the attorney general, but does not require his approval. However, any defects or ambiguities noted therein by the attorney general and communicated to the submitting party shall be corrected prior to any further use or distribution of the statement.

356-B:55. Annual Report by Declarant.

On April 1 of each year following the registration of the condominium, the declarant shall, until such time as all of the improvements in the condominium have been completed and all of the units have been disposed of by the declarant, file a report in the form prescribed by the attorney general. The report shall reflect any material changes in information contained in the original application for registration, including but not limited to any change in the ownership of interests in the corporation or organization as required by RSA 356-B:51, I(f), (g) and (h).

356-B:56. Conversion Condominium; Special Provisions.

I. Any declarant of a conversion condominium shall include in his public offering statement, in addition to the requirements of RSA 356-B:52, the following:

(a) A specific statement of the amount of any initial or special condominium fee due from the purchaser on or before settlement or closing of the purchase contract and the basis of such fee;

(b) Information on the actual expenditures made on all repairs, maintenance, operation or upkeep of the subject building or buildings within the last 3 years or for the period of the declarant's ownership, whichever, is less, set forth tabularly with the proposed budget of the condominium, and cumulatively broken down on a per unit basis in proportion to the relative voting strengths allocated to the units by the bylaws. If information shall be set forth for the maximum time during said period such building or buildings have been occupied;

(c) A description of any provisions made in the budget for reserves for capital expenditures and an explanation of the basis for such reserves, or, if no provision is made for such reserves, a statement to that effect;

(d) A statement of the declarant as to the present condition of all structural components and major utility installations in the condominium, which statement shall include the approximate dates of construction, installation, and major repairs, if known, and the expected useful life of each such item, together with the estimated cost (in current dollars) of replacing each of the same.

II. [Repealed.]

III. The declarant of a conversion condominium shall, in addition to the requirements of RSA 356-B:51, include with the application for registration a copy of the notices described in RSA 356-C:3, I or II, and a certified statement that the notices comply with the provisions of RSA 356-C:3, I or II, and have been or will be mailed to each of the tenants in the condominium for which registration is sought, in compliance with RSA 356-C:3, I or II.

356-B:57. Escrow of Deposits.

Any deposit made in regard to any disposition of any interest in a unit shall either be held in escrow until settlement or closing or shall be delivered to the person providing construction financing, who shall either hold said deposit in escrow or shall apply said deposit to the construction of the condominium; provided, however, that any deposit made under a nonbinding reservation agreement shall be placed in escrow. Subject to the foregoing, such escrow funds shall be deposited in a separate account designated for this purpose; provided, however, if such funds are being held by a real estate broker or attorney licensed under the laws of this state, they may be placed in that broker's or attorney's regular escrow account and need not be placed in a separate designated account. Such escrow funds shall not be subject to attachment by the creditors of either the purchaser or the declarant.

356-B:58. Resale by Purchaser.

I. In the event of any resale of a condominium unit or any interest therein by any person other than the declarant, the prospective unit owner shall have the right to obtain from the owners' association, prior to the contract date of the disposition, the following:

(a) Appropriate statements pursuant to RSA 356-B:46, VIII and, if applicable, RSA 356-B:47;

(b) A statement of any capital expenditures and major maintenance expenditures anticipated by the unit owners' association within the current or succeeding 2 fiscal years;

(c) A statement of the status and amount of any reserve for the major maintenance or replacement fund and any portion of such fund earmarked for any specified project by the board of directors;

(d) A copy of the income statement and balance sheet of the unit owners' association for the last fiscal year for which such statement is available;

(e) A statement of the status of any pending suits or judgments in which the unit owners' association is a party defendant;

(f) A statement setting forth what insurance coverage is provided for all unit owners by the unit owners' association and what additional insurance coverage would normally be secured by each individual unit owner; and

(g) A statement that any improvements or alterations made to the unit, or the limited common areas assigned thereto, by the prior unit owner are not known to be in violation of the condominium instruments.

(h) A copy of the condominium declaration, by-laws, and any formal rules of the association.

(i) A statement of the amount of monthly and annual fees, and any special assessments made within the last 3 years.

II. The principal officer of the unit owners' association, or such other officer or officers as the condominium instruments may specify, shall furnish the statements prescribed by paragraph II upon the written request of any prospective unit owner within 10 days of the receipt of such request.

356-B:59. General Powers and Duties of the Attorney General.

I. [Repealed.]

II. If it appears that any person has engaged or is about to engage in any false, deceptive or misleading advertising to offer or dispose of any interest in a condominium unit, the attorney general may require by written notice the filing of advertising material relating to such condominium unit prior to its distribution.

III. If it appears that a person has engaged or is about to engage in an act or practice constituting a violation of a provision of this chapter, or a rule or order hereunder, the attorney general, with or without prior administrative proceedings, may bring an action in the superior court to enjoin the acts or practices and to enforce compliance with this chapter or any rule or order hereunder. Upon proper showing, injunctive relief or temporary restraining orders shall be granted, and a receiver may be appointed pursuant to paragraph IV. The attorney general is not required to post a bond in any court proceedings or prove that any other adequate remedy at law exists.

IV. In connection with any action brought under paragraph III, the attorney general may also petition the court to appoint a receiver to take charge of the business of any person during the course of litigation when the attorney general has reason to believe that such an appointment is necessary to prevent such person from continuing to engage in any act or practice declared unlawful by this chapter and to preserve the assets of said person to restore to any other person any money or property acquired by any unlawful act or practice. The receiver shall have the authority to sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, records, documents, papers, chooses in action, bills, notes and property of every description, including property with which such property has been mingled if it cannot be identified in kind because of such commingling, derived by means of any unlawful act or practice, and to sell, convey and assign the same and hold, dispose and distribute the proceeds thereof under the direction of the court. Any person who has suffered damages as a result of the use of any unlawful act or practice, and submits proof to the satisfaction of the court that he has in fact been damaged, may participate with general creditors in the distribution of the assets to the extent that he has sustained out-of-pocket losses. In the case of a partnership or business entity, the receiver shall settle the estate and distribute the assets under the direction of the court. The court shall have jurisdiction of all questions arising in such proceedings and may make such orders and judgments therein as may be required. In lieu of the foregoing procedure, the court may permit any person alleged to have violated this chapter to post a bond in a manner and in an amount to be fixed by the court. Said bond shall be made payable to the state and may be distributed by the court only after a decision on the merits and the process of appeals has been exhausted.

V. The attorney general may intervene in any suit involving the declarant. In any suit by or against a declarant involving a condominium, the declarant shall promptly furnish the attorney general notice of the suit and copies of all pleadings.

VI. The attorney general may:

(a) Accept registrations filed in other states or with the federal government;

(b) Contract with similar agencies in this state or other jurisdictions to perform investigative functions; and

(c) Accept grants in aid from any governmental source.

VII. The attorney general shall cooperate with similar agencies in other jurisdictions to establish uniform filing procedures and forms, uniform public offering statements, advertising standards, rules and common administrative practices.

356-B:60. Investigations and Proceedings.

I. The attorney general may make necessary public or private investigations in accordance with law within or outside of this state to determine whether any person has violated or is about to violate this chapter or any rule or order hereunder, or to aid in the enforcement of this chapter or in the prescribing of rules and forms hereunder. In aid of such investigations, the attorney general may require or permit any person to file a statement in writing, under oath and subject to penalties of perjury or otherwise as the attorney general determines, as to all the circumstances concerning matters under investigation.

II. For the purpose of any investigation or proceeding under this chapter, the attorney general or any officer designated by rule may administer oaths or affirmations and, upon his own motion or upon request of any party, shall subpoena witnesses, compel their attendance, take evidence, and require the production of any matter which is relevant to the investigation, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge or relevant facts or any other matter reasonably calculated to lead to the discovery of material evidence.

III. Upon failure to obey a subpoena or to answer questions propounded by the investigating officer and upon reasonable notice to all persons affected thereby, the attorney general may apply to the superior court for an order compelling compliance.

356-B:61. Cease and Desist Orders.

I. If the attorney general determines after notice and hearing that a person has:

(a) Violated any provision of this chapter;

(b) Directly or through an agent or employee knowingly engaged in any false, deceptive, or misleading advertising, promotional, or sales methods to offer or dispose of any interest in a unit;

(c) Made any material change in the plan of disposition and development of the condominium subsequent to the order of registration without notifying the attorney general, obtaining his approval and making appropriate amendment of the public offering statement;

(d) Disposed of any interest in a unit which has not been registered with the attorney general; or

(e) Violated any lawful order or rule of the attorney general;
he may issue an order requiring the person to cease and desist from the unlawful practice and to take such affirmative action as in the judgment of the attorney general will carry out the purpose of this chapter.

II. If the attorney general determines that the public interest will be irreparably harmed by delay in issuing an order, he may, without hearing, issue a temporary cease and desist order. Prior to issuing the temporary cease and desist order, the attorney general shall attempt to give telephonic or other notice of the proposal to issue a temporary cease and desist order to the person. Every temporary cease and desist order shall include findings of fact in support of the attorney general's determination that the public interest will be irreparably harmed by delay in issuing the order and a provision that, upon request, a hearing will be held within 10 business days of the deposit in the United States mails or delivery in hand of said order, to determine whether or not it becomes permanent.

356-B:62. Revocation of Registration.

I. A registration may be revoked after notice and hearing upon a written finding of fact that the declarant has:

(a) Failed to comply with the terms of a cease and desist order;

(b) Been convicted in any court subsequent to the filing of the application for registration for a crime involving fraud, deception, false pretenses, misrepresentation, false advertising, or dishonest dealing in real estate transactions;

(c) Disposed of, concealed, or diverted any funds or assets of any person so as to defeat or for the purpose of defeating the rights of unit purchasers;

(d) Failed to perform any stipulation or agreement made with the attorney general as an inducement to grant any registration, to reinstate any registration, or to approve any promotional plan or public offering statement; or

(e) Made intentional misrepresentations or concealed material facts in an application for registration.

Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.

II. If the attorney general finds after notice and hearing that the developer has been guilty of a violation for which revocation could be ordered, he may issue a cease and desist order instead.

III. If the attorney general makes a determination that the public interest will be irreparably harmed by delay in issuing an order, he may, without hearing, issue a temporary cease and desist order subject to the requirements of RSA 356-B:61, II.

356-B:63. Judicial Review.

I. Any person aggrieved by a decision or action of the attorney general may, by petition, appeal from said decision or action to the superior court for review. The superior court may affirm, reverse, or modify the decision or action of the attorney general as justice may require.

II. The filing of the petition does not itself stay enforcement of the attorney general's decision. The attorney general may grant, or the superior court may order, a stay upon appropriate terms.

III. Within 30 days after the service of the petition, or within further time allowed by the court, the attorney general shall transmit to the superior court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record.

IV. If, before the date set for a court hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the attorney general, the court may order that the additional evidence be taken before the attorney general, upon conditions determined by the court. The attorney general may modify his findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the superior court.

356-B:64. Penalties.

Any person who willfully violates any provision of this subdivision IV or of a rule adopted under it or any person who willfully, in an application for registration, makes any untrue statement of a material fact or omits to state a material fact shall be guilty of a class B felony if a natural person, or guilty of a felony if any other person.

356-B:65. Civil Remedy.

I. Any declarant who disposes of any interest in a condominium unit in violation of this chapter, or who in disposing of any such interest makes an untrue statement of a material fact, or who in disposing of any such interest omits a material fact required to be stated in a registration statement or public offering statement or necessary to make the statements made not misleading, is liable to the purchaser of such interest, as set forth in paragraph II, unless in the case of an untruth or omission it is proved that the purchaser knew of the untruth or omission or that the declarant did not know and in the exercise of reasonable care could not have known of the untruth or omission, or that the purchaser did not rely on the untruth or omission.

II. Any purchaser, who is eligible for relief under paragraph I, may bring an action to restrain by temporary or permanent injunction any act or practice declared unlawful by this subdivision IV and may recover the consideration, including all finance charges paid in connection with the purchase of the condominium unit together with interest at the rate of 6 percent per year from the date of all such payments, less the amount of any income received from the condominium unit, upon tender of deed reconveying title to the declarant which is as good and marketable as that which was conveyed to the purchaser by the declarant. In the discretion of the court, exemplary damages of up to $5,000 may also be awarded. If the purchaser no longer owns the condominium unit, he may recover the amount that would be recoverable upon a tender of a reconveyance less the value of the condominium unit when disposed of and less interest at the rate of 6 percent per year on that amount from the date of disposition. If the purchaser prevails in any such action, he may be awarded all reasonable costs and attorney's fees, as approved by the court.

III. Any person who materially participates in any disposition of any interest in a condominium unit in the manner specified in paragraph I and knew of the existence of the facts by reason of which the liability is alleged to exist shall also be liable jointly and severally with the declarant if and to the extent such liability may exist at common law or under other statutory provision. A right to contribution exists among persons so liable.

IV. Every person whose occupation gives authority to a statement which with his consent has been used in an application for registration or public offering statement, if he is not otherwise associated with the condominium and development plan in a material way, is liable only for false statements knowingly made.

V. At any time before the entry of an action under this section, and thereafter only with the approval of the court, a declarant or any other person may limit his exposure herein by tendering a written offer to reimburse the injured person for all mandatory damages set forth in paragraph II, including reasonable attorney's fees and court costs, if any, to the date of such tender upon reconveyance of title as set forth in paragraph II.

VI. A person may not recover under this section in any action commenced more than 2 years from the date the purchaser knew or should have known of the existence of his cause of action, but in any case not more than 6 years after his first payment of money to the declarant in the contested transaction.

VII. Any stipulation or provision purporting to bind any person acquiring any interest in a condominium unit to waive compliance with this chapter or any rule or order under it is void.

VIII. The owner, publisher, licensee or operator of any newspaper, magazine, visual or sound radio broadcasting station or network of stations or the agents or employees of any such owner, publisher, licensee or operator of such newspaper, magazine, station or network of stations shall not be liable under this chapter for any advertising of any condominium or any interest in a condominium unit carried in any such newspaper or magazine or by any such visual or sound radio broadcasting station or network of stations nor shall any of them be liable under this chapter for the contents of any such advertisement.

IX. Any broker or real estate salesman violating any provision of this chapter may, in addition to any other penalty imposed by this chapter, have his real estate broker's or salesman's license suspended or revoked by the real estate commission pursuant to RSA 331-A, for such time as in the circumstances it considers justified.

356-B:66. Jurisdiction.

Dispositions of any interest in condominium units are subject to this chapter, and the superior courts of this state have jurisdiction in claims or causes of action arising under this chapter if:

I. The condominium units offered for disposition are located in this state; or

II. The declarant's principal office is located in this state; or

III. Any offer or disposition of any interest in condominium units is made in this state, whether or not the offeror or offeree is then present in this state, if the offer originates within this state or is directed by the offeror to a person or place in this state and received by the person or at the place to which it is directed.

356-B:67. Interstate Rendition.

In the proceedings for extradition of a person charged with a crime under this chapter, it need not be shown that the person whose surrender is demanded has fled from justice or at the time of the commission of the crime was in the demanding or other state.

356-B:68. Service of Process.

I. Service may be made by delivering a copy of the process to the office of the attorney general, but it is not effective unless the plaintiff (which may be the attorney general in a proceeding instituted by him):

(a) Forthwith sends a copy of the process and of the pleading by certified or registered mail to the defendant or respondent at his last known address, and

(b) The plaintiff's affidavit of compliance with this section is filed in the case on or before the date specified by the court on the summons, or within such further time as the court allows.

II. If any person, including any nonresident of this state, engages in conduct prohibited by this chapter or any rule or order hereunder, and has not filed a consent to service of process and personal jurisdiction over him cannot otherwise be obtained in this state, that conduct authorizes the attorney general to receive service of process in any noncriminal proceeding against him or his successor which grows out of that conduct and which is brought under this chapter or any rule or order hereunder, with the same force and validity as if served on him personally. Notice shall be given as provided in paragraph I.

356-B:69. Conflict of Interests.

No member of the consumer protection and antitrust bureau, department of justice shall act as an officer, employee, agent, attorney or broker of a condominium or offer or dispose of any interest in a condominium unit required to be approved pursuant to RSA 356-B:51.

356-B:70 Committee to Study the Laws Relating to Condominium and Homeowners' Associations.

I. There is established a committee to study laws relating to condominium and homeowners' associations.

II. The members of the committee shall be as follows:

(a) Three members of the house of representatives, appointed by the speaker of the house of representatives.

(b) One member of the senate, appointed by the president of the senate.

III. Members of the committee shall receive mileage at the legislative rate when attending to the duties of the committee.

IV. The committee shall:

(a) Study laws relevant to condominium and other homeowners' associations, and the rules and regulations adopted thereunder, to assess their scope and application and whether revision or amendment is necessary.

(b) Study the registration of subdivisions under the land sales full disclosure act, RSA 356-A, and condominiums under the condominium act, RSA 356-B, with the department of justice.

(c) Evaluate the need to distinguish smaller and larger associations in the statutes and to differentiate between condominium associations and homeowners' associations.

(d) Study model laws for possible improvement to New Hampshire laws.

(e) Recommend statutory changes.

(f) Solicit information and testimony from the Community Associations Institute and others with expertise or information relevant to the committee's study.

V. The members of the committee shall elect a chairperson from among the members. The first meeting of the committee shall be called by the first-named house member. The first meeting of the committee shall be held within 45 days of the effective date of this section. Three members of the committee shall constitute a quorum.

VI. The committee shall submit an annual report of its findings and any recommendations for proposed legislation to the speaker of the house of representatives, the president of the senate, the house clerk, the senate clerk, the governor, and the state library on or before November 1, 2010 and each November 1 thereafter.

31 C.J.S. Estates § 237

Corpus Juris Secundum
August 2016 Update
Estates

John Glenn, J.D., William Lindsley, J.D., Lucas D. Martin, J.D., Eric Mayer, J.D.

XI. Condominiums
B. Creation and Documents Generally
1. In General

Topic Summary References Correlation Table

§ 237. Generally

West's Key Number Digest

West's Key Number Digest, Common Interest Communities 20 to 35, 48, 84, 171 to 173
With respect to setting up condominiums, matters not specifically addressed by the condominium enabling statute should be worked out by the parties involved.

By statute a condominium may be created by recording condominium instruments in the appropriate local registry.[1] However, by statute the developer, as a prerequisite to recordation, must substantially complete all structural components and mechanical systems.[2]

The creation of a condominium is, by statute, a unilateral act by the owner in anticipation of a future sale; it does not involve any transfer of rights to a third party.[3]

With respect to setting up condominiums, matters not specifically addressed by the condominium enabling statute should be worked out by the parties involved.[4]

Under a condominium enabling statute so providing, the failure to incorporate the condominium owners' association legally at the time of the first conveyance of individual units does not affect the prior valid creation of the condominium itself.[5]

Waiting period.

An effective waiting period imposed by state and local law before property can be subjected to a condominium regime has been held not to offend due process.[6]

CUMULATIVE SUPPLEMENT

Cases:

Condominium developers or declarants will owe fiduciary duties to each other if they are engaged in a partnership. DiPasquale v. Costas, 2010-Ohio-832, 926 N.E.2d 682 (Ohio Ct. App. 2d Dist. Montgomery County 2010).

[END OF SUPPLEMENT]

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CJS ESTATES § 237

Footnotes

[1] N.H.—Ryan James Realty, LLC v. Villages at Chester Condominium Ass'n, 153 N.H. 194, 893 A.2d 661 (2006).

[2] R.I.—America Condominium Ass'n, Inc. v. IDC, Inc., 870 A.2d 434 (R.I. 2005).

[3] Wis.—Anderson v. Quinn, 2007 WI App 260, 743 N.W.2d 492 (Wis. Ct. App. 2007).

[4] Mass.—Tosney v. Chelmsford Village Condominium Ass'n, 397 Mass. 683, 493 N.E.2d 488 (1986).

[5] U.S.—Custom Built Homes of Maine v. Hampton Management Corp., 689 F. Supp. 28 (D. Me. 1988).

[6] Md.—Rockville Grosvenor, Inc. v. Montgomery County, 289 Md. 74, 422 A.2d 353 (1980).

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American Law Institute - American Bar Association Continuing Legal Education
ALI-ABA Course of Study
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Drafting for Planned Unit Developments, Golf Course Communities, and Condominiums

***457** LENDER PROTECTION AND SECONDARY MARKET

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***459** FNMA AND FHLMC STANDARDS FOR CONDOMINIUM AND PLANNED UNIT DEVELOPMENTS.

The institutions lending money for housing, have in recent years, virtually all borrowed money from one or another secondary mortgage lenders in order to fund home loans. The largest players in this field are the two nationally chartered secondary mortgage market lenders. They are the Federal National Mortgage Association (FNMA) and the Federal Home Loan Mortgage Corporation (FHLMC).

The role of the lender in reacting to, dealing with and understanding the common interest ownership form of real estate has been described in detail in a recent monograph by Dennis Anderson and the author, entitled Lenders' Guide to the Common Interest Ownership Act recently published by the ABA Section on Real Property, Probate and Trust Law, and available from the Section headquarters.

By virtue of their size, these secondary mortgage lenders have set the standards for acceptability for condominium and community association mortgages, and have drafted extensive guidelines for these projects in order to engender sound, financeable and acceptable mortgages. These standards are over and above those required by single family homes, and have required a project review, as well as an underwriting analysis and appraisal usually required for a home mortgage.

These project standards have done more than any other scheme to unify the structure of condominium and homeowner association managed projects throughout the country. Thus, when a significant change occurs in these guidelines, the whole structure of the common interest community as an institution will be significantly affected, in particular, the new project attempting to get initial approval for permanent unit loans.

***460** Although the FNMA standards for PUD's changed in 1989, the standards for condominiums remain the same.

Condos and PUDs are now separated. Condos come in Type A, B, and C. Co-ops come in Types 1 and 2. The original guidelines for PUD's have been changed substantially as described below.

Type A Condominium -- Limited Review Project

If the unit is within an eligible condo (not a condo hotel, time share, houseboat, multifamily dwelling project or non-rebuildable nonconforming buildings,) the unit's legal phase is complete even if there are additional pending phases, the unit complies with the appraisal guidelines, the unit is owner occupied, and has a loan to value ratio of 75% or less without secondary financing, a loan on the unit qualifies under the "Limited Review Project" standards. The lender can call the loan a Type A condominium loan no matter what the loan would have been with a full review. The appraisal guidelines require a satisfactory appraisal which must include the Condo/PUD features including an analysis of the adequacy of the project budget. As a type A condominium unit loan, or a type E PUD loan, FNMA will accept the loan with merely a project warranty, and no further questions. Thus, the new onerous condominium standards apply only to new condominium projects, and investor, second home and high loan to value loans in any other condominium projects. [FN1]

Under the old requirements, Type A condominium or PUD projects, projects that were no longer under any significant developer presence, were eligible for FNMA purchase of mortgages without limit or restriction, if the project satisfied Type A, established, 90% sold, standards. FNMA could purchase investor mortgages from Type A projects, without limit, and

even if the project was substantially investor owned. [FN2]

***461** Type A Principal Residence Condominium Projects

Principal residence condominium projects require 90% sold, 70% conveyed as owner/occupied principal residences, homeowner control for one year, and no more than 10% owned by a single entity [FN3]. If the project contains over 20 units, a fidelity bond must be in place, which covers the maximum amount of funds being handled by the association, or, covers three months of collections, if certain financial controls are in place [FN4].

Some general requirements are as follows [FN5]:

- Common areas and facilities must be complete without additional phasing.
- Control of the association must be by unit owners for one year for principal residence projects.
- Hazard insurance must now be for 100% replacement cost of common areas, with deductibles of no more than the lesser of $10,000 or 1%. Liability coverage must be at a minimum of $1,000,000. These requirements also apply to Type B and C [FN6].
- There is a requirement that the developer cannot have an ownership interest in the "project facilities" (undefined). No such requirement existed in the old regulations.
- FNMA will now approve certain leasehold condominiums. No standards have yet been published, however.
- If the project is a conversion, construction and the rehabilitation must be complete.
- A new requirement that applies also to Type B, is that no more than 10% of the project can be owned by a single entity.

Type A Investor/ Second Home

Investor/second home condominium projects must be 90% sold, have no more than 10% owned of the units by a single entity, and ***462** have had control in the homeowners for 2 years. If a majority of units in an investor/second home condominium project are owned by investor owners, FNMA will buy mortgages on owner/occupied units, or second home units only with special consideration. If more than 50% are owned as owner/occupied primary homes, or second home residences and no more than 10% of the units are owned by a single person, then FNMA will buy any mortgages, including those of investors. The investor second home condominium projects must be demonstrably well managed and have a management contract terminable on 90 days notice. There must be a consistent operating budget with adequate reserves. And, no more than 10% of the unit owners can be more than one month delinquent [FN7].

Investor/second home condominium projects require a much more detailed underwriting analysis of the association documentation and internal operation, which requires a thorough investigation of the documents, management style, and records of the association, including insurance and bonds.

In addition some specific requirements for investor' second home projects, in addition to the general requirements for Type A Principal Residences, [FN8] are as follows:

- Control of the homeowners' association must be for two years.
- The association must be controlled by the unit owners for 2 years;
- The project must be demonstrably well managed;
- The Association must have an operating budget consistent with the nature of the project;
- The budget must show adequate reserves based upon age, remaining life, quantity and replacement cost of deteriorating elements; and
- The association must have no more than 10% of the unit owners in delinquency.

Type B. New and Conversion Condominiums

Type B projects are those that are between Type A and C. They are in transition from developer control to homeowner control. Type B projects must be 70% sold to principal residence ***463** or second home purchasers, by contract or closing, and the project must be complete and not subject to phasing or add ons [FN9].

The new requirements are as follows:

- Control must have been turned over or can be turned over in the near future.
- The FHLMC legal warranties can no longer be substituted for the FNMA standards.
- The project must be demonstrably well managed, the budget must be consistent with the project, and the reserves must be adequate based upon age, remaining life, quantity and replacement cost of major common area components, and the project must comply with FNMA legal guidelines.
- For conversions, an architect's or engineer's review must comment favorably on sound transmission, (ASTM Standards

E90 and E413, know them,) hazardous substances, structural integrity and condition and remaining useful life of major components.

• Insurance and a fidelity bond is required like a Type A Investor/second home project [FN10], except that condominium insurance must be on a blanket basis and cover the interior realty improvements on the interior of the units.

• Although a legal opinion need not be given to FNMA, the lender warrants that the legal documents comply with the legal requirements of the Guide. Thus, some sort of legal opinion will have to be given to the lender [FN11].

• No more than 10% of the project can be owned by a single entity.

New Type C Condominium Projects.

The Type C approval is still required to be submitted and approval received from FNMA. The procedure for preliminary ***464** review, preliminary approval, and final approval, using the form 1026, 1027 and 1028, all remain the same [FN12] . A New Type C Condominium Project approval is the only one that permits the Lender to cite FNMA in its advertising.

The New Type C project is the one that the developer and his or her drafter of condominium documents will find is the one that he or she is most involved in. It is the only one that will involve an opinion of counsel. It is also the only one that a lender may permit advertising as "Fannie Mae Approved."

The principal changes for a New Type C Project are as follows:

• Type C is now generally limited to condominium projects expected to be predominantly primary residences or second home projects. Formerly it could apply to any project that did not meet Type A or B requirements.

• For conversions, an architect's or engineer's review form is required for soundness and structural integrity.

• A written inquiry to the state agency having jurisdiction over environmental matters and laws must now be made, and a copy of any response must be included [FN13].

• Separate legal phases may be approved individually. "Legal" does not apply to construction or marketing phases that do not have separate legal standing.

• The new form 1037, Guide Form for Attorney's Opinion, required for New Type C Condominium Projects, mandates that the attorney opine that the project's legal documents comply with the applicable legal requirements contained in the FNMA Selling Guide, and with local law [FN14]. These new requirements apparently appear in Chapter 6 of the new project standards, although the language of Form 1037 seems to apply to all ". . . Fannie Mae legal requirements contained in the Fannie Mae Selling Guide except as otherwise specifically stated ***465** and explained below." Legal requirements appear all through the Selling Guide [FN15]. The form opinion should not be followed slavishly. The process and analysis of the form opinion is extensive, time consuming, and requires both a detailed familiarity with the documents and with the FNMA guidelines. It is terribly inefficient for an attorney who did not draft the documents to give a FNMA opinion, and unless the documents were drafted with the FNMA guidelines in mind, the drafting attorney cannot give a FNMA opinion without many waivers and qualifications. A form FNMA opinion with commentary follows this paper.

Type C Established Condominium projects

This is an entirely new approval category. This new category presupposes a full review by the FNMA regional office, but will involve a streamlined procedure. Essentially its project characteristics are those of a Type A investor/second home project.

• 90% of the units must be conveyed and 60% sold to primary residence, or second home purchasers.

• Conversion standards must be met if the conversion is less than three years old.

• The budget must meet Type B guidelines with adequate reserves, etc.

• There is no requirement that the documents must meet the FNMA legal guidelines [FN16].

In May, 1988, to be effective on August 1, 1988, FNMA issued new guidelines for the purchase of mortgages secured by units in condominiums and planned unit developments. (PUDs) Although the PUD guidelines were less strenuous than those imposed upon condominiums, unless the PUD conformed to "de minimis" standards, there were still a number of complex and imposing project review ***466** standards imposed for new projects, and significant turnover provisions for older projects. By "de minimus" FNMA meant a project where the association amenities and management influence on the value of the individual unit or lot was so insignificant to be disregarded in underwriting a single mortgage. Until this time, de minimus standards required an underwriting judgment by the lender to make this determination. This had resulted in a great deal of criticism because of its unpredictability. The new de minimis standards were clear, but the next level, Type E, were not, still requiring a judgment as to the significance of the common elements to the value of each unit.

The new guidelines imposed onerous and complex standards on condominiums, and limited the possibility of investor units, or mortgages from projects which had not reached very high (70%) pre-sale requirements. The new guidelines also required a

lengthy and expensive new form of borrowers' counsel's opinion.
Shortly after the effective date of the new PUD guidelines, FNMA issued a bulletin concerning de minimis PUDs. It stated that underwriters could choose to follow the old subjective standards for de minimis PUDs, follow the new standards, or use the standards that were most advantageous, either old or new. Underwriters could follow this guide while FNMA studied the impact of the new standards, for which concern had been expressed by lenders and regional offices.
In April, 1989 in FNMA Announcement No. 89-11, FNMA virtually abandoned any review standards for PUDs at all. The announcement eliminated the de minimis PUD classification. The new standard defined a "PUD" as a project (or subdivision) consisting of common property and improvements owned and maintained by an owners' association for the use and benefit of the individual units in the project (or subdivision). A project is a PUD if the owners' association require automatic, nonseverable membership for each individual owner, and has the right to impose mandatory assessments. Zoning is not a basis for classifying a project or subdivision as a PUD.
The new standards no longer recognize Type D, de minimis PUDs. There are now only two PUD project classifications, Type E, and Type F.

Type E Planned Unit Development

The sole eligibility requirement for a type E project (one for which individual mortgage loans will be available with minimum project underwriting,) is that the control of the owners' association has been turned over to the unit purchasers. The sole warranty given by the lender is that the project satisfies the project eligibility requirements.
***467** A Type F project, is essentially a project under development. There are two subcategories of Type F mortgage loans.

Type F Detached Dwelling Planned Unit Development

The first subcategory involves a project consisting solely of detached dwellings, or the mortgage is secured by a detached dwelling in a project that consists of attached and detached dwellings. This category only requires three characteristics. It requires no approval, merely a warranty by the lender of qualification. Thus a lender should get an opinion or a title certification that:
(a) The owners' association owns and maintains the common property and common improvements for the use and benefit of the individual unit owners of the project (or subdivision);
(b) The owners' association must require automatic, nonseverable membership of each individual unit owner; and
(c) The Owners' association has the right to impose mandatory assessments.
If the detached dwelling home or project can not qualify for Type E mortgage loans, (i.e. control has not been turned over for two years,) it will be classified as type F. No project review is required, but the lender must warrant that the PUD conforms to the above three characteristics described under Type F.

Type F, New, Attached Dwelling Planned Unit Development

The second subcategory involves mortgages that are secured by attached dwellings. In this instance, the lender must perform a project review. If the units consists of conversions in multi-unit buildings, FNMA must receive a project analysis for review. Any project may be submitted for review by FNMA at the lenders' option. Projects reviewed and approved by FNMA will be included on the list of approved projects, and FNMA will buy mortgages from that project list without further review by the lender. (Thus, reviewed projects is a subcategory of this subcategory, but the standards are the same.)
If the PUD is still under the control of the developer, and the mortgage is on attached dwellings, the project must be reviewed and must conform to the following criteria. The Type F--New, Attached project is the only type that requires any review. The lender can make the review, (except for conversions), or it can be submitted on a full condominium type review process using FNMA's form 1026/1027/1028 procedures and receive the final approval of a project that would allow any mortgage lender to sell any mortgage in the project to FNMA:
***468** (a) It cannot be a conversion of an existing building to a PUD.
(b) No multi-unit dwellings can represent the security for a single mortgage.
(c) Common area improvements within the project or subject phase must be improved, or satisfactory arrangements such as a bond for completion, must be approved by FNMA;
(d) 50% of the attached units in an acceptable phase must have been conveyed to outside purchasers, and the phase must be able to support the responsibilities of the association. If the income will not support the association, a cash bond covering income for two years may be substituted.
(e) The units must be owned in fee simple, and the unit purchasers must have sole ownership interest in, and the right to use

the project facilities once the control has been turned over to the owners.
(f) The project budget must include reserves that are consistent with the responsibilities of the association.
(g) The project must be covered by the required insurance. (This is unclear, but it presumably is the condominium style insurance as modified for PUD use as outlined in Chapter 7 of Part V of the Selling Guide.)
Any of these requirements may be waived if the lender can demonstrate that FNMA's mortgage risk is adequately protected.

Limited Review Project, Planned Unit Development

The "limited review project" (75% loan to value ratio) mortgages that are also permitted in condominium projects, can still be delivered with limited review (i.e. no review other than a certification that the mortgage loan/value ratio is less than 75%).

Federal Home Loan Mortgage Corporation

Almost simultaneously, on May 3, 1989, the Federal Home Loan Mortgage Corporation ("FHLMC or Freddie Mac") issued its Bulletin 89-8 on PUD requirements. FHLMC's definition of PUD requires three criteria:
(a) The individual unit owners own a parcel of **land** improved by a dwelling. Ownership is not in common with other unit owners;
***469** (b) The development is administered by a homeowners association that owns and is obligated to maintain property and improvements within the development; and
(c) The unit owners have an automatic, nonseverable interest in the homeowners association and pay mandatory assessments.
That is it. If there is a leasehold estate, or a condominium within the PUD, the requirements for those forms of ownership must be met.
No longer will there be Type I, II, and III, and de minimis classifications of PUDs like condominiums. The criteria in the former Chapter 20 for Condominium/PUD's will still apply to condominiums.
If the project includes separately owned commercial spaces, 2-4 unit dwellings, or conversions, it will require FHLMC's review and waiver.
PUD mortgages must continue to attach a PUD rider and have a PUD title insurance policy. The insurance requirements remain the same. The appraisal must continue to evaluate the PUD contribution. There is no pre-sale requirement at all, however, if the project remains under the control of the developer, the appraisal must include at least one comparable outside of the project, as well as one within the project.
Most significantly, the factors that will most certainly influence the institution of common interest community development is what these secondary lenders will not require for a planned unit development. These factors are found in what they did not say.
FHLMC does not require completion of the common area improvements; any pre-sale level; legal warranties; replacement reserve funds in the budget; or fidelity insurance, as required by FNMA; control of the association for any particular period;.
Unlike the condominium requirement of FNMA, and some of the condominium requirements of FHLMC, for a planned unit development there is no owner/occupant requirement; high pre-sale requirements; 100% replacement cost hazard insurance; or single ownership limits to 10% of the project. There is no requirement for compliance with the detailed and extensive legal requirements, and no legal opinion is required. There is no requirement for "adequate" reserves, or detailed underwriting analysis of the budget of the association.
Projects need not be "demonstrably well managed" as required for Type B condominiums under FNMA standards, nor need there be blanket insurance.
***470** New projects need not be designed predominantly for primary or secondary homes, there is no requirement for inquiry to state government on environmental topics, nor must approval be only of "legal phases."
In "New, Attached PUD" projects, under FNMA standards, a lender can opt to have FNMA review the application, using Form 1026 and receive a Form 1028 Project Acceptance that assures acceptance by FNMA for mortgages, and obviate a separate warranty with each mortgage submission. Acceptance will be good for three years. This "gold seal" of FNMA approval will obviously enhance the mortgageability of project units.
If the lender elects not to have FNMA review the project, it must accompany its mortgage with a warranty, which is good for only that submission.
Although the new PUD standards prohibit conversions, there were FNMA standards for conversions included in the former standards themselves, so a waiver of the prohibition was clearly contemplated. Because such a waiver would be too time consuming and expensive for a single loan in a given project, the conversion waiver and acceptance would only occur with a full submission application for project qualification.
The result of this change will be to make the PUD option vastly more attractive. If the common elements are owned by the

association, FNMA will consider it a PUD. In addition, if the dwelling can sit in an individually owned lot (which will most likely require subdivision approval,) FHLMC will also consider it a PUD.
In those fortunate states with the Uniform Common Interest Ownership Act, the PUD structure is almost identical to the condominium structure, and a condominium can be readily changed to a planned community with association ownership of the common elements. The Uniform Common Interest Ownership Act is an amalgam of the three acts designed for condominiums, cooperatives, and planned communities: the Uniform Condominium Act, the Model Real Estate Cooperative Act, and the Uniform Planned Community Act. They were merged into the Uniform Common Interest Ownership Act ("UCIOA") in 1982. In 1983 Connecticut passed its version of the UCIOA. Conn. Gen Stat. 47-200 et seq. (1983). Two years later, Alaska followed Connecticut by also passing its version of the UCIOA, Alaska Stat. Ann. 35-8-2 et seq., and in May of 1986, West Virginia passed UCIOA as an amendment to its UCA. W. Va. Code 368-1-101 In 1989, the Nevada legislature is considering a bill (A.B. 521) to pass UCIOA. At this writing, it is still pending. Vermont has introduced UCIOA, and there is some chance of passage.
***471** To create a PUD under UCIOA a deed is required to convey common elements to the association, and a the name of the project type must be changed from condominium to planned community. These changes will satisfy the FNMA definition. In non-UCIOA states, a PUD must be created by a declaration of covenants and restrictions, which should follow the FHA-1500 form as developed and explained in the Homes Association Handbook of the Urban **Land** Institute. Technical Bulletin 50, Urban **Land** Institute, Washington, D.C. (1962) now out of print. An air space PUD is technically possible without UCIOA, but many common law, property tax, subdivision and easement problems would have to be solved. For townhouses, or semi-detached units, or pinwheel fourplexes, where the unit sits on the ground, subdivision of the ground into individual lots can also satisfy FHLMC standards, which permit joint or common walls, but no other common ownership to comply with its definition of a PUD.0000000000000000
Our office is recommending planned communities, where ever possible. In UCIOA states the condominium will probably disappear, and in the other states, the common law covenants creating PUDs will become standard, where subdivision regulations permit.
The result of this radical relaxation of standards for planned unit developments will be to stimulate the development of PUDs where the zoning density would have previously favored condominiums. It will add to the inspiration of the federal Fair Housing Act Amendments of 1988 favoring first floor access for the handicapped, and exempting townhouses from its restrictions. These two enactments will change the face of moderate density housing throughout the country.
In addition, the lack of standards for PUD project documentation may lead to the abuses of consumers in PUDs that the former application of condominium standards to PUDs were designed to prevent. Thus we may see protective legislation in the home owner association field, following the lead of UCIOA, and Virginia's recent home owner association law.

***472** MODEL FORM FOR ATTORNEY'S FNMA OPINION.

Introductory Remarks: The following draft form opinion is an attempt to create a form, qualified opinion under the amendment to the Federal National Mortgage Association Selling Guide of April 27, 1988, effective August 1, 1988. It is based upon a hypothetical project called "Stonemason Village" from The Connecticut Common Interest Ownership Manual. This project was designed for a pedagogical purpose as a project by the Connecticut Bar Association Real Property Section committee on the new Common Interest Ownership Act. The Manual may be obtained from the Connecticut Bar Association in Rocky Hill Connecticut.
This article must be read in conjunction with the summary of new FNMA requirements set out above.
This article, in draft form was discussed at the panel and committee meeting of the Committee on Condominiums, Cooperatives and Homeowners Associations (now the six Committees on Condominiums, Cooperatives, and Associations of Co-Owners,) in Toronto, On August 8, 1988. Based on the comments at that meeting the draft has been revised. The opinion has not yet been reviewed officially by FNMA people, and the form and conclusions have not received the imprimatur of that august body.
Stonemason Village is a two phase, eighteen unit project, to be created under Connecticut's version of the Uniform Common Interest Ownership Act. The Act is a version of the Uniform Condominium Act, which, in some version is the law in 19 states.
The phases are expandable using the "**convertible** **land**" technique of the Uniform Act, where the entire property is declared at once, the first nine units are created upon substantial construction, and an option called a "development right" is retained by the declarant to create the additional units within the common elements of the original condominium.
The draft FNMA opinion is based in large part on a draft submitted by Robert Diamond and Deborah Raines, of the Virginia Bar, based upon a successful FNMA submission under the former version of the Legal Requirements of the Selling Guide.
This revised draft is being given greater dissemination to the committee in Common Sense, the newsletter of the Committee.

***473** Comments and criticisms of the members of the committees was solicited.
Because Stonemason Village was created to offer a modest range of real life drafting problems to a typical drafter, it does not qualify for FNMA approval without waivers. As a part of this article, a copy of the Article XVIII, Mortgagee Protection article may be found in the draft Declaration included in these materials. It is substantially similar to the Stonemason Village article discussed in the form. This model form is based upon a set of forms used in Connecticut and Alaska as standard condominium forms. They were initially drafted by a committee of the Connecticut Bar Association, and were based in a large part on the Chairman's forms. The Chair, Gurdon H. Buck will be authoring a version of the Stonemason Village forms, useful in all states with the uniform condominium act, or the uniform common interest ownership act, (referred to throughout the form as the "Act", with the numbering coming from the two uniform acts as published by the National Commissioners on Uniform State Laws,) including all standard forms for development, marketing, managing and financing a typical condominium, with explanations and comments, to be published by Callaghan & Company called Condominium Documents, Law and Commentary. The attached Article XVIII is similar to the Article XVIII in that forthcoming book.
A discussion on the method of drafting the waiver requests for the Form 1054 Lenders' Warranty cover letter was made at the committee meeting. Appendix B, the form language for the Form 1054 is derived from that discussion.
In particular, many of the paragraphs of the opinion do not opine that the project does not qualify, merely that in interpreting the rather ambiguous language of the Selling Guide Legal Requirements, under specific qualifications, the project does qualify. Based upon committee consensus at the meeting, no waiver is requested of those provisions. (Since each waiver costs a $100, that will save clients a lot of money as well.)
Following this article, Appendix B, is draft language for a Form 1054 Lenders' Warranty of Compliance, based on this opinion, with the waivers agreed upon at the committee meeting. Discussion was held as to which provisions were interpretations and which provisions required a waiver, and the attached were agreed to require a waiver.

***474** FORM ATTORNEY'S OPINION FOR FEDERAL NATIONAL MORTGAGE ASSOCIATION

Following FNMA Form 1037

[Attorney's Letterhead]
[Date]
First Galaxy Bank Mortgage Company
200 Main Street
Saltonstall, [State] 99999

COMMENT: The lender to whom the opinion is addressed must be a FNMA approved lender. This is required by FNMA Form 1037.

Att: Mr. Billy Banker
Project Mortgage Specialist

Re: Stonemason Village
1489 Main Street
Saltonstall, [State] 99999
The project is legally phased (by **convertible land** option).
This opinion covers phase 1.
Final Opinion

COMMENT: The name of the project and its location including the zip code is required by Form 1037. Also whether or not it is phased, the phase number, and whether this is a preliminary or final opinion are also required to be included in the subject heading. We have assumed that all of the presale and construction requirements have been completed, the project has been duly recorded, and the mortgages have been made ready for sale to FNMA. If this were to be a preliminary opinion, the conditions for reaching final approval should be added at each paragraph where applicable below.

***475** Ladies and Gentlemen:
I. You have requested the undersigned to provide certain legal services required for the referenced condominium project (the "Project"). The undersigned understands that this opinion will be relied upon by the Federal National Mortgage Association ("Fannie Mae") in determining whether certain Fannie Mae requirements have been met in connection with Fannie Mae's acceptance of any unit loan in the project.

COMMENT: This is an exact quotation of the introductory paragraph of Form 1037.

The undersigned has examined certain documents of legal significance relating to the project including the following:

A. The Declaration of Stonemason Village, Saltonstall [State] by Victor W. Xyz, Inc., a [State] corporation of Saltonstall [State] dated ___, ______, 19__; and recorded in the Office of the Recorder of Deeds, on ________, 19__, at Vol. ____, Page____. with the exhibits A-1, (Description); A-2 (table of Allocated Interests); A-4 (Plat); and A-4 (Plans) attached or incorporated by reference. Plats and Plans are filed in the Office of the Recorder at File Nos: ___________.

COMMENT: In order to issue a final opinion, these documents which must be recorded, will have to have been recorded. Form 1037 requires, as a minimum, the date of recording. Since there has been a certain level of presale requirements imposed by the construction lender and consummated before the FNMA final application is submitted, it is assumed that the documents have been recorded some time prior to the time that the project is ready for Fannie Mae acceptance, and the recording information is available. In a preliminary opinion, the reference can be to the exhibits in the Public Offering Statement, and indicated as "to be recorded."

B. The Articles of Incorporation for Stonemason Village Association, Inc., the owners' association of the Project, ("Owners' Association"); the Minutes of its Organization Meeting, and the Minutes of the First Meeting of the Executive Board of the Owners' Association.

COMMENT: Form 1037 only lists the articles of incorporation. Since, in order to be validly ***476** incorporated, and to validly undertake the duties of an Owners Association the corporation must be organized, and adopt the various resolutions establishing the regime, we have added the organization meeting minutes here. Some attorneys have had routine FNMA requirements adopted as resolutions by the Executive Board, rather than including them in the Condominium Instruments. This makes them easier to amend, but does not give the lender adequate assurance of the permanence of the provisions. It also does not satisfy the requirement of FNMA that the lender protective requirements by only amendable by a vote of 67% of the unit owners, and a majority of eligible mortgagees. In Connecticut, lenders have expected to find the FNMA protective provisions in Article XVIII of the Declaration. Thus they can be assured that they will receive notice and opportunity to object to their amendment.

C. The Bylaws for the Owners' Association adopted at the organization meeting of the Owners Association, and a part of its corporate records. The Bylaws are not to be recorded.

COMMENT: Form 1037 requires a comment on whether or not the Bylaws are to be recorded. Since under §3-106 of the Act, the Bylaws need not be recorded (See Commissioners' Comment 1.) and in Stonemason Village (and under Connecticut and Alaska practice,) we have chosen not to record them, some reference must be made as to the official character of the Bylaws that have been examined.

D. The Public Offering Statement for Stonemason Village by Victor W. Xyz, Inc. dated ________, 19__, as amended _____, 19__, and _______, 19___. With respect to the documents included in the Public Offering Statement, it is assumed that except for the versions of the documents described above in subparagraphs A., B., and C., included therein, the other documents included in the Public Offering Statement are accurate copies of those which have been duly executed, and dated, and are in effect in accordance with their terms, without amendment.

COMMENT: In order to make the opinion, the attorney must refer to the budget, the management ***477** contract, the service and maintenance standards, the form resale disclosure, and, as the opinion is one of total compliance with the Act, the Public Offering Statement itself. The actual, recorded and adopted instruments must be also referred to as to compliance with law. If they depart significantly from the documents in the Public Offering Statement, there must have been an amendment, or the disclosure may have been defective.

In order to avoid an audit of the documents included in the Public Offering Statement as to adoption and due execution, where not referred to in the organization meetings, the above assumption is made, that the copies in the P. O. S. are accurate.

E. An Insurance Policy from Gotrocks Insurance Company of Linwood, Utah, issued through the Laz-Boy Insurance Agency of Saltonstall [State], dated ________, 19____, and effective through _________, 19___, policy number 4321-006578-88-435. No opinion is given as to compliance with Chapter 7 of the Project Standards of the Fannie Mae Selling Guide, merely as to compliance with the requirement of the [State] Uniform Act.

COMMENT: The Fannie Mae Legal Requirements, Chapter 6 of its Project Standards of its Selling Guide ("FNMA Legal Requirements") do not require an opinion that the insurance provisions comply with its Chapter 7, merely that the documents require that the insurance policies be consistent (Section 608.06). However, in order for the condominium to comply with the Act, the proper insurance policies must be in place and examined. Act, §3-113. Article XXI of the Declaration (not included in this article,) outlines the insurance requirement that are designed to comply both with the Act and Fannie Mae requirements. Thus Article XXI must be used as the checklist to review the insurance policy to assure compliance, and incidentally, probably compliance with Chapter 7. However, Chapter 7 includes a number of judgment calls that are not the province of an attorney, and no opinion should be made as to such compliance.

F. Standard Form Purchase Agreement for a Condominium Unit in Stonemason Village, from Victor W. Xyz, Inc.

***478** COMMENT: The purchase agreement includes some matters that are referred to in the opinion.

G. Other [Specify any amendment to the documents listed above or any other documents or materials upon which the opinion is based.]

COMMENT: If local or state law requires any licensing for the establishment of the condominium, reference to such license should be made. Only Virginia presently has adopted Article V of the Uniform Act, and requires licensing for the sale of a Condominium. However, inter alia, New York, Florida, Arizona, California, Nevada, New Jersey, and Michigan, all require some form of state licensing by an attorney general's office or other consumer protection agency to sell, and hence to form a condominium. Thus a reference to such license should be included here. In addition several local municipalities have conversion licensing procedures, and a reference should thus be made. Several zoning ordinances have different requirements for condominiums than for other multi-family projects. In those states that have adopted a version of §1-106 of the Act, local zoning or building codes cannot discriminate against condominiums. However only about a half of the states adopting the Act have adopted that section.

The undersigned is familiar with all laws, ordinances, regulations and other legal requirements which, as of the date the Project was created, were applicable with respect to the establishment and administration of projects in the jurisdiction and locality where the Project is located.

COMMENT: This is Form 1037 language. However, nothing in the following opinion provides to the lender and Fannie Mae the opinion that the Project is in compliance with all of the laws listed above. No attorney with all of his or her normal mental faculties would or could give such an opinion. Particularly the laws applicable with respect to administration of projects include virtually the entire gamut of law itself including OSHA, environmental laws, civil rights, and every other law going back to the Magna Carta of King John.

***479** You will note that the opinion speaks as of the date the Project was created. If this were a preliminary opinion given before that date, it would speak as of the date of the opinion.

II. Based upon such examination, it is the opinion of the undersigned that the Declaration, Bylaws, Articles of Incorporation and Organization Documents referred to above, ("Condominium Instruments") comply with the requirements of Part V, Project Standards, Chapter 6, Legal Requirements, (amended through the releases effective 8/01/88) of the Fannie Mae Selling Guide ("Fannie Mae Legal Requirements") with only the exceptions noted:

COMMENT: This introduction qualifies the FNMA language to limit the opinion to the Condominium Instruments and Chapter 6 of the Project Standards. Be sure to insert the date of the latest release that your copy of the Guide incorporates. FNMA issues releases periodically, and often the mortgage bankers are not operating with the latest release. Do not rely on the last release in your files. It will inevitably be out of date. Releases are issued every two or three months or so. The release of 8/1/88 contained significant changes to the FNMA Selling Guide, and entirely changed the legal guidelines, and the typing of common interest communities. The model documents have attempted to conform to the 8/1/88 release.

A. With respect to the establishment of Project and compliance of the Condominium Instruments as implemented in the applicable provisions of the Public Offering Statement, therewith, all requirements of the [State] Uniform .... Act [citation] ("Uniform Act") have been complied with. [If applicable also reference local laws, ordinances and legal requirements regarding the establishment of a condominium project and the compliance of the subject project documents.]

COMMENT: The first subparagraph of the opinion portion of Form 1037 merely requires a statement that all requirements of the Act with respect to the Project have been complied with. It is our opinion that is overly broad. The bracketed language recited above is from the Form 1037, and the limitation to establishment and compliance of the documents ***480** appears there. Thus we feel that it is appropriate to limit the opinion to the same categories. Your title insurance company in other than Uniform Act states would want the same opinion. (In Uniform Act states, insubstantial failure of the declaration to comply with the Act does not affect marketability and a title company can be much sloppier in its assurance of marketability. Subsection 2-103 (d) of the Act.)

This provision was the only one required in the Form 1037 prior to the August 1, 1988 amendment. It is principally a statement that the developer's lawyer did not commit malpractice. If the documents had been reasonably drafted, the developer could expect compliance with local law. No reference to the FNMA Guide was needed, and the opinion could be given without reference to the Guide.

We have referred to the Public Offering Statement in this paragraph alone. The Public Offering Statement is also occasionally referred to in the qualifications of the FNMA compliance paragraph below.

B. The Condominium Instruments comply with the requirements of Part V, Project Standards, Chapter 6, Legal Requirements, of the Fannie Mae Selling Guide (amended through 8/1/88) except as otherwise specifically stated and explained immediately below. Definitions of significant terms are found in the Declaration.

COMMENT: The August 1, 1988 provision of Form 1037 required that the opinion state that:

"The documents of legal significance relating to the Project, as listed in the second paragraph of this letter comply with the Fannie Mae legal requirement contained in the Fannie Mae Selling Guide, except as otherwise specifically stated and explained immediately below."

The term "legal requirements" was not defined or limited. Obviously the Selling Guide is loaded with "legal requirements". By limiting the opinion to Part V, Chapter 6, ***481** the attorney can have a limited area to review and opine to. Since Chapter 6 is entitled "Legal Requirements", it is reasonable to assume that that chapter is what was intended as the basis for the opinion. The introduction to Chapter 6 seems to bear this out.

The regional offices of FNMA seem to expect that this opinion will be qualified. One regional counsel was heard to say that he would be suspicious of a legal opinion that was totally unqualified.

Since so many of the standards of Chapter 6 are not those that an attorney can opine upon, qualification is essential.

We thus go through the Chapter on a paragraph by paragraph basis, and provide qualifications and references to the provisions of the Act and the Condominium Instruments that define our position.

The text of the opinion is self explanatory, and few comments are included. It must be read with the provisions of the Fannie Mae Legal Requirements open. A copy of the current (8/1/88) Legal Requirements are attached as Appendix C. They must be read with the remainder of the Selling Guide, and they may very well be obsolete. However, to evaluate how the author treated each category, these provisions are useful.

The underlined references are to the sections in the 8/1/88 update to the Fannie Mae Legal Requirements. Document references are to the Model Documents prepared by the author, and based upon the model documents of the Connecticut Common Interest Ownership Manual. A sample Mortgagee Protective Clause is attached as Appendix B. Where references are made to that Article XVIII, the appendix can be reviewed for those provisions. Reference is also made to other articles of the model forms which are not attached. Your own documents should be made to conform to those references. All references should be changed to conform to the drafter's own documents. Many of the design and management decisions were unique to the model project.

***482** Especially, the assignment of limited common element, and maintenance responsibility are unique to the model project.

You can expect about twenty hours of review and analysis to create the first model opinion letter for your own project. Obviously, once standard clauses are found, you can use the opinion as a form, and only differences need be found.

Section 601. In accordance with the requirements of Section Part 5, Project Standards, Chapter 6, Legal Requirements, of the Fannie Mae Selling Guide, ("Fannie Mae Legal Requirements,") Section 601, we have reviewed the Condominium Instruments and the applicable state local law as set forth above and as limited above and are providing this opinion. Pursuant to Section 301.01 A. of Chapter 3 of the Selling Guide, this firm is not an employee, principal, or officer of the developer or sponsor of the Project, however, our firm does represent the developer in several legal matters including preparation of the Condominium Instruments and the Public Offering Statement.

1) Pursuant to the following provisions of the declaration: Section 1.5; Section 1.18; Section 1.32; Article III; Section 4.2; Article V; Article VII; as they may be amended from time to time pursuant to the Reservation of Development Rights in Article VIII; Article XII; as Unit boundaries may be relocated between adjoining Units pursuant to Article XIV; Section 15.4; and Section 15.8, when read together with Exhibits A-3, the Plat and A-4, the Plans, together provide legal description of the Units, Common Elements and Limited Common Elements. This description complies with the Act, and practice in [State], no opinion is given as to its clarity;

2) Article VI, with respect to created Units, Limited Common Elements and Common Elements; Article VIII, with respect to responsibility of the Declarant for Development Rights Area; Section 13.3; Sections 19.1 and 19.2; and with respect to damage to or destruction of the property, Article XXIII of the Declaration; read together, provide for the allocation of maintenance and repair responsibilities;

3) Article XV of the Declaration provides a mechanism for amending the Declaration including the plats and plans attached, and Article XVI of the Declaration provides a mechanism for amending the Bylaws. The Articles of Incorporation are amendable in accordance with the Bylaws.

***483** 4) Section 1.2; and Article IX of the Declaration; provide for an allocation of owners voting rights and general allocation of assessments; Article XIX provides for assessment and collection of common expenses some in accordance with the allocated interest and some with respect to expenses attributable to fewer than all Units. Section 25.2 authorizes the Executive Board to levy fines and additional charges as common expense assessments; and the Declaration Schedule 8-2 allocates the allocated interest with respect to the first phase and all when read together provide for an allocation of common expenses. Whether such allocations are equitable is not a legal matter as to which it is appropriate for us to provide an opinion. It must be pointed out that pursuant to Subsection 2-107 (b) of the Act, the allocations of the allocated interests may not discriminate in favor of the Units owned by the Declarant or an affiliate of the Declarant. The allocations

do not so discriminate.

Section 601.01. Section 18.6 of the Declaration provides that the Association must maintain current copies of the Declaration, Bylaws, Rules, books, records, and financial statements. The Association is required to permit any Eligible Mortgagee or Eligible Insurer or other first mortgagee on Units to inspect the books and records of the Association during the normal business hours.

Section 18.7 of the Declaration, provides for the provision of financial statements to an Eligible Mortgagee or Eligible Insurer. The Project does not consist of fifty or more Units, however, if the development rights are exercised to create more than fifty Units, the Owners Association must provide an audited statement for the preceding fiscal year if an Eligible Mortgagee or Eligible Insurer submits a written request for it. When the Project consists of fewer than fifty Units and there is no audited statement available, any such mortgage holder or insurer is allowed to have an audited statement prepared at its own expense. However, the availability of such an audited or certified statement is available only to Eligible Mortgagees or Eligible Insurers. The submission of a written statement to the Association by any qualified mortgagee or insurer will make them Eligible Mortgagee or Eligible Insurers and, thus, any holder, insurer or guarantor of a first mortgage has a right thereunder.

COMMENT: This paragraph assumes that the phase receiving approval has less than fifty units, but will expand to over fifty units. If this is not the fact, the paragraph will have to change accordingly.

***484** Section 601.02. Pursuant to the discussion above, Project documents give the Unit Owners the right to amend the Project documents, the Declaration may be amended by a vote of the Unit Owners, the Bylaws by the Executive Board. Pursuant to Article XVIII of the Declaration, specified percentages of eligible mortgage holders defined as “Eligible Mortgagees” (which definition conforms to the requirements of this section,) have the right to join in decision making about certain amendments to the project documents.

No opinion is given as to whether or not the following amendments are all of the amendments that might be of a material nature. However, those amendments listed in Section 601.02 of the Fannie Mae Legal Requirements, considered as material would require an amendment to the Declaration as provided. Certain items i.e. the increase or decrease in Special Declarant Rights, increase in the number of Units, the changes in the boundaries of a Unit, the changes in the Allocated Interest of a Unit or changes in the uses to which a Unit is restricted, may not be amended without the unanimous consent of the Unit Owners pursuant to Section 15.4 of the Declaration. In addition other amendments i.e. those that may be executed by the Declarant’s exercise of his Development Rights or by the conveyance of easements and licenses pursuant to Article XI of the Declaration or with respect to relocation of boundaries between adjoining Units pursuant to Section 14.1 of the Declaration. All other amendments require a vote of 67% of the votes of the Unit Owners pursuant to Section 15.1 of the Declaration. In addition, approval of the actions listed in Section 601.02 of the Fannie Mae Legal Requirements must be obtained by Eligible Mortgagees who represent at least 51% of the votes of the Association with the following exceptions: a) with respect to consent for reallocation of interest in the Common Elements or Limited Common Elements, when Limited Common Elements are reallocated by agreement between the Unit Owners and only those Unit Owners and only the Eligible Mortgagees holding Security Interest in such Units need approve such action; b) when there is a redefinition of a boundary of adjoining Units, or c) when a Unit is being subdivided, then only those Unit Owners and Eligible Mortgagees holding Security Interest need approve such action.

In addition, pursuant to Section 18.4(b) of the Declaration, when Unit Owners are considering termination of the legal status of the Project for reasons other than substantial destruction or condemnation of property, consent of Eligible Mortgagees representing at least 67% of the ***485** Eligible Mortgagees is required pursuant to Section 15.4(d) of the Declaration.

Under Section 18.4 (d) of the Declaration, the failure of an Eligible Mortgagee to respond within thirty (30) days to any written request of the Association, delivered by certified or registered mail “return receipt requested”, for approval of an addition or amendment to the documents or wherever mortgagee or insurer approval is required, shall constitute an implied approval of the addition or amendment or consent. By virtue of Sections 1.13 and 1.14 of the Declaration, Definitions of “Eligible Insurer” and “Eligible Mortgagee” are those holders of a first Security Interest in a Unit which have notified the Association in writing of its name and address that holds a first Security Interest in a Unit. The documents do not provide that if a notice is other than in writing, that the mortgage holder thereupon becomes an “Eligible Mortgagee”.

The Documents do not require the establishment of professional management.

COMMENT: The FNMA requirement is that if the project documents or an eligible mortgagee requires professional management, there be a vote of 67% of the unit owners and 51% of the eligible mortgagees to amend the documents to decide to establish self management. I do not think that is what FNMA meant, since the model documents do not require professional management in the first place. It seems that FNMA wants the unit owners and the mortgagees to participate in a decision to terminate professional management. But that is not what FNMA said.

Any provisions that expressly benefit mortgage holders, insurers, or guarantors must be amendable only by at least 67% of the unit owners and 51% of the eligible mortgagees. Several provisions in the legal requirements, i.e. section 608 require certain provisions in the bylaws. The bylaws are amendable by a vote of the executive board. Section 606.02 requires a working capital fund of two months' assessments. Section 608.05 requires that the association maintain adequate reserves. These provisions are also in the bylaws, and are amendable by the ***486** executive board. However, these provisions are not expressly for the benefit of mortgage holders, etc.

Section 602. The Project is not a legally expandable project as defined by expansion through phasing or staging through incremental development by addition of **land**.

COMMENT: FNMA states that it will consider accepting on an individual basis flexible projects which are expandable in a manner such as the model. However no standards for such acceptance are given, and the flexing of the model follows the standards of adding phases as provided in the legal requirements. Thus no waiver is requested.

However, the Project is phased pursuant to Development Rights reserved in Article VIII of the Declaration as follows:

The developer has reserved the right by amendment to create Units, Common Elements and Limited Common Elements and the location shown as "Development Rights Reserved in this Area" on the Plats and Plans.

This right falls within the definition of "**Convertible** Real Estate" under Section 602 of the Fannie Mae Legal Requirements. There is no right for withdrawal of real estate other than the right to withdraw and grant easements to public utility companies and to convey utility lines, pipes, wires, ducts, conduits and facilities for the purposes of providing utility and other services to improvements to be constructed on the **land**. No other right to withdraw real estate or subdivide Units has been provided.

The provisions for the exercise of the Development Rights for **Convertible** Real Estate satisfies the requirements of Section 602 of the Fannie Mae Legal Requirements for a legally expandable project in that:

The area wherein the **Convertible** Real Estate Rights may be exercised has been legally described on Exhibit A-3 and shown as "Development Rights Reserved in this Area". The maximum number of Units that may be added is described in Section 8.2(b) and (c) of the Declaration, and in this Declaration not more than nine (9) additional Units may be created and not more than five (5) garage and four (4) carports as Limited Common Elements may be built. The time limit within which the **Convertible** Rights may be exercised ***487** by the Declarant is limited to seven (7) years after the recording of the additional Declaration pursuant to Section 8.2(a).

COMMENT: Query whether a time limit for expansion in excess of seven years will require a waiver. The standard is "usually limited to seven years..." Thus a limit in excess of seven years may be unusual pursuant to FNMA, but not a violation.

Formulas for the allocation of interests for the Units to be created within the **convertible land** with respect to the undivided interest in the Common Elements and the liability for the common expenses are based upon the relative floor area of each Unit and with respect to votes each Unit shall have one equal vote. These provisions are found in Section 9.2 of the Declaration. Pursuant to Subsection 2-101(b) of the Uniform Act, all structural components and mechanical systems of all buildings containing or comprising any Units created by an amendment to the Declaration adding Units must be substantially completed in accordance with the plans as evidenced by a recorded certificate. All improvements need not be completed. Since all Unit Owners in new phases share in the undivided interest of the Project's total common areas, there is no statement of reciprocal easements for specified common areas in the various phases. However, the Declarant has reserved the right to construct underground utility lines, pipes, wires, ducts, conduits and facilities across the community for the purpose of serving **land** designated as "Development Rights Reserved in this Area" on the plat. In addition, the Declarant is reserved the right to withdraw such easements and convey them to public utility companies as described above. The document for the exercise of development rights that will be recorded pursuant to Section 2-110 of the Uniform Act, the amendment to the Declaration must assign an identifying number to each new Unit created and, except in the case of subdivision of Units, reallocate the Allocated Interest among the Units. The amendment must describe any Common Elements and Limited Common Elements created, in the case of Limited Common Element may designate the Unit to which he is allocated to the extent required by Section 2-108 of the Act (Limited Common Elements). A sample of the annexation document is included in the Public Offering Statement as Exhibit A-6. Expansion has not been provided by merger of legally separate projects. Pursuant to Section 8.2(d) of the Declaration, Quality of Construction, any buildings and improvements to be created in the property shall be consistent with the quality of those constructed pursuant to the Declaration as initially recorded.

***488** Section 603. The Unit Owner's interest in the Unit is in fee simple. The Project does not involve a leasehold estate. Each Unit Owner's estate consists of a defined space in a building as described above (the Unit), an undivided interest in the Common Elements and the right to use Limited Common Elements and other easements. The criteria for the allocation of the Unit Owner's undivided interest in the Common Elements described above, no opinion is given as to whether or not

this method is an equitable or reasonable basis. However, in this instance the allocations of the percentage interest are proportioned to the Unit's relative size excluding basement areas. Definitions described under the description under Section 601 above provide a clear definition as the component elements of the Unit estate - the Unit, the interest in the Common Elements and all Limited Common Elements, except for parking spaces shown on the plat which may be subsequently allocated as Limited Common Elements by the Declarant pursuant to Subsection 8.1(b) in Article XII the Declaration. Certain significant Limited Common Elements are identified in the legal plat or plan Exhibits A-3 and A-4 to the Declaration and are assigned to the Units by the plat or plan or the Declaration. No opinion is given as to whether or not these constitute "all significant limited common areas" as required by the Fannie Mae Legal Requirements. Subsection 2-108(c) and Subdivision 2-105(a)(7) of the Uniform Act allow the Declaration to provide for subsequent allocation as Limited Common Elements certain portions of real property not subject to Development Rights. Subdivision 2-105(a) (7) of the Act requires that a description of any subsequently allocated property included in the Declaration and Article XII of the Declaration sets out the procedure to be followed in making the parking spaces Limited Common Elements. Pursuant to Subdivision 2-109(b) (10) of the Act, the location and dimensions of the parking spaces which are to be Limited Common Elements need not be shown on the plans and those shown on the plans are merely schematic and numbered.

In general, and subject to the above, the description of each part of the Project with respect to ownership and responsibility from maintenance and repair are set out, except for those Limited Common Elements described in Article V Section (a) and Section (b) of the Declaration. In addition, Article V describes specific areas which are Limited Common Elements which are not necessarily accurately depicted on the plats or plans. Pursuant to Section 6.3 of the Declaration, certain Limited Common Elements have portions of maintenance repair and replacement assigned to the Unit Owners, portions assigned to the Common Elements. Specifically, any common expense associated with the ***489** maintenance, repair, replacement, of heat exchanges, heater outlets, enclosures and mechanical attachments are assessed against the Units or Units which the Limited Common Element is assigned. Common Expenses associated with the maintenance, repair or replacement of components and elements attached to, planted on, or part of, yards, patios, decks, exterior surfaces, trim, siding, doors, windows and elevators will be assessed against the Unit or Units to which the Limited Common Elements assigned. If any such Limited Common Element is assigned to more than one Unit, the common expense allocated to the Limited Common Elements are assessed equally among the Units to which they are assigned. Common expenses associated with the maintenance, repair or replacement of the chimney serving unit 1-9 is assessed against the Unit Owner 1-9. Common expenses associated with the cleaning, maintenance, repair or replacement of all the Limited Common Elements is assessed against the Units in accordance with their allocated interest in the common expenses. Each Unit Owner is responsible for removing, leaves, debris from all patios which are Limited Common Elements.

If any such Limited Common Element is appurtenant to two or more Units, the owners of those Units will be jointly responsible for such removal. Common areas, elements and facilities are not separately owned or held in a leasehold estate.

[Alternative A - if your statute provides for easements for encroachments under the alternative language of §2-114 of the Uniform Act then the following language should be included:]

Pursuant to §2-114 of the Act, to the extent that any Unit or Common Element encroaches upon each other, a valid easement for the encroachment exists.

The easement does not relieve the Unit Owner of liability in the case of his willful misconduct nor relieve it declared under the person of liability for failure to adhere to any plats or plans.

[Alternative B. If your statute provides for the alternative of the Uniform Act §2-114, Monuments As Boundaries, the following statements should be included:]

Construction, reconstruction, repair, shifting, settlement or other movement of a portion which results in an encroachment as a common area in the Unit or the Unit on the common areas does not create a valid easement. However, pursuant to §2-114 of the Uniform Act existing physical boundaries of a Unit or the physical boundaries of the Unit ***490** be constructed in substantial accordance with the description contained in the original Declaration or its legal boundaries, rather than the boundaries derived from a description contained in the original Declaration, regardless of vertical or lateral movement of the building of minor variance between those boundaries and the boundaries derived from the description contained in the original Declaration. This section does not relieve the Unit Owner of liability in case of his willful misconduct or leave it declared or any other person of liability for failure to adhere to any plats and plans.

COMMENT: If your statute uses monuments as boundaries, rather than easements for shifting boundaries, you will require a waiver of the last paragraph of section 604.

The Declaration provides or no other limits to the extent of such shifting of boundaries.

Section 605. With respect to condemnation, §1-107 of the Uniform Act provides for procedures for the handling of the losses and proceeds from condemnation or eminent domain proceedings. Section 1.31 of the Declaration provides for the establishment of a trustee for the receipt of condemnation and other awards. Pursuant to Section 18.10 of the Declaration

any eligible mortgagee may require that the proceeds of condemnation be payable to a trustee so established. Upon request the trustee may be required to be a corporate trustee. Unless otherwise required, the members of the executive board, acting by a majority vote through the president, may act as trustee. Pursuant to Section 25.2(f) of the Declaration, the executive board acting in behalf of the Association may institute, defend or intervene in litigation on behalf of the Association or two or more Unit Owners of matters affecting the Common Interest Community. Therefore the Association is authorized to represent the Unit Owners in proceedings, negotiations, settlements and agreements involving two or more Unit Owners. However, if a condemnation involves a single Unit Owner and that Unit Owner will be represented by himself. With respect to damage or destruction of the property Article XXIII of the Declaration, provides for procedures for the handling of losses and proceeds.

In brief any portion of the Common Interest Community for which insurance is required must be repaired or replaced promptly by the association unless the Common Interest community is terminated, replacement would be illegal or eighty percent of the Unit Owners and the eligible mortgagees vote not to restore. With respect to termination ***491** and liquidation provisions of § 2-118 of the Uniform Act prevail. Distribution of funds in connection with the termination of the Project is to be made pursuant to Section 2-118(j) unless the Units or limited Common Elements are destroyed prior to the termination, To the extent that allocation of the fair market value can be made, the respected interest of the Unit Owners are the fair market values of the Units immediately before termination and liquidation established by appraisal. If such determination cannot be made the interests are in proportion to the respective Common Element Interest before termination.

Section 606. Pursuant to Section 8.4 of the Declaration the Declarant reserved certain "special Declarant rights" as follows: (a) to complete improvements indicated on the plats and plans filed with the Declaration; (b) to exercise development rights reserved in the Declaration as described above; (c) to **convert** Common Elements into Units and Limited Common Elements, (d) to withdraw utility rights of way and to allocate not more than eighteen of the parking spaces as Limited Common Elements; (d) to maintain sales offices, management offices, signs advertising the Common Interest Community models; (e) to use easements through the Common Elements for the purpose of making improvements within the Common Interest Community; and (f) to appoint or remove an officer of the Association Executive Board member during a period of Declarant control. Except for the above special declarant rights, the Declarant does not retain an ownership interest or have any other rights in the facilities or Common Elements related to the property. The amenities and facilities, including the parking and recreation facilities, are owned by the Unit Owners under the control of the Association and are not subject to a lease between the Unit Owners and another party. No opinion is given as to whether or not these rights are "reasonable" as required by Section 606 of the Fannie Mae Legal Requirements.

COMMENT: The committee felt that this did not require a waiver, although the rights reserved were in excess of simply marketing and easements for completion. These rights are permitted by a well conceived statute, and could be considered "reasonable".

Section 606.01. The Project documents do not require professional management. However, pursuant to the Section 25.2 of the Declaration, the Executive Board is empowered to hire, discharge managing agents and under Resolution 16 of the initial organization meeting of the Association, Able Management Company, Inc. is designated as the manager. A ***492** management contract, copy of which is attached in the Public Offering Statement has been executed. Able Management is an affiliate of the Declarant. Management contract provides for termination without payment of any penalty and upon an advanced notice of ninety days.

COMMENT: Note, if the project documents do not require professional management, it would appear that the self-dealing, non-cancellable management contract with the developer would be permitted. That clearly is not what was meant.

Section 606.02. Pursuant to Paragraph 10 of the Standard Purchase Agreement with each purchaser, each purchaser agrees to pay at closing an amount equal to two months of regularly budgeted common expense assessments based upon the initial monthly common expense assessment for which a particular Unit shown in the Public Offering Statement. The funds are to be held as a capital contribution for the Association and may not be refunded to the purchaser. Pursuant to Section 8.5 of the Bylaws a working capital fund is to be established in the amount of two months regularly budgeted initial common expense assessments for each unit. Any amounts paid into this fund are not to be considered as an advance payments of assessments. Each Unit share the working capital fund may be collected by the Declarant at the of the sale the Unit is closed or the termination of declarant control pursuant to Section 8.9 of the Declaration, if earlier. Until control of the Project is transferred, the working capital shall be deposited in a segregated fund without interest to the Association. While the Declarant is in control of the Association, it cannot use any of the working capital funds to defray its expenses, reserve contributions, or construction costs or make up budget deficits.

Section 607. Pursuant to Section 8.9 of the Declaration and Subsection 3-103(d) - (g) of the Uniform Act, Declarant control

during which a Declarant or persons designated by the Declarant may appoint and remove officers and members of the executive board terminates no later than the earlier of: (a) 60 days after conveyance of 75% of the Units may be created to Unit Owners other than the Declarant; (b) two years after all Declarants have ceased to offer Units for sale in the course business; (c) two years after any right to add new Units was last exercised; or (d) five years after the first Unit is conveyed to a Unit Owner other than a Declarant. It is noted that this Project, although not expandable, is "flexible" pursuant to development rights described above. Section 607 of the Fannie Mae Legal Requirements, permits the five year ***493** limitation period as this Project is not a large development and as time limits have not been extended.

Section 608. The Bylaws provide for extensive details as to the ability of the Unit Owners to govern the Project. No opinion is given as to whether such detail is sufficient to govern the Project successfully. The Bylaws provide provisions for the election and removal of officers and directors. No opinion is given as to whether or not these provisions are adequate. As described above voting rights are allocated equally to each Unit. On certain matters differing percentages of the Unit Owners approval are required for certain matters. No opinion can be given as to which particular matters the Fanny Mae legal requirements are referring or whether or not the differing percentages required, except as described above, are appropriate.

Section 608.01. The Executive Board of the Association has responsibility for levying and collecting general and special assessments for common expenses pursuant to Article XIX of the Declaration, and the Association has the power to levy and collect general and special assessments for common expenses. Pursuant to Subsection 25.2(c) of the Declaration, the executive board, acting on behalf of the Association may collect assessments for the common expenses for the Unit Owners. There is no restriction on increases of assessments, other than the fact that the Association must operate on a non-profit basis. The assessments are allocated proportionate to each Unit Owner's Estate's Interest in Common Expenses relative to size as described above. Pursuant to Section 19.1 of the Declaration all common expenses are assessed against all Units in accordance with a percentage interest in the common expenses as shown on Schedule A-2 to this Declaration.

Section 19.10 of the Declaration provides that the common expense assessment shall begin on the first day of the month which conveyance of the first Unit to a Unit Owner other than a Declarant occurs.

A reduced assessment may not be allocated to unsold Units provided that they have been created, and the first Unit is sold.

Section 608.02. The Association has a lien on a Unit for any assessments or fines due from the time the assessment or fine becomes due. The lien is prior to all other liens and encumbrances on the Unit except those recorded before the recordation of the Declaration, a first security interest on a Unit recorded before the date which the assessment sought to be enforced becomes delinquent and liens for real estate taxes and governmental assessments. A ***494** lien is also prior to all security interests to the extent of the common expense assessments based on the periodic budget adopted by the Association which assessments would have become due in the absence of acceleration during the six months immediately proceeding institution of an action to enforce either the Association's lien or security interest. This limited priority is pursuant to the provisions of the Uniform Act.

If a holder of a first security interest in the Unit forecloses the security interest a purchaser at the foreclosure sale is not liable for any unpaid assessment against that Unit which become due before the sale other than the assessment which are prior to the security interest described above. Any unpaid assessments not satisfied from those proceeds of the sale become common expenses collectable from all of the Unit Owners including the purchaser. This is pursuant to Subsection 19.4(j) of the Declaration.

Section 19.8 of the Declaration requires common expense assessments to be due and payable monthly as required for those jurisdictions providing for priority over the first mortgage lien. The undersigned is not aware of the imposition of other specific requirements by FNMA in the instance of such special priority.

Pursuant to Section 18.4(c) of the Declaration the Association may not change the period for collection of regularly budgeted common expenses to other than monthly without the consent of all eligible mortgagees.

Section 608.03. The Declaration provides remedies for Unit Owner's failure to pay assessments levied by the Association as follows pursuant to its Section 19.4. As described above, the Association has a lien for assessments levied against the Units including fees, charges, late charges, fines and interests. Recording of the Declaration constitutes record notice and perfection of lien. Any judgment or decree in an action shall include costs and reasonable attorneys fees for the prevailing party. Any judgment or decree in an action is enforceable by execution under the state's statute on judgment executions. A receiver may be appointed to collect sums due from the Unit Owner during the pendency of an action.

Each assessment against the Unit is the personal obligation of the person who owns the Unit and the lien runs with the title whether or not the successors agree to assume the obligation. However it would appear that the obligation is not the personal obligation of successors.

***495** Section 608.04. Section 6.4 of the Declaration, provides that any person authorized by the executive board has the right of access to all portions of the property for the purpose of performing emergency repairs and to do other work

reasonably necessary for the proper maintenance of the Common Interest Community and for other purposes of performing installations, alterations and repairs, including repairing and replacing utility meters and related pipes, wires and equipment, provided requests for entry are made in advance, and such entry is at the time is reasonably convenient to the effected Unit Owner. In a case of emergency, no request or notice is required. Such right of entry shall be immediate and with such force as is reasonably necessary to gain entrance whether or not the Unit Owner is present at the time. No opinion is given as to whether or not this is a reasonable right of entry. Subsection 25.2(k) grants the executive board the power to grant easements for any period of time including permanent easements and to grant leases and licenses and concessions for no more than one year across the Common Elements. Thus the Association has the right to grant permits, licenses and easements over the common areas, for utilities, roads and other purposes necessary for the proper operation the Project.
Section 608.05. Pursuant to Section 8.6 of the Bylaws as a part of the adoption of the regular budget pursuant to Section 19.5 and 19.6 of the Declaration, the executive board shall include an amount, which in its reasonable business judgment, will establish and maintain an adequate reserve fund for replacement of improvements and the Common Elements and those Limited Common Elements that it is obligated to maintain. The regular budget requires that it be collected out of the regular assessments for common expenses. No opinion is given as to whether or not the reasonable business judgment of the executive board will in fact generate “adequate” reserves.
Section 608.06. Article XXII of the Declaration requires the Owner’s Association to maintain hazard and flood insurance, liability insurance and fidelity bond coverage. Article XXII is approximately consistent with the requirements of Chapter 7 of the Project standards of the Fannie Mae guide. However, we give no opinion with respect to the specific requirements of Part 5, Chapter 7 of the Fannie Mae selling guide and we give no opinion as the provisions of the insurance policy and fidelity bonds actually acquired by the Unit Owner’s Association.
Section 608.07. Subsection 25.2(f) of the Declaration, grants the executive board acting on behalf of the Owner’s Association the power to institute or defend litigation or ***496** administrative proceedings or seek injunctive relief for violation of the Association Declaration, Bylaws or rules in the Association’s name on behalf of the Association or two or more Unit Owner’s in matters affecting the Common Interest Community. §4-117 of the Uniform Act gives the power to any person or class of persons adversely affected by failure to comply with any provision of the Act or any provision of the Declaration of Bylaws to have a claim for appropriate relief. Punitive damages may be awarded for willful failure to comply with the Act. A court in an appropriate case may also award reasonable attorneys’ fees.
Section 608.08. The documents do not reserve to the Project developer, the sponsor or the Owner’s Association right to use summary abatement or similar means to enforce restrictions against use of property within the Unit.
Section 609. As described above all Units which are created are subject to all the rights and duties assigned to Unit Owner’s in the Project documents. These rights and duties are those of the unsold Units of the Declarant as well.
Section 609.01. Because each Unit Owner has an undivided interest in the Common Elements of the Project, each Unit Owner has a right of egress and ingress across the Common Elements to such Unit or to any portion of the Project which the Unit Owner has a right to enter, subject only to reasonable restrictions made by the Unit Owner’s Association and designations of limited uses for Common Elements, Limited Common Elements made by Unit Owner’s Association or a Declarant in the Declaration. Pursuant to the Act, Subsection 2-107(f), any purported conveyance, encumbrance, judicial sale, or other voluntary or involuntary transfer of an undivided interest in the common elements made without the unit to which that interest is allocated is void.
Section 609.02. The only restriction appearing on the Unit Owner’s right to sell, transfer, convey his or her Unit appears in Section 10.3 of the Declaration. A Unit may not be conveyed pursuant to a time sharing plan nor may a Unit be leased or rented for a term of less than 60 days. All leases must be in writing and subject to the requirements of the documents in the Association. All leases of the Unit must include a provision that the tenant will recognize and attorn to the Association as landlord solely for the purpose of having the power to enforce a violation. The provisions of the documents against the tenant provide the Association gives a landlord notice of its intent to so enforce at a reasonable opportunity to cure the violation directly prior ***497** to commencement of the enforcement action. The Unit Owner’s Association is not granted a right of first refusal to purchase the Unit.
Section 609.03. The restrictions on leases and rental agreements is described above under Section 609.02, above.
Section 609.04. The Project documents do not restrict the Unit Owner’s right to mortgage his or her Unit. In addition, the Project documents do not limit the Unit Owner’s financing options by requiring the use of a specific lending institution or particular type of lender.
Section 610. Section 18.3 of the Declaration provides that the Association shall give proper written notice to each Eligible Mortgagee and Eligible Insurer of (a) any condemnation or casualty loss which effects a material portion of the Common interest community or any Unit in which there is a first security interest held insured a guaranty by such Eligible

Mortgagee or Eligible Insurers applicable; (b) Any delinquency in the payment of common expense assessments owed by a Unit Owner whose Unit is subject to a first security interest held, insured, or guaranteed, by such Eligible Mortgagee or Eligible Insurer, as applicable which remains uncured for a period of sixty days; (c) any lapse, cancellation or material modification of any insurance policy or fidelity bond maintained by the Association; (d) any proposed action which will require the consent specified percentage of Eligible Mortgagees or specified in Section 18.4 of the Declaration. Pursuant to Section 1.13 and 1.14 of the Declaration, Eligible Insurers and Eligible Mortgagees are defined as those insurers or guarantors of a first security interest or the holders of the first security interest which have notified the Association in writing of each of their names, addresses and that they hold the first security interest in a Unit, and the Unit number and address of the Unit on which it has the security interest or guarantees for insurers the mortgage.

Section 611. The condominium Project is not located in an area that has passed inclusionary zoning restrictions as defined in the legal requirements.

Section 612. - 617. The Project is not a cooperative.

(c) The documents do not provide for the amenities or facilities including any recreational or parking facility related to or associated with the Project, to be leased to the Owners Association or Unit Owners (other than by individual leases between Unit Owners for individual parking spaces). None of such ***498** amenities or facilities will be subject to any restriction or reservation in favor of the Developer or Declarant of the Project or any affiliate of such Developer or Declarant by virtue of the Project documents except for marketing purposes during construction. In addition, the Declarant has reserved certain Special Declarant Rights described above including the rights:

(i) to complete the improvements indicated on the plats and plans filed with the Declaration;

(ii) to exercise Development Rights reserved in the Declaration;

(iii) to maintain sales offices, managers offices, signs advertising the Common Interest Community, models;

(iv) to use easements for the Common Elements for the purpose of making improvements within the Common Interest Community; and

(v) to appoint or remove an officer of the Association or an Executive Board member during a period of declaring control subject to the limitations of the Act and Section 8.9 of the Declaration, as described above.

COMMENT: The last sentence beginning "In addition..." is necessary in Uniform Act States. These are reservations and restrictions given to the declarant in excess of those required for marketing. However, Section 606 of the Legal Requirements permits the sponsor to retain "reasonable rights ... including rights to maintain facilities for marketing unit estates, and have easements over the common areas so that improvements can be completed or repaired." It also permits voting rights in unsold units. It would appear that these rights are not exclusive, as long as they are "reasonable," in spite of the language of the form.

(d) The Project and the Project Units are not subject to any "Master" project documents or Owners Association, or any similar entity to which assessments are paid. The Unit Owners will not pay assessments to more than one Association, either directly or through the primary Owners Association.

COMMENT: If a Master Association is contemplated, you will have to opine that the master association complies with the Fannie Mae Legal Guidelines where appropriate.

***499** The foregoing opinions are for an exclusive reliance of you and Fannie Mae; however, they may be made available for informational purposes to, but not for the reliance of, successors and assigns of Fannie Mae. These opinions are given as of the date of this letter without qualification * except as follows. This opinion is qualified in that the undersigned relied on copies of documents which it had no reason to believe were not accurate, without further certifications of authenticity and authority. To the extent enforceability was applicable to such opinions it is limited by rules of insolvency, bankruptcy law and other provisions of law and equity limiting such enforceability. It is assumed that all documents referred to above were duly authorized, executed, acknowledged, delivered, and appropriately recorded where required and that all officers signatures were authentic and duly authorized. Certain professional opinions and certifications such as those of architects and engineers have been relied upon. No independent opinion with respect to title is given, relying wholly on the issuance of title insurance policies in the form attached. However, nothing has come to the attention of the undersigned that would indicate that the documents and instruments reviewed were other than as they were purported to be.

COMMENT: The provisions following the asterisk (*) are those added to make the opinion not misleading, and to qualify the level of diligence undertaken with respect to the opinion. An unqualified opinion would take an unconscionable amount of due diligence. These assumptions and qualifications are often found in borrowers' counsel opinions to mortgage lenders. Pursuant to a recent (March, 1988) opinion of the Rhode Island Lawyers' Ethics Committee of its Supreme Court, a lawyer who signed an unqualified opinion of enforceability and authority required by a lender under a coercive atmosphere, i.e. "sign or your client will not get his money," would be committing a breach of ethics, in that he was not providing his client with undivided loyalty.

Respectfully Submitted
[FIRM]
By________________________
Signature
cc: Declarant

***500** COMMENT: Since this is an opinion being given to a third party concerning the affairs of a client, there must be a waiver of confidentiality, and the obligation to diligently pursue the interests of the client as required by the ethical rules. The client should review and pass on the opinion before it is forwarded, for it may include items requiring waivers, or elements of non-compliance which will prejudice the interests of the declarant.

***501** PROPOSED LANGUAGE FOR EXCEPTIONS TO FORM 1054, WARRANTY OF PROJECT LEGAL DOCUMENTS:

The following language should be inserted into the form 1054 following the phrase: "Specific exceptions to above requirements: (delete "none") Yes, noted below or attached."
The following exceptions are taken from the attorney's opinion of [name of firm] attached, and all of the above conclusions are defined and limited by the qualifications, explanations and limitations contained therein.
1. Selling Guide, Part V, Chapter 6, Legal Requirements, Section 601.02 Section 601.02 requires certain amendments to be approvable by at least 67ercent of the votes of the unit owners and 51% of the votes of the Eligible Mortgagees. The following do not require such approval: i.e. those that may be executed by the Declarant's exercise of his Development Rights or by the conveyance of easements and licenses pursuant to Article XI of the Declaration or with respect to relocation of boundaries between adjoining Units pursuant to Section 14.1 of the Declaration. In addition, there are the following other exceptions: a) with respect to consent for reallocation of interest in the Common Elements or Limited Common Elements, when Limited Common Elements are reallocated by agreement between the Unit Owners and only those Unit Owners and only the Eligible Mortgagees holding Security Interest in such Units need approve such action; b) when there is a redefinition or relocation of a boundary of adjoining Units, or c) when a Unit is being subdivided, then only those Unit Owners and Eligible Mortgagees holding Security Interest need approve such action.
2. Section 604 of the Legal Requirements requires that expenses of maintenance of the limited common areas be the responsibility of the association. Pursuant to Section 6.3 of the Declaration, certain Limited Common Elements have portions of maintenance repair and replacement assigned to the Unit Owners, portions assigned to the Association. Specifically, any common expense associated with the maintenance, repair, replacement, of heat exchanges, heater outlets, enclosures and mechanical attachments are assessed against the Unit or Units which the Limited Common Element is assigned. Common Expenses associated with the maintenance, repair or replacement of components and elements attached to, planted on, or part of, yards, patios, decks, exterior surfaces, trim, siding, doors, windows and elevators will be assessed against the Unit or Units to which the Limited Common Elements are assigned. If any such Limited Common Element is assigned to more than one Unit, the common expense allocated to the Limited Common Elements are assessed equally among the Units to which they are assigned. Common expenses associated with the maintenance, repair or replacement of the ***502** chimney serving unit 1-9 is assessed against the Unit Owner 1-9. Common expenses associated with the cleaning, maintenance, repair or replacement of all the Limited Common Elements is assessed against the Units in accordance with their allocated interest in the common expenses. Each Unit Owner is responsible for removing, leaves, snow and debris from all patios which are Limited Common Elements.
3. Section 604 of the Part V of the Selling Guide, requires that there be a valid easement for shifting of boundaries of Units and common areas. In Stonemason Village construction, reconstruction, repair, shifting, settlement or other movement of a portion which results in an encroachment of a common area into the Unit or the Unit on the common areas does not create a valid easement. However, pursuant to §2-114 of UCIOA, (Monuments as Boundaries, Alternative B of the Uniform Act choices,) existing physical boundaries of a Unit or the physical boundaries of the Unit reconstructed in substantial accordance with the description contained in the original Declaration are its legal boundaries, rather than the boundaries derived from a description contained in the original Declaration, regardless of vertical or lateral movement of the building of minor variance between those boundaries and the boundaries derived from the description contained in the original Declaration. This section does not relieve the Unit Owner of liability in case of his willful misconduct or relieve a declarant or any other person of liability for failure to adhere to any surveys or plans.

[FN1]. FNMA Selling Guide, Part V, Project Standards, Chapter 1, Section 104, Eff. 8/1/88.

[FN2]. FNMA Selling Guide, amended 9-30-87, Part V, Chapter 4, Section 101, ref to Section 102, Type B standards if

detailed underwriting review not undertaken by the lender. A detailed underwriting analysis was required, or the Type B criteria, e.g. 70% non-investor owned, applied by warranty of the lender and many regions apparently required that standard for all condominium mortgages. This was generally interpreted by lenders as a rejection of the purchase of mortgages from condominiums that were more than 30% investor owned. The lenders would not take the trouble of undertaking the Type A underwriting analysis of these loans for the application fee for a single mortgage.

[FN3]. Supra Note 6.

[FN4]. Op. cit. note 2, supra, Part V, Chap. 7, Section 704.

[FN5]. Op. cit. note 2, supra, Part V, Chapt. 2. Cf. ibid amended through 9-30-87.

[FN6]. Op. cit. note 2, supra, Part V, Chapt 7, Section 701.

[FN7]. Supra, note 6.

[FN8]. As explained above, they must be 50% principal residences or second homes. See text at Note 11 supra.

[FN9]. Op. cit. note 2, supra, Part V, Chapt 2, Section 202.

[FN10]. Op. cit. note 2, supra, Part V, Chapt. 7, Section 701 and 704.

[FN11]. This requirement implies that the documentation was originally set up to comply with the Guide, and thus a Type B approval will seldom be available for a project that did not go through the Type C process.

[FN12]. Op. cit. note 2, supra, Part V, Chapt. 3,

[FN13]. Seldom, in the author's experience is there a single state agency having jurisdiction over environmental matters and laws, and even more seldom will such an agency make a check of the records in response to an inquiry. In most cases the records are a shambles anyway.

[FN14]. Op. cit. note 2, supra, Forms, Form 1037.

[FN15]. Examples of legal requirements include acceptable title exceptions, and unacceptable title exceptions as to easements, encroachments, etc. appear in Op. cit. note 2, supra, Part III, Chapter 3, Section 314.04, and Section 314.06, insurance requirements appear in Part V, Chapter 7, and compliance with all marketing laws is required by Part V, Chapter 3, Section 301 G.

[FN16]. Op. cit. note 2, supra, Part V, Chapt 3, Section 302.

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No. C.A. SU-14-0010

State of Rhode Island
Supreme Court

TWENTYELEVEN, LLC,
PLAINTIFF,

v.

MICHAEL J. BOTELHO, ET AL.,
DEFENDANTS.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT
NOS. KC-2013-0432

BRIEF OF *AMICUS CURIAE*, COMMUNITY ASSOCIATIONS INSTITUTE SUPPORTING REVERSAL OF THE DECISION BELOW

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INTRODUCTION AND STATEMENT OF INTEREST

The *Amicus Curiae*, the Community Associations Institute ("CAI"), is a national non-profit research and education organization formed in 1973 by the Urban Land Institute and the National Association of Home Builders to provide the most effective guidance for the creation and operation of condominiums, co-operatives and homeowner associations. CAI represents more than 17,000 homeowners, community associations, community managers and affiliated professionals and service providers in 57 local chapters. CAI's industry data estimates that as of 2012, there were approximately 63.4 million Americans living in 25.9 million housing units in more than 323,600 community associations. This number constituted roughly 21% of the population of the United States, assuming a population of 300 million.

Community associations are property developments in which a developer, or declarant, has willingly submitted an interest in real property to some form of community association regime. The regimes include, among others, condominiums, homeowner associations and co-operatives. The community association presents a unique form of ownership where responsibility for the submitted property is shared, on some level, between the individual owner or member, on the one hand, and an association, trust or corporation, on the other. The properties governed by community associations may be commercial or residential in nature. Community associations are usually governed by not-for-profit incorporated (or sometimes unincorporated) entities pursuant to Articles of Incorporation (or a similar document) and By-laws.

The case under consideration by this Court is one of substantial import to the body of law regarding the meaning of the statutory phrase "prior to" in a foreclosure context. Approximately twenty (20) states have adopted condominium acts providing condominiums with some form of

"priority lien." In most of those states, that priority extends to the foreclosure of the lien and consequential extinguishment of subordinate liens, as without it, the priority is not a true priority. The significant question presented in this case is whether the valid foreclosure of a lien which the Rhode Island Condominium Act describes as "prior to" another lien or mortgage extinguishes that subordinate lien. That issue not only has bearing on liens held by condominiums but also on mortgages held by banks and other lenders, municipal liens and all other liens.

In keeping with CAI's long-standing interest in promoting understanding regarding the operation and governance of community associations, CAI submits this brief for the Court's consideration.

STATEMENT OF THE ISSUES AND ERRORS CLAIMED

CAI relies upon, and incorporates herein by reference, the Statement of the Issues contained in the Brief of Appellant, TwentyEleven, LLC, ("Appellant's Brief").

STATEMENT OF THE CASE

CAI relies upon, and incorporates herein by reference, the Statement of the Case contained in the Appellant's Brief.

STATEMENT OF FACTS

CAI relies upon, and incorporates herein by reference, the Statement of Facts contained in the Appellant's Brief.

ARGUMENT

I. THE SUPERIOR COURT OF THE STATE OF RHODE ISLAND ERRED IN RULING THAT THE FORECLOSURE OF A PRIORITY LIEN UNDER R.I. Gen. Laws § 34-36.1-3.21 DOES NOT EXTINGUISH THE FIRST MORTGAGE OR DEED OF TRUST.

The Superior Court's holding fails to apply the well-worn principals of law regarding the foreclosure of a priority lien by re-defining the phrase "prior to" as used in the statute. In addition, the Superior Court's decision deviates from applicable principles of statutory interpretation by failing to give the words "prior to" a plain, unambiguous and consistent definition under the law. The Superior Court's decision also renders meaningless the redemption provision contained in R.I. Gen. Laws §34-36.1-3.21(c). Finally, the Superior Court's holding is contrary to the public policy underlying, and legislative purpose supporting, the enactment of R.I. Gen. Laws §34-36.1-1.01 *et seq.*

A. The Statutory Framework Creates a Condominium Association Lien Which is Prior to a First Mortgage or Deed of Trust.

Rhode Island regulates the control and governance of condominiums by statute. This regulation includes, *inter alia*, the statutory creation of a condominium association's lien on a unit for unpaid assessments, the relative priority of the lien and the procedure for foreclosing upon the lien. *See generally* R.I. Gen. Laws §34-36.1. The Rhode Island Condominium Act ("R.I. Act") provides, in relevant part, as follows:

> (b) (1) A lien under this section is ***prior to*** all other liens and encumbrances on a unit except:
>
> (i) Liens and encumbrances recorded before the recordation of the declaration and not subordinated to the declaration;
>
> (ii) A first mortgage or deed of trust on the unit recorded before the date on which the assessment sought to be enforced became delinquent; or

(iii) Liens for real estate taxes and other governmental assessments or charges against the unit.

(2) The lien is ***also prior to*** any mortgage or deed of trust described in subdivision (b)(1)(ii) of this section to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to § 34-36.1-3.15(a) which would have become due in the absence of acceleration during the six (6) months immediately preceding the foreclosure of the interest of the unit owner including any costs and reasonable attorney's fees not to exceed two thousand five hundred dollars ($2,500), incurred in the collection of any delinquent assessment or other charges by legal proceedings or otherwise and all costs of foreclosure held pursuant to § 34-36.1-3.21, including but not limited to, publication, advertising and auctioneer costs, said foreclosure costs not to exceed five thousand dollars ($5,000)(for a total aggregate of attorneys' fees and costs of $7,500).

R.I. Gen. Laws § 34-36.1-3.16(b) (emphasis added). The statute creates a "super priority" lien in favor of a condominium association, which provides that the common expense assessments for the six months immediately preceding the foreclosure action are "prior to" a first mortgage or deed of trust. R.I. Gen. Laws § 34-36.1-3.16(b)(2). The question in this case is whether the foreclosure of a condominium association's priority lien pursuant to R.I. Gen. Laws § 34-36.1-3.21 extinguishes a first mortgage or deed of trust.

Pursuant to R.I. Gen. Laws § 34-36.1-3.21, a condominium association can enforce its lien by foreclosing on the defaulting unit. Even though this foreclosure provision requires the condominium association to provide notice to the first mortgagee of record[1] (over whom the condominium association has priority) prior to the foreclosure sale, and provides a thirty-day right of redemption running in favor of the first mortgagee after auction,[2] the Superior Court held

[1] R.I. Gen. Laws § 34-36.1-3.21(a)(2). Section 34-36.1-3.21(a)(4) also requires the condominium association to serve the first mortgagee with notice of the auction results within (7) days following the sale, which provision facilitates the first mortgagee's right of redemption. As a practical matter, if the Superior Court's holding is correct, and the first mortgagee is not subject to the condominium association's super-priority lien, there is no reason to provide the first mortgagee with notice of a foreclosure.

[2] R.I. Gen. Laws § 34-36.1-3.21(c).

that the Westwood at Warwick Condominium Association's ("Condominium Association") lien foreclosure did not extinguish the first mortgage. As discussed in-depth herein, a super priority lien that is "prior to" a first mortgage or deed of trust is a superior lien, the foreclosure of which extinguishes all subordinate liens including a first mortgage or deed of trust.

B. The phrase "prior to" has a clear and unambiguous meaning in this context.

The Superior Court expressly held that the "so-called super priority" lien has priority over the first mortgage. Decision 15:15-21. The Superior Court also held, by quoting R.I. Gen. Laws § 34-36.1-3.21(b), that, "[a]ny condominium assessment lien foreclosure sale held by the association pursuant to subsection (a) above and the title conveyed to any purchaser or purchasers pursuant to such sale shall be subject to **any lien or encumbrances entitled to priority over the lien of the association pursuant to Section *34-36.1-3.16(b)*.**" Decision 13:5-11 (emphasis added). The Superior Court, referring only to § 34-36.1-3.16(b)(1), then held that,

> [b]y the expressed and unambiguous terms, which require no interpretation by this Court, the statute indicates or states that a purchaser at a condominium foreclosure sale take [*sic*] title to any prior first mortgage. Therefore, this Court finds that the plaintiff took its condominium lien foreclosure deed and any rights granted subject thereto or contained therein subject to PNC's first mortgage. Decision 13:12-15.

The Superior Court failed to cite § 3.16(b)(2), which section creates the super-priority lien, until later in the Order when it is identified as an "exception to the general priority rule" that does not operate to "extinguish a first mortgagee's priority portion with respect to a subsequent condominium lien foreclosure deed." Decision 14:11-14.

The *Amicus* agrees with the Superior Court that the terms of the statute are unambiguous. The Superior Court erred, however, in failing to read § 34-36.1-3.16(b) as a whole and in conjunction with well-established foreclosure principles to determine that the first mortgage is

subordinate to the Condominium Association's super priority lien, and is thus extinguished upon foreclosure of the condominium association's super-priority lien.

When interpreting a statute, this Court has the "'ultimate goal' of giving effect to that purpose which [the] Legislature intended in crafting the statutory language." McCain v. Town of N. Providence ex rel. Lombardi, 41 A.3d 239, 243 (R.I. 2012). This Court has "acknowledged that in ascertaining and effectuating that legislative intent, 'the plain statutory language' itself serves as 'the best indicator.'" Id. quoting DeMarco v. Travelers Insurance Co., 26 A.3d 585, 616 (R.I.2011). When that statutory language is "clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." State v. Gordon, 30 A.3d 636, 638 (R.I.2011) quoting Tanner v. Town Council of East Greenwich, 880 A.2d 784, 796 (R.I.2005).

The phrase "**prior to any mortgage or deed of trust"** has a clear and unambiguous meaning in real estate law - especially in foreclosure law - such that foreclosure of a lien "prior to" a first mortgage or deed of trust extinguishes the first mortgage or deed of trust. Several courts in other jurisdictions have recently addressed the issue of foreclosure by a condominium association of a super priority lien and its effect on the first mortgage. In doing so, the courts acknowledge the well-worn foreclosure principles that form the backdrop for the statutory enactments.

The U.S. District Court, District of Nevada – analyzing language nearly identical to R.I. Gen. Laws §34-36.1-3.16(b) - held that the foreclosure of a homeowner association's super priority lien extinguishes all subordinate liens **including the first deed of trust**. 7912 Limbwood Court Trust v. Wells Fargo Bank, N.A., 979 F.Supp.2d 1142 (D. Nev. 2013). Like the Rhode Island Act, the Nevada Act provides that a portion of an association's lien is "prior to" a first

security interest. Nev. Rev. Stat. §116.311(6)(2)(2012). In 7912 Limbwood, The holders of the first deed of trust argued that the homeowner association's foreclosure of the lien was improper and did not extinguish the first deed of trust. Rather, they contended, a homeowner association's lien "is a payment priority lien only, and the first deed of trust continues to encumber the property" following the foreclosure of an association's lien. Id. at 1145. The Court rejected this argument, concluding that the statutory language "effectively separates the [homeowners association's] lien into two separate liens," one that has priority (i.e., six months of common expense assessments including legal fees and costs) and one for any amounts incurred beyond that six-month period. Id. at 1149. The Nevada Court went on to hold that the super priority portion of an association's lien is "prior to" the first deed of trust and the remainder of the association's lien, "consisting of any charges not contained within the [six-month] super priority lien … is junior to the first deed of trust" under the plain language of the statute. Id. Noting that the state's "statutory scheme is clear" and that the language "unambiguously" states that an association's super priority lien is prior to the first deed of trust, the Court concluded that a foreclosure sale on an association's super priority lien "extinguishes all junior interests, including the first deed of trust." Id.

The Court of Appeals of the State of Washington also recently considered the issue of lien priority in the context of a condominium association's foreclosure and reached the same result. Summerhill Village Homeowners Ass'n v. Roughley, 289 P.3d 645 (Wash. Ct. App. 2012). In Summerhill Village, the condominium association foreclosed on a condominium unit in accordance with the Washington Condominium Act. Consistent with the Nevada Condominium Act and R.I. Condominium Act, the Washington Act establishes a super priority lien for a portion of an association's common expense assessment. The Washington

Condominium Act states, in similar verbiage, that a condominium association's super priority lien is "prior to" mortgages on the unit that were "recorded before the date on which the assessment sought to be enforced became delinquent." Wash. Rev. Code § 64.34.364 (2013). Citing legislative intent, the Court held that the condominium association's assessment lien had priority over the previously recorded mortgage to the extent of the super priority lien. Summerhill Village, 289 P.3d at 648. Thus, the condominium association's foreclosure sale of the unit properly extinguished the junior lien on the unit. Id.

Most recently, the Court of Appeals of the District of Columbia considered the issue of the effect of the foreclosure of a condominium association's super priority lien on a first mortgage and again reached the same result. Chase Plaza Condominium Ass'n, Inc. v. JPMorgan Chase Bank, N.A., 98 A.3d 166 (D.C. 2014). In Chase Plaza, the condominium association foreclosed on a unit in accordance with the D.C. Condominium Act, the terms of which contain similar verbiage as the Nevada, Washington and R.I. condominium acts. The D.C. Condominium Act also creates a "super priority" lien in favor of the association that is "prior to a [first] mortgage or [first] deed of trust . . . to the extent of the common expense assessments . . . which would have become due in the absence of acceleration during the [six] months immediately preceding institution of an action to enforce the lien." Chase Plaza Condominium Ass'n, Inc., 98 A.3d 166, 173 quoting DC ST §42-1903.13(a). The Court held that the D.C. Condominium Act "does not expressly address what happens when, as in this case, a condominium association forecloses solely on its super-priority lien and the proceeds of the sale are not sufficient to pay off a first deed of trust." Id. at 173. The Court, however, cited basic principles of foreclosure law, the language of the D.C. Condominium Act, and the legislative history of the D.C.

Condominium Act, and held that the condominium association's foreclosure of its super-priority lien extinguished the first mortgage. Id. at 175.

The Court in Chase Plaza also found instructive the comments by the drafters of the Uniform Condominium Act (UCA) and Uniform Common Interest Ownership Act. Section 34-36.1-3.16(b) of the R.I. Condominium Act was adopted from the UCA. As this Court held, "[w]hen it enacted the [Condominium] act, the Legislature authorized and directed the secretary of state to insert the official comments to the Uniform Condominium Act (1980). America Condominium Association, Inc. v. IDC, Inc., 844 A.2d 117, 127 (2004). Further, "[u]nless the statutory language clearly and expressly states otherwise, those comments are to be used as guidance concerning the legislative intent in adopting the chapter." Id. In the comments to section 3-116 concerning liens, the Commission states that the six month super priority lien is a "significant departure from existing practices" but it

> "strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of mortgage lenders. As a practical matter, mortgage lenders will most likely pay the 6 months' assessments based on the demand by the association rather than having the association foreclose on the unit." Unif. Condominium Act § 3-116 cmt. 2 (1980).

If foreclosure by the condominium association does not extinguish the first mortgage, there would be no incentive for the first mortgagee to pay the priority lien and prevent foreclosure. The import of the Commission's comment is obvious.

The Commission, in the comments to section 3-116, also states that, an "association's lien on a unit for unpaid assessments shall be enforceable in the same manner as mortgage liens." Id. at cmt. 1. It is axiomatic that the foreclosure of a prior mortgage wipes out any junior encumbrances to which the mortgagee has not subordinated its mortgage interest. See, Moloney v. Five Cents Savings Bank FSB, 422 Mass. 431, 435 (1996), citing J&W Wall Sys. Inc. v.

Shawmut First Bank & Trust Co., 413 Mass. 42, 44 n. 4 (1994). While "priority" implies a temporal quality, the Legislature can make a certain category of lien "prior to" other encumbrances. Where there are insufficient proceeds after foreclosure of the priority lien, just like when there are insufficient funds at foreclosure of a lien "first-in-time," the subordinate liens are extinguished.

In this case, § 34-36.1-3.16(b) of the Rhode Island Condominium Act clearly and unambiguously provides that the Condominium Association's super priority lien was "prior to" the first mortgage on the condominium unit. The Superior Court acknowledges that the Condominium Association's lien is prior to the first mortgage. Decision 15:15-21. The Rhode Island Condominium Act goes on to authorize the association to foreclose on its priority lien as a means of enforcement. R.I. Gen. Laws § 34-36.1-3.21. If the foreclosure enforcement mechanism contained in the statute does not extinguish junior encumbrances, then it is pointless. The foreclosure of the Condominium Association's lien must therefore extinguish any subordinate liens including the first mortgage. This result is in accord with legislative intent and the plain language of the statute, as evidenced by other jurisdictions that have interpreted identical statutory language in this same manner. Moreover, even if the statutory language were not explicit, the extinguishment of the first mortgage would still occur under the settled principles of foreclosure law. Accordingly, the Condominium Association's lawful foreclosure of its undisputed super priority lien extinguishes the first mortgage.

Therefore, when the Court ruled that, ". . . plaintiff took its condominium lien foreclosure deed and any rights granted subject thereto or contained therein subject to [the] first mortgage," the Court was plainly in error.

C. The Superior Court's holding does not comport with controlling principles of statutory interpretation and must be reversed.

The Superior Court's analysis must be rejected as it ascribes a meaning to the words "prior to," as used in R.I. Gen. Laws § 34-36.1-3.16(b)(2), which could not be consistent with the use of that same phrase in R.I. Gen. Laws § 34-36.1-3.16(b)(1), the immediately preceding section of the statute. In this circumstance, it is manifest that (1) the legislature intended that the foreclosure of a condominium association's lien pursuant to § 34-36.1-3.16(b)(1) would extinguish all liens which it was "prior to" and (2) there is no statutory basis to give the words "prior to" in § 34-36.1-3.16(b)(2) a different meaning.

Rhode Island General Laws § 34-36.1-3.16(b)(1) provides as follows:

> (1) [The association's] lien under this section is prior to all other liens and encumbrances on a unit except:
>
> (i) Liens and encumbrances recorded before the recordation of the declaration and not subordinated to the declaration;
>
> (ii) A first mortgage or deed of trust on the unit recorded before the date on which the assessment sought to be enforced became delinquent; and
>
> (iii) Liens for real estate taxes and other governmental assessments or charges against the unit.

Stated affirmatively, § 34-36.1-3.16(b)(1) provides, *inter alia*, that a condominium association's lien is prior to (1) any lien or encumbrance recorded after the recordation of the declaration and (2) a first mortgage or deed of trust recorded after the date on which the assessment sought to be enforced became delinquent. There is no reasonable dispute that the foreclosure of a condominium association's lien would extinguish a lien or encumbrance recorded **after** the recording of the declaration.

Similarly, it is beyond question that the foreclosure of a condominium association's lien in such circumstance would extinguish a subsequently recorded first mortgage or deed of trust. In fact, § 34-36.1-3.16(b)(1) would have virtually no meaning if the Superior Court's definition of "prior to" in this case were imported into § 34-36.1-3.16(b)(1). If "prior to" in that section were given the Superior Court's meaning, a condominium lien foreclosure would not even extinguish (1) a lien which was recorded after the declaration or (2) a first mortgage or deed of trust recorded after the date an assessment became delinquent. Such interpretation of the phrase "prior to" must be rejected because it would lead to an absurd result which is flatly inconsistent with the legislature's purpose in enacting R.I. Gen. Laws § 34-36.1-3.16. McCain v. Town of N. Providence ex rel. Lombardi, 41 A.3d 239, 243 (R.I. 2012)("In fulfilling our interpretive calling, this Court remains mindful of the longstanding principle that 'statutes should not be construed to achieve meaningless or absurd results.'") quoting Ryan v. City of Providence, 11 A.3d 68, 71 (R.I.2011); see also Berman v. Sitrin, 991 A.2d 1038, 1043 (R.I. 2010)(under no circumstances will the court construe a statute to reach an absurd result); see also Generation Realty, LLC v. Catanzaro, 21 A.3d 253, 259 (R.I. 2011)(hold that the court "must 'consider the entire statute as a whole; individual sections must be considered in the context of the entire statutory scheme, not as if each section were independent of all other sections.'") quoting Sorenson v. Colibri Corp., 650 A.2d 125, 128 (R.I.1994).[3]

[3] The absurd consequences of such interpretation are amplified by analyzing the impact of foreclosing a first mortgage or deed of trust secured by a condominium unit. Under the Superior Court's analysis, the first mortgagee would have to "pay back to the association" the amount of the super priority lien. The Superior Court's holding would, therefore, require an association's lien to be foreclosed subject to a first mortgage or deed of trust and at the same time the first mortgage or deed of trust to be foreclosed subject to the association's super priority lien that somehow survives. That the legislature intended such an absurd result is doubtful and that the law could accomplish that result employing no more than the language in R.I. Gen. Laws § 34-36.1-3.16(b) is impossible. The bottom line is, in the lien context, someone has to be first.

As discussed further below, there is no clear basis to give a different meaning to the phrase "prior to" as used in §§ 34-36.1-3.16(b)(1) and § 34-36.1-3.16(b)(2). Controlling principles of statutory interpretation, therefore, require the phrase be given the same meaning.

Section 34-36.1-3.16(b)(2) provides as follows:

> (2) The lien is also prior to any mortgage or deed of trust described in subdivision (b)(1)(ii) of this section . . ..

There is no indication in the statute that the phrase "prior to" in § 34-36.1-3.16(b)(2) should be given a meaning distinct from the meaning the same phrase has in the immediately preceding statutory section. "It is [a] fundamental maxim of statutory construction that statutory language should not be viewed in isolation." In re Brown, 903 A.2d 147, 149 (R.I. 2006). Absent some clear indication to the contrary, the phrase "prior to" in these two separate sections should be given the same meaning. State v. Badessa, 869 A.2d 61, 67 (R.I. 2005)("It is a well-recognized tenet of this Court that 'when we are faced with statutory provisions that are in pari materia, we construe them in a manner that attempts to harmonize them and that is consistent with their general objective scope.'") quoting State v. Dearmas, 841 A.2d 659, 666 (R.I.2004). "Prior to" is a term of art, purposefully chosen, and as such it should be given a consistent meaning and interpretation so that the statute can be read as a harmonious whole.

Furthermore, that "prior to" should be given the same meaning in both sections is clear when considering the broader text of the reference in R.I. Gen. Laws § 34-36.1-3.16(b)(2) which paragraph begins "[t]he lien is **also** prior to any mortgage or deed of trust **described in subdivision (b)(1)(ii)**." (emphasis added). It is clear that although (b)(2) establishes a separate

The Rhode Island Condominium Act has made condominium associations first. Common sense dictates that the lien that is first is not subordinate to the second or third, whereas the second is subordinate to the first.

priority – by using the word "also" and by referencing "paragraph (b)(1)" – the legislature was simply identifying another class or category of encumbrance over which an association's lien has priority. It is impossible to articulate how the meaning of the phrase "prior to" could be different in these two paragraphs. Principles of statutory interpretation do not support an approach which rejects the plain, common-sense interpretation of the statutory text in favor of some interpretation that is implausible and inconsistent with the over-arching goal of the legislation. State v. Gordon, 30 A.3d 636, 638 (R.I. 2011)(The Court "must interpret the statute literally and must give the words of the statute their plain and ordinary meaning"); see also C & J Jewelry Co. v. Dep't of Employment & Training, Bd. of Review, 702 A.2d 384, 385 (R.I. 1997)("'[w]hen the language of a statute is unambiguous and expresses a clear and sensible meaning, there is no room for statutory construction or extension, and we must give the words of the statute their plain and obvious meaning.'") quoting Wayne Distributing Co., 673 A.2d 457, 460 (R.I. 1996). The legislature's language, therefore, requires that the phrase "prior to" be given the same meaning in both sections.

In the event the legislature had intended that the first mortgage would survive a foreclosure of a condominium association's lien, it could have clearly expressed such intent by using different language. In fact, there is nothing in R.I. Gen. Laws § 34-36.1-3.16 that creates or addresses "superior" or "junior" liens; that directs that an association's lien under (b)(2) be paid from the proceeds of a foreclosure without extinguishing the first mortgage or deed of trust; or that the purported "split" nature of the priority lien mandated a different interpretation of the words "prior to" in (b)(2). There were numerous methods for the legislature to express its intent that the foreclosure of a condominium association's lien would not follow typical foreclosure

principles and extinguish the first mortgage or deed of trust.[4] In the first instance, one would have expected the legislature to use different words in describing the drastically different legal consequences of foreclosing pursuant to (b)(1)(ii) and foreclosing pursuant to (b)(2). That is, one would not have expected the legislature to include language which specifically provides that a condominium association's lien is "prior to" the first mortgage or deed of trust.

The very expression by the legislature of the concept that a condominium association's lien is "prior to" the first mortgage or deed of trust must be given significance. State v. Clark, 974 A.2d 558, 572 (R.I. 2009)(stating the presumption that the Legislature intended each word to have a "significant meaning"). Further, "'[i]f the language is clear on its face, then the plain meaning of the statute must be given effect' and this Court should not look elsewhere to discern the legislative intent.'" Ret. Bd. of Employees' Ret. Sys. of State v. DiPrete, 845 A.2d 270, 297 (R.I. 2004) quoting Henderson v. Henderson, 818 A.2d 669, 673 (R.I.2003). In fact, but for the contemplation of extinguishing subordinate liens, there would be no legitimate legislative purpose in creating a super priority over the first mortgage or deed of trust.

Further, an instrument which is recorded prior in time or "prior to" a subsequent instrument has a meaningful legal status under the law. McFarland v. Brier, 850 A.2d 965, 973 (R.I. 2004)("In the world of debtors and creditors, first in time is often first in right"). Under common law – and without some statutory exception (like a condominium super-lien) – the rights granted and the interests secured by a valid prior recorded instrument cannot be

[4] For instance, if a condominium association really was not intended to have a true priority lien – but simply a right of payment – there would have been no statutory need to create the so-called split priority. The unit owner association's lien could have remained wholly subordinate to the first mortgage or deed of trust and the statute could have either allowed six months of proceeds from an association's foreclosure to be retained by an association or imposed upon the foreclosing lender a duty to pay six months of common expense fees.

undermined, avoided or extinguished by subsequently recorded instruments. To be recorded "prior to," or to be treated in the eyes of the law as having been recorded "prior to," is outcome determinative in Rhode Island.[5] See Bytovetski v. McDuff's Estate, 54 R.I. 207 (1934)(impliedly holding that the holder of a mortgage recorded "prior to" all other encumbrances takes the collateral free from those encumbrances). In R.I. Gen. Laws § 34-36.1-3.16(b) the legislature created a statutory exception to the general rule for a condominium association's lien but it did so by employing words which require an association's lien to be treated as if it were recorded "prior to" certain other liens and encumbrances. The legislature's reference to "prior to" was purposeful because a legislative body knows what it means when it uses the phrase. That is to say, when the legislature in a jurisdiction that recognizes "first-in-time" principles establishes that a lien should be treated as a matter of law as if it is "prior to" one must presume that it will be treated for all intents and purposes as if it were recorded "prior to" the lien identified as subordinate. The adoption in this jurisdiction of the phrase "prior to" to identify interests and encumbrances which take precedence – which interests and encumbrances cannot be extinguished – is not a coincidence, and the Superior Court's attempt to avoid that legal significance should be rejected.

D. The Superior Court's holding renders meaningless the redemption provision in the R.I. Act.

The Court will not "interpret legislative enactments as meaningless or nugatory if any other construction is reasonably possible." Sleboda v. Heirs at Law of Harris, 508 A.2d 652, 657 (R.I. 1986). R.I. Gen. Laws § 34-36.1-3.21(c) provides that:

[5] It is that meaning of "prior to" which is employed by the legislature in (b)(1)(i) which provides "liens or encumbrances recorded before the recordation of the declaration." Such reference is entirely temporal.

> Any foreclosure sale held by the association pursuant to subsection (a) above, shall be subject to a thirty (30) day right of redemption running in favor of the holder of the first mortgage or deed of trust of record. The right of redemption shall be exercisable by tendering payment to the association in full of all assessments due on the unit together with all attorney fees and costs incurred by the association in connection with collection and foreclosure process within thirty days of the date of the post-foreclosure sale notice sent by the association pursuant to section (a)(4) above. Otherwise the right of redemption shall terminate thirty days from the date of the post-foreclosure sale notice sent by the association pursuant to section (a)(4) above.

By its clear terms, the purpose of section § 34-36.1-3.21(c) is to allow the first mortgagee the opportunity to resurrect its lien position after failing to pay the priority lien prior to foreclosure. If the Legislature had not intended for foreclosure of the super priority lien to wipe out the first mortgage, there would be no need for a statutory right of redemption in favor of the first mortgagee.[6]

The redemption paragraph was added in 2008 along with R.I. Gen. Laws § 34-36.1-3.16(b)(4) requiring the condominium association to send notice to a first mortgagee when the unit owner is 60 days in arrears with common expense payments. 2008 Rhode Island Laws Ch. 08-479. The Legislature is presumed to know the law in existence at the time of an amendment. State v. DelBonis, 862 A.2d 760, 769 (R.I. 2004). Thus, the Legislature is presumed to have known about the super priority lien and the effect of foreclosure of the lien on a first mortgagee. The notice and redemption provisions must be a response to protect the interests of the first mortgagee. If not, then the paragraph has no purpose.

The Superior Court held that "[n]othing in [the redemption] section indicates that a first mortgage is extinguished absent timely redemption by the mortgagee. In fact, the word

[6] Moreover, if the first mortgage is not subject to the super-priority lien, then there is no reason why the Legislature would have required the condominium association to provide notice to the first mortgagee both before and after the foreclosure sale. See R.I. Gen. Laws §§ 34-36.1-3.21(a)(2) and (a)(4).

extinguish does not appear in the statute just cited." Decision 15: 8-11. Neither does the redemption section contain the word "preserve" or "maintain" with respect to the first mortgage. Had the Legislature intended to upend well-established foreclosure law, it would have done so explicitly.[7] Giving the terms of the redemption section their plain meaning, and in light of well-established law (that the Legislature is presumed to be aware of[8]) it is clear that the section was inserted to give the first mortgagee an opportunity to regain their collateral after foreclosure of the super priority lien.

The Superior Court also held that the mortgagee "has the option to exercise [the redemption right], but failure to exercise that right in a so-called timely manner does not result in the extinguishment of its mortgage." Decision 15: 12-15. The Superior Court's holding leads to an absurd result. The first mortgagee typically sits in the middle of the condominium association's priority and non-priority liens. According to the Superior Court, foreclosure by the condominium association of the priority lien has no effect on the first mortgagee other than the requirement that the first mortgagee pay the priority lien, which the Court concludes exists in any event. Why then, would the Legislature ever create a right to redeem. There is no scenario, under the Superior Court's analysis, in which it would make practical sense for a first mortgagee

[7] In 7912 Limbwood, the Nevada Court concluded that even if the statutory language was ambiguous, in the absence of legislative intent otherwise, "settled foreclosure principles" would control. Such principles provide that "foreclosure of a superior lien extinguishes junior security interests." 7912 Limbwood Court Trust v. Wells Fargo Bank, N.A., No. 2:13-CV-00506 PMP-GWF, 2013 WL 5780793, at *6 (D. Nev. Oct 28, 2013). The absence of language exhibiting an intent that something other than normal foreclosure principles would apply to the foreclosure of the super priority lien, the Court reasoned, was evidence that the senior lien extinguishes all junior liens. "[T]he Nevada Legislature presumably was aware of the normal operation of foreclosure law when it enacted [the Nevada Act]. If the Legislature intended a different rule to apply … , it could have said so." Id. The analysis is apt in this circumstance as well, as discussed herein above.

[8] State v. DelBonis, 862 A.2d 760, 769 (R.I. 2004).

to voluntarily pay the **full** amount of the condominium association's lien pursuant to § 34-36.1-3.21(c). Notably, section § 34-36.1-3.21(c) creates a penalty for a lender that wants to redeem, as the payment is unlimited. It is not limited to six months of assessments, plus $2,500.00 in attorneys' fees and $5,000.00 in foreclosure costs and advertising. The post-foreclosure sale redemption requires payment of all amounts owed without limitation. The redemption provision only makes sense if foreclosure by the condominium association on its priority lien extinguishes the first mortgage and thus the only way for the first mortgagee to preserve its collateral is through payment of the entirety of the association's lien – both priority and non-priority. The Superior Court's holding leads to an absurd result that renders statutory language meaningless and should thus be reversed. Sleboda v. Heirs at Law of Harris, 508 A.2d 652, 657 (R.I. 1986).

E. Public Policy Demands that Foreclosure of the Priority Lien Extinguishes All Liens to which it is Prior and Renders the Holders Thereof Unsecured.

While the Appellee Bank may be unhappy with the outcome being sought by Appellants, the ancient maxim "*Dura lex sed lex*" ("The law is hard, but it is the law") certainly applies to the case at hand.

Where are the teeth in a statute designed to help an association where the purportedly prior lien is subject to the bank's mortgage? Who would want to bid at an auction, especially where there is no right of the bidder to recoup amounts bid and expenses incurred, in a situation where the lender could then foreclose its mortgage? What would the bidder at a condominium foreclosure own after the sale?

The answer the Appellee asks this court to accept is that regardless of how underwater the unit may be, the successful bidder at an auction takes title subject to the first mortgage. Therefore, to preserve its title interest that successful bidder would have to pay the principal

amount, accrued interest and late charges, penalties, attorney's fees, prior advances to cover insurance, and all other costs, in addition to the condominium lien foreclosed upon.

How can it be that the legislature went to the bother of declaring a priority that has no practical value? Particularly where this Court has held that the "Rhode Island Condominium Act is a consumer protection statute." America Condominium Association, Inc., 844 A.2d 117, 128. When the six-month priority was established, lenders were not foreclosing, not paying common fees and allowing mortgages on property that were "under water" to languish. In creating the statutory lien the legislature was no doubt aware that when a unit owner fails to pay common fees due on a unit, the debts of the association must be paid by innocent neighbors as a matter of law. There is no other type of real estate where a homeowner is obligated to pay the debts of his neighbor.

The phrase "prior to" must have meaning. The effect is that the limited priority lien works a statutorily crafted equitable subordination. If a lender is going to sit on its rights to the detriment of what would otherwise be a subordinate lienholder, equity and public policy demand that the foreclosure of the priority lien extinguish the security of the first mortgage, leaving the holder of that mortgage to the surplus, if any.

CONCLUSION

For all of the above reasons, and for the additional reasons set forth in the brief of the Appellant, CAI respectfully requests that this Court reverse the Judgment of the Superior Court.

Respectfully submitted,

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Dated: January 28, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this twenty-eighth day of January 2015, I have served a copy of the within Amicus Brief upon

STATE OF NEW HAMPSHIRE

STRAFFORD, ss

SUPERIOR COURT
DOCKET NO.

CONDOMINIUMS AT LILAC LANE UNIT OWNERS' ASSOCIATION,

Plaintiff,

v.

MONUMENT GARDEN LLC and CENTRIX BANK AND TRUST,

Defendants.

VERIFIED COMPLAINT

NOW COMES the Plaintiff, Condominiums at Lilac Lane Unit Owners' Association, by and through their attorneys, Marcus, Errico, Emmer & Brooks, P.C., and respectfully submits the following Verfied Complaint for declaratory judgment, unjust enrichment and disgorgment, and injunctive relief, saying as follows:

PARTIES

1. The Plaintiff, Condominiums at Lilac Lane Unit Owners' Association ("Association" or "Plaintiff"), is the organization of unit owners of the Condominiums at Lilac Lane, a residential condominium with an address at 12 Lilac Lane, Dover, Strafford County, New Hampshire, 03820. The Condominium at Lilac Lane ("Condominium") was created by the Declaration of Condominiums at Lilac Lane ("Declaration"), recorded with the Strafford County Registry of Deeds ("Registry of Deeds") on March 3, 2010, at Book 3816, Page 458. (A true copy of the Declaration is attached hereto as **Exhibit "1"**). The Association governs the

Condominium pursuant to the Condominiums at Lilac Lane Bylaws ("Bylaws") recorded at the Registry of Deeds on March 3, 2010, at Book 3816, Page 478 (A true copy of the Bylaws is attached hereto as **Exhibit "2"**).

2. Defendant Monument Garden LLC ("Monument Garden") is a corporation duly organized in the State of Maine with its principle place of business located at 21 Continental Boulevard, Suite 101, Merrimack, New Hampshire 03054.

3. Defendant Centrix Bank And Trust ("Centrix") is New Hampshire banking corporation with its principle place of business located at 1 Atwood Lane, Bedford, New Hampshire 03110.

STATEMENT OF FACTS

4. The original declarant of the Condominum is New Meadows, Inc. ("New Meadows"). Monument Garden succeeded to the interests of New Meadows by Deed recorded with the Registry of Deeds on October 4, 2012, at Book 4059, Page 452 (the "Deed"). (A true copy of the Deed is attached hereto as **Exhibit "3"**).

5. The Declaration, as recorded by New Meadows, provides that the land consisting of 7.18 acres, as described in Exhibit "A" to the Declaration, with all buildings and improvements, was submitted to condominium status pursuant to the New Hampshire Condominium Act (the "Act").

6. The Declaration states that the Condominium shall consist of a maximum of 120 units located in five buildings designated on a Condominium Plan as Buildings 12, 13, 14, 15 and 16, with each building containing 24 units.

7. At the time the Declaration was recorded on March 3, 2010, only building 12 was completed. At the present time, Monument Garden owns three units in building 12. The remaining units in building 12 are owned by third parties.

8. Building 13 was completed in June 2013. Building 14 was completed in July 2014. Monument Garden claims ownership of the 48 units in buildings 13 and 14, which it rents to third party tenants.

9. On information and belief, Monument Garden has recently commenced the development and construction of buildings 15 and 16. Buildings 15 and 16 are not completed.

10. Phased condominiums are expressly regulated by the New Hampshire Condominium Act (the "Act").

No Convertible Land

11. The Act refers to phased condominium land as "convertible land." Convertible land is defined as "a building site which is a portion of the common area, within which additional units and/or a limited common area may be created in accordance with this chapter." RSA 356-B:3, X.

12. Pursuant to the Act, if the condominium is to be phased, the declaration must contain language that the condominium includes convertible land and must contain the following provisions:

(a) A legal description by metes and bounds of each convertible land within the condominium;

(b) A statement of the maximum number of units that may be created within each such convertible land;

(c) A statement, with respect to each such convertible land, as to whether or not any portion of such convertible land will not be restricted to residential use, and, if not, the nature of the permitted uses, and the maximum percentage of the

aggregate land and aggregate floor area of all units that may be created which will not be restricted exclusively to residential use;

(d) A statement of the extent to which any structure erected on any convertible land will be compatible with structures on other portions of the submitted land in terms of quality of construction, the principal materials to be used, and architectural style;

(e) A description of all other improvements that may be made on each convertible land within the condominium;

(f) A statement that any units created with each convertible land will be substantially identical to the units on other portions of submitted land, or a statement describing in detail any differences in design, layout, size, quality or other significant characteristics of the units that may be created therein; and

(g) A description of the declarant's reserved right, if any, to create limited common areas within any convertible land, and/or to designate common areas therein which may subsequently be assigned as limited common areas in terms of the types, sizes, and maximum number of such areas within each such convertible land.

Provided, that site plans and floor plans may be recorded with the declaration and identified therein to supplement information furnished pursuant to subparagraphs II(a), (d), (e), (f) and (g), and that subparagraph II(c) need not be complied with if none of the units on other portions of the submitted land are restricted exclusively to residential use.

RSA 356-B:16, II.

13. The Declaration contains none of the provisions required by RSA 356-B:16, II to convert, phase, and develop convertible land.

14. New Meadows recorded site plans and floor plans with the declaration, but the plans failed to provide all of the supplemental information required by RSA 356-B:16, II (a) through (g). (A true copy of the site plans and floor plans are attached hereto as **Exhibit "4"**).

15. At the time when the declarant converts the convertible land to new condominium units, the declarant must record site plans and floor plans for the new buildings and units and must

prepare, execute, and record an amendment to the declaration describing the

> conversion. Such amendment shall assign an identifying number to each unit formed out of a convertible land and shall reallocate undivided interest in the common areas in accordance with RSA 356-B:18, II. Such amendment shall describe or delineate the limited common areas formed out of the convertible land, showing or designating the unit or units to which each is assigned.

RSA 356-B:23, II.

16. The Declaration was never amended to convert common area land to buildings 13 and 14 or to convert the spaces therein to units. An amended site plan was recorded, but on information and belief, no new floor plans were recorded for buildings 13 and 14. (A true copy of the amended sit plan is attached hereto as **Exhibit "5"**).

17. New Meadows recorded a so-called "Memorandum of Understanding (Phasing Plan)" with the Registry of Deeds on April 13, 2012, at Book 4009, Page 2 (the "MOU"). (A true copy of the MOU is attached hereto as **Exhibit "6"**). The MOU was executed solely by the President of New Meadows.

18. The MOU states New Meadows' "present plans for the construction and sale of the New Units" in phases, but it expressly provides that it "shall not be binding on New Meadows, its successors or assigns, and shall not be deemed to benefit or create any rights in any Unit Owner or third-party."

19. The MOU fails to comply with the Act's requirements for establishing and developing convertible land.

20. Buildings 13 and 14 were not lawfully converted, and the structures, units, and other improvements comprising buildings 13 and 14 and the land on which they are located are common area of the condominium, all owned in equal share by the owners of the units in building 12.

21. The Act also provides that no conversion of convertible land to condominium units or limited common areas "shall occur after 5 years from the recordation of the declaration . . ., provided, however, that the time limit contained in the declaration may be extended by not more than 5 years by an amendment to the declaration adopted pursuant to RSA 356-B:54, V." RSA 356-B:23, III.

22. The Declaration was recorded on March 3, 2010, and it has not been amended to extend the statutory five-year conversion period. Thus, Monument Garden is now time-barred from converting the Condominium's convertible land, if it existed, to additional buildings, units, limited common areas, or other improvements.

Invalid Deed

23. The 2012 Deed from New Meadows to Monument Garden purports to convey certain real estate, improvements, and development rights to the Condominium.

24. The real estate described in the Deed is the same 7.18 acres of land that was submitted to condominium status by the Declaration on March 3, 2010. The Declaration paragraph 3(e)(i) defines the 7.18 acres of submitted land, with the exception of Condominium units, as "Common Area," and Declaration paragraph 3(g) establishes that all Condominium units share an "equal fractional share or undivided percentage interest in the Common Areas."

25. At the time of the Deed, the 7.18 acres of Condominium land and all the improvements thereon, with the exception of units in building 12, were owned in common by the owners of the units in building 12. The land and improvements were not owned by New Meadows. Accordingly, the Deed did not convey any land or improvements to Monument Garden.

26. To the extent that the Deed conveyed any development rights to Monument Garden, such rights terminated March 3, 2015—five years after the recording of the Declaration. RSA 356-B:23, III.

No Declarant Control of the Association

27. Pursuant to RSA 356-B:36, 1, the maximum period in which the declarant may control a non-phased condominium association is two years from the date the declaration is recorded. Likewise, the Bylaws establish that the maximum period of the declarant's control of the Plaintiff Association is two years from the recording of the Declaration.

28. The declarant's right to control the Association terminated on March 3, 2012—two years after the recording of the Declaration.

29. There are five Directors serving on the Association's Board of Directors. Three Directors are building 12 unit owners (the "Unit Owner Directors"). Two directors are self-appointed Monument Garden principals, Kenneth Anderson and Stephen Fee (the "Monument Garden Directors").

30. On June 30, 2015, the Monument Garden Directors submitted a letter to the Association Board requesting a special meeting for the purpose of removing one of the Unit Owner Directors, Board President Anthony Stevens, from the Board. (A true copy of the June 30, 2015, letter is attached hereto as **Exhibit "7"**). The Monument Garden Directors requested the special meeting on the purported ground that they control more than the 30% voting interests in the Association that are needed to call a special meeting.

31. Pursuant to the Bylaws, each Condominium unit is entitled to one vote on Association matters. Monument Garden does not lawfully own any Condominium units except for three units in building 12. Accordingly, Monument Garden's voting interest amount to three

of the 24 votes allotted to the building 12 owners. Monument Garden does not have the voting power to unilaterally appoint Directors to—or remove Directors from—the Board.

The Centrix Mortgage

32. Monument Gardens entered into a Mortgage And Security Agreement with Centrix, as recorded with the Registry of Deeds on September 30, 2014, at Book 4246, Page 140, on the entirety of the Condominium land and improvements except the 24 units in building 12 (the "Centrix Mortgage"). (A true copy of the Centrix Mortgage is attached hereto as **Exhibit "8"**).

33. In connection with the Centrix Mortgage, Monument Garden gave Centrix a Collateral Assignment of all of its rights in and to the Condominium, including the development rights. (A true copy of the Collateral Assignment is attached hereto as **Exhibit "9"**).

34. Centrix has no mortgage or assignment rights to the Condominium land, because at the time of the Centrix Mortgage and Collateral Assignment, the Condominium land had been submitted to condominium status and was owned in equal share by the owners of units in Condominium building 12.

35. Centrix has no mortgage or assignment rights to Condominium buildings 13 and 14, because buildings 13 and 14, and the 48 units therein, are common areas owned in equal share by owners of units in building 12.

COUNT I
(Declaratory Judgment/Quiet Title RSA 498:5-a as to Monument Garden)

36. Plaintiff restates and reavers Paragraphs 1-35 of this Verified Complaint, as if fully set forth herein.

37. An actual controversy has arisen and exists creating uncertainty by and between and among the parties regarding the status of Condominium buildings 13 and 14 as converted land under RSA 356-B.

38. In developing buildings 13 and 14, Monument Garden and/or its predecessor failed to comply with the requirements of RSA 356-B for convertible land in one or more of the following ways:

a. Failing to include disclosures and statements in the Declaration for convertible land, in violation of RSA 356-B:16, II;

b. Failing to record site plans with the Declaration that identify convertible land designated for future development, in violation of RSA 356-B:20, I;

c. Failing to record amended site plans when converting Condominium land for the development of buildings 13 and 14, in violation of RSA 356-B:20, III and IV;

d. Failing to record floor plans for the convertible land units, in violation of RSA 356-B:16, II and RSA 356-B:20; and

e. Failing to amend the Declaration when converting Condominium land to develop buildings 13 and 14 to include the specific provisions for convertible land as required under the Act, in violation of RSA 356-B:23, II.

39. The Plaintiff is entitled to a Declaratory Judgment that:

a. Condominium buildings 13 and 14 were not lawfully developed as convertible land;

b. All building 13 and 14 improvements, structures, units, and facilities appurtenant thereto are Condominium common areas; and

c. All building 13 and 14 improvements, structures, units, and facilities appurtenant thereto are owned in equal share by the owners of the units in Condominium building 12.

COUNT II
(Declaratory Judgment as to Monument Garden)

40. Plaintiff restates and reavers Paragraphs 1-39 of this Verified Complaint, as if fully set forth herein.

41. An actual controversy has arisen and exists creating uncertainty by and between and among the parties regarding Monument Garden's rights to develop and construct buildings 15 and 16.

42. In developing the Condominium, Monument Garden and/or its predecessor failed to comply with the requirements of RSA 356-B for convertible land in one or more of the following ways:

a. Failing to include disclosures and statements in the Declaration for convertible land, in violation of RSA 356-B:16, II;

b. Failing to record site plans with the Declaration that identify convertible land designated for future development, in violation of RSA 356-B:20, I; and

c. Failing to record floor plans for the convertible land units, in violation of RSA 356-B:16, II; and

43. Furthermore, even if Condominium convertible land existed, Monument Gardens is time-barred from further developing any convertible land because more than five years have passed since the recording of the Declaration. RSA 356-B:23, III.

44. The Plaintiff is entitled to a Declaratory Judgment that Monument Garden has no rights to further develop or construct any buildings, units, limited common areas, or other improvements at the Condominium.

COUNT III
(Declaratory Judgment as to Monument Garden)

45. Plaintiff restates and reavers Paragraphs 1-44 of this Verified Complaint, as if fully set forth herein.

46. An actual controversy has arisen and exists creating uncertainty by and between and among the parties regarding Monument Garden's rights to control the Association.

47. Monument Garden claims to own 51 of the 72 existing Condominium units—three units in building 12, and all 48 units in buildings 13 and 14. Monument Garden claims a right to 51 of 72 unit votes on Association matters, one vote per unit under the Bylaws.

48. For the reasons stated herein, Monument Garden's claim of ownership rights to units in buildings 13 and 14 is unlawful, and it owns no units in those buildings. Moreover, the units in buildings 13 and 14 are not lawfully converted Condominium units, and no Association voting rights are derived from those units. Accordingly, Monument Garden is entitled to only three votes on Association matters, one for each unit it owns in building 12.

49. Pursuant to the Bylaws, the Board is comprised of five Directors. Three of the acting Directors are duly elected owners of the units in building 12.

50. The principals of Monument Garden are currently serving as self-appointed Directors of the Board. Monument Garden does not have sufficient voting power to unilaterally elect Directors of the Board.

51. Pursuant to RSA 356-B:36, 1 and the Bylaws, the two year period of declarant control of the Association expired on March 3, 2012—two years after the Declaration was recorded. Accordingly, Monument Garden has no right to control the Association.

52. The Plaintiff is entitled to a declaratory judgment that:

a. The three Unit Owner Directors are true and lawful Directors of the Board, and that Monument Garden's purported appointment of two of its principals is null and void;

b. Monument Gardens has no voting rights derived from the units in buildings 13 and 14; and

c. Monument Garden has no right to remove Directors from the Board or otherwise control the Association.

COUNT IV
(Unjust Enrichment/Disgorgement as to Monument Garden)

53. Plaintiff restates and reavers Paragraphs 1-52 of this Verified Complaint, as if fully set forth herein.

54. Monument Garden has controlled, leased, and collected rent on the 48 units in buildings 13 and 14 to third party tenants.

55. Monument Garden exercise of control, leasing, and collection of rent on the units in buildings 13 and 14 is unlawful, as said buildings were not lawfully converted from convertible land under RSA 356-B.

56. Monument Garden has been unjustly enriched by collecting rent on units in buildings 13 and 14, to which it has no legal right, to the detriment of the Association.

57. Monument Garden should be disgorged of all rent payments it has unlawfully collected from tenants in buildings 13 and 14, and said payments belong to and should be awarded to the Association, as Monument Garden's retention of the rent payments would be unconscionable.

COUNT V
(Declaratory Judgment as to Centrix)

58. Plaintiff restates and reavers Paragraphs 1-57 of this Verified Complaint, as if fully set forth herein.

59. An actual controversy has arisen and exists creating uncertainty by and between and among the parties regarding Centrix's rights under the Centrix Mortgage.

60. The Centrix Mortgage and the Collateral Assignment convey no mortgage or assignment rights to any of the Condominium land, buildings, units, other improvements, or development rights, because at the time of the Centrix Mortgage, Monument Garden had no ownership interests in any Condominium land, buildings, units, other improvements, or development rights, except for an ownership interest in certain units in building 12.

61. Plaintiff is entitled to a declaration that Centrix has no mortgage or assignment interests in any Condominium land, buildings, units, improvements, or development rights.

COUNT VI
(Prejudgment Attachment in the Form of Lis Pendens)

62. Plaintiff restates and reavers Paragraphs 1-61 of this Verified Complaint, as if fully set forth herein.

63. Plaintiff's Verified Complaint raises legitimate issues about the status of title of the Condominium, in particular the ownership rights to the units in building 13 and 14 and future development rights.

64. The Association enjoys a reasonable likelihood of success on the merits of aforementioned issues.

65. Monument Garden intends to proceed with the development of additional buildings at the Condominium.

66. Issuance of an attachment in the form of a Lis Pendens will alert third parties (including potential purchasers and mortgagors) of the existence of this lawsuit and the serious title issues raised herein and will serve to preserve the status quo until Plaintiff's claims are fully adjudicated.

COUNT VII
(Injunctive Relief as to Monument Garden)

67. Plaintiff restates and reavers Paragraphs 1-66 of this Verified Complaint, as if fully set forth herein.

68. There is a reasonable likelihood that the Association will succeed on the merits of its claims concerning ownership rights to the Condominium land and the units in buildings 13 and 14.

69. To preserve the status quo until Plaintiff's claims are fully adjudicated, the Association requests a preliminary injunction preventing Monument Garden from constructing, leasing (except for existing leases), selling, hypothecating, transferring, pledging, assigning, mortgaging, devising, encumbering, or otherwise conveying any interests of any kind whatsoever, in the Condominium land or in the units in Condominium buildings 13 and 14.

70. Unless Monument Garden is so enjoined, such conduct will result in irreparable harm to the Association and the Condominium unit owners, to which the Association has no adequate remedy at law, as the issues presented are those of ownership and control of real property.

71. Based on the fact as recited herein, a preliminary injunction is necessary to prevent immediate and irreparable harm and to preserve the status quo pending the adjudication of Plaintiff's claims.

COUNT VIII
(Injunctive Relief as to Monument Garden)

72. Plaintiff restates and reavers Paragraphs 1-71 of this Verified Complaint, as if fully set forth herein.

73. There is a reasonable likelihood that the Association will succeed on the merits of its claims that Monument Garden has no rights to develop or construct additional buildings or units at the Condominium.

74. To preserve the status quo until Plaintiff's claims are fully adjudicated, the Association requests a preliminary injunction preventing Monument Garden from taking any action toward the development or construction of any additional buildings, units, or other improvements of any kind at the Condominium.

75. Unless Monument Garden is enjoined, such conduct will result in irreparable harm to the Association and the Condominium unit owners, to which the Association has no adequate remedy at law, as the issues presented are those of ownership and control of real property.

76. Based on the fact as recited herein, a preliminary injunction is necessary to prevent immediate and irreparable harm and to preserve the status quo pending the adjudication of Plaintiff's claims.

COUNT IX
(Injunctive Relief as to Monument Garden)

77. Plaintiff restates and reavers Paragraphs 1-76 of this Verified Complaint, as if fully set forth herein.

78. Monument Garden owns no units in buildings 13 and 14, and therefore Monument Garden's voting interests on Association matters are limited to the three votes derived from the three units owned by Monument Garden in building 12.

79. Based on its unlawful assertion of voting rights, Monument Garden has appointed its principals, Kenneth Anderson and Stephen Fee, as Directors on the Association's Board of Directors.

80. Based on its unlawful assertion of voting rights, Monument Garden has requested a special meeting and is seeking to remove one of the Unit Owner Directors from the Board.

81. Based on the fact as recited herein, a preliminary injunction is necessary to prevent immediate and irreparable harm and to preserve the status quo pending the adjudication of Plaintiff's claims.

COUNT X
(Injunctive Relief as to Centrix)

82. Plaintiff restates and reavers Paragraphs 1-81 of this Verified Complaint, as if fully set forth herein.

83. There is a reasonable likelihood that the Association will succeed on the merits of its claims that Centrix has no enforceable rights under its Mortgage or Collateral Assignment with Monument Garden.

84. To preserve the status quo until Plaintiff's claims are fully adjudicated, the Association requests a preliminary injunction preventing Centrix from taking any action or enforcing any of its purported rights under the Mortgage or Collateral Assignment.

85. Unless Centrix is enjoined, such conduct will result in irreparable harm to the Association and the Condominium unit owners, to which the Association has no adequate remedy at law, as the issues presented are those of ownership and control of real property.

86. Based on the fact as recited herein, a preliminary injunction is necessary to prevent immediate and irreparable harm and to preserve the status quo pending the adjudication of Plaintiff's claims.

REQUEST FOR RELIEF

WHEREFORE, the Plaintiff respectfully requests that the Court enter an Order and Judgment for the following relief:

1. Under Count I, enter judgment for the Plaintiff declaring that:

   a. Condominium buildings 13 and 14 were not lawfully developed as convertible land;

   b. All building 13 and 14 improvements, structures, units, and facilities appurtenant thereto are Condominium common areas; and

   c. All building 13 and 14 improvements, structures, units, and facilities appurtenant thereto are owned in equal share by the owners of the units in Condominium building 12.

2. Under Count II, enter judgment for Plaintiff declaring that Monument Garden has no rights to further develop or construct any buildings, units, limited common areas, or other improvements at the Condominium.

3. Under Count III, enter judgment for Plaintiff declaring that:

   a. The three Directors elected by a plurality of votes by the owners of units in building 12 are the true and lawful Directors of the Board, and that Monument Garden's appointment of two of its principals is null and void;

   b. Monument Gardens has no voting rights derived from the units in buildings 13 and 14; and

   c. Monument Garden has no right to control the Association.

4. Under Count IV, enter judgment disgorging Monument Garden of all rent payments it has collected from tenants in buildings 13 and 14, and award the sum of all such rent payments to the Association.

5. Under Count V, enter judgment in favor of Plaintiff declaring that Centrix has no mortgage or assignment interests in any Condominium land, buildings, units, improvements, or development rights.

6. Under Count VI, enter an order allowing an attachment in the form of a lis pendens on the Condominium land and all units in Condomininum buildings 13 and 14.

7. Under Count VII, enter a preliminary injunction enjoining Monument Garden from constructing, leasing (except for existing leases), selling, transferring, hypothecating, pledging, assigning, mortgaging, devising, encumbering, or otherwise conveying any interests of any kind whatsoever in the Condominium land or units in Condominium buildings 13 and 14.

8. Under Count VIII, enter a preliminary injunction enjoining Monument Garden from taking any action toward the development or construction of any additional buildings, units, or other improvements of any kind at the Condominium.

9. Under Count IX, enter a preliminary injunction enjoining Monument Garden from taking any action to appoint or remove any Unit Owner Directors from the Association Board of Directors.

10. Under Count X, enter a preliminary injunction enjoining Centrix from taking any action or enforcing any of its purported rights under its Mortgage or Collateral Assignment with Monument Garden.

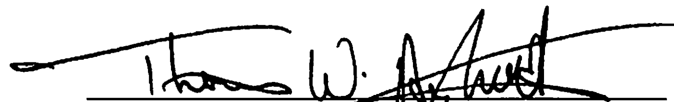
11. For such further and additional relief as the Court deems just and proper.

Respectfully submitted,

CONDOMINIUMS AT LILAC LANE
UNIT OWNERS' ASSOCIATION

By its attorneys,

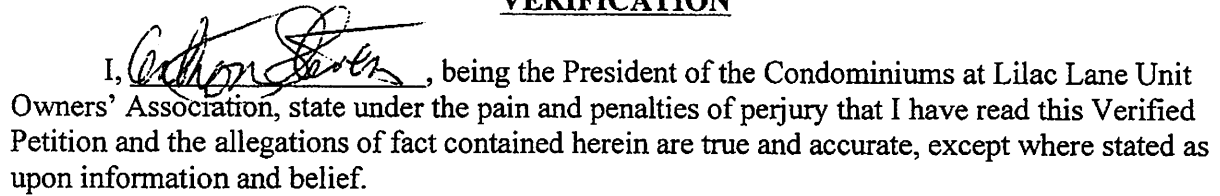
MARCUS, ERRICO, EMMER
& BROOKS, P.C.



Edward A. Allcock, NH Bar#16196
Thomas W. Aylesworth, NH Bar#12065
45 Braintree Hill Office Park
Braintree, MA 02184
(781) 843-5000

Dated: August 17, 2015

VERIFICATION



I, ____________, being the President of the Condominiums at Lilac Lane Unit Owners' Association, state under the pain and penalties of perjury that I have read this Verified Petition and the allegations of fact contained herein are true and accurate, except where stated as upon information and belief.

____________, President
Condominium at Lilac Lanes Unit Owners' Association

EXHIBIT 1

Doc # 0002850 Mar 3, 2010 11:17 AM
Book 3816 Page 0458 Page 1 of 16
Register of Deeds, Strafford County

UPON RECORDING, PLEASE RETURN TO:

Cleveland, Waters and Bass, P.A.
P.O. Box 1137
Concord, New Hampshire 03302-1137
ATTN: Sharon Zavorotny

DECLARATION OF CONDOMINIUMS AT LILAC LANE

One Lilac Lane
Dover, Strafford County
State of New Hampshire

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DECLARATION

OF

CONDOMINIUMS AT LILAC LANE

One Lilac Lane
Dover, County of Strafford
State of New Hampshire

THE NEW MEADOWS INC. (the "Declarant"), with an address of One Lilac Lane, Dover, County of Strafford, State of New Hampshire hereby declares:

1. Submission of Property. The Declarant hereby submits the land located on Lilac Lane, Dover, New Hampshire, and more particularly described in Exhibit A attached hereto (the "Land"), together with the buildings and all improvements heretofore or hereafter constructed thereon, and all easements, rights, and appurtenances thereto described in said Exhibit A all of which are owned by the Declarant, to the provisions of the Condominium Act of the State of New Hampshire, Chapter 356-B of the Revised Statutes Annotated, in order to create a plan of condominium ownership in such property. The condominium shall consist of no more than one hundred twenty (120) units. The units shall be located in five buildings, each containing twenty-four (24) units.

2. Definitions. As provided in Section 12, I of the Condominium Act, capitalized terms not otherwise defined herein, or in the By-Laws recorded herewith, shall have the meanings specified in Section 3 of the Condominium Act. The following terms are expressly defined herein:

(a) "By-Laws" mean the By-Laws of Condominiums at Lilac Lane Condominium Owners' Association providing for the government of the Condominium, to be recorded herewith, as amended from time to time.

(b) "Common Area" means all parts of the Property other than the Units, as more fully set forth in Paragraph 3(e) of this Declaration and includes any Limited Common Area.

(c) "Condominium" means Condominiums at Lilac Lane, the condominium established by this Declaration.

(d) "Condominium Act" means Chapter 356-B of the New Hampshire Revised Statutes Annotated, as amended.

(e) "Land" shall have the meaning set forth in Section 1 of this Declaration.

(f) "Majority of the Owners" mean the Owners of the Units to which more than 50% of the votes in the Unit Owners' Association appertain. Any specified percentage of the Owners means the Owners of Units to which the specified percentage of the votes in the Unit Owners' Association appertains.

(g) "Owner or Unit Owner" means any Person or Persons who holds or hold fee simple title to a Unit. No mortgagee shall be deemed to be an Owner until such mortgagee has acquired such title pursuant to foreclosure or any procedure in lieu of foreclosure.

(h) "Percentage Interest" or "Undivided Percentage Interest" means a fractional share or undivided interest of each unit in the Common Area, as further set forth in Exhibit B.

(i) "Property" means the Land and buildings and all other improvements heretofore or hereafter constructed thereon, and all easements, rights, and appurtenances thereto, and all articles of personal property intended for common use in connection therewith, except as any of the foregoing may be limited in Exhibit A attached hereto.

(j) "Registry" means the Strafford County Registry of Deeds.

(k) "Rules" means those rules and regulations adopted from time to time by the Board of Directors of the Association relative to the use of the Condominium, provided they are not in conflict with the Condominium Act, the Declaration, or the By-Laws.

(l) "Site Plan and Floor Plans" means the plat of the entire property described in this Declaration, and all floor plans relative thereto, recorded simultaneously herewith or recorded subsequently.

(m) "Unit" means a unit as defined by the Condominium Act, which is bounded and described as shown on the Plans of the Condominium and as provided in Paragraph 3(d) hereof. A Unit is completed when a certificate of occupancy has been issued by the City of Dover for the Unit.

(n) "Unit Owners' Association", or "Condominiums at Lilac Lane Unit Owners' Association" or "Association" mean all the Owners acting as a group in accordance with this Declaration and/or the By-Laws.

3. Statutory Requirements. The following information is provided pursuant to the provisions of Section 16 of the Condominium Act:

(a) Name. This Condominium shall be named "Condominiums at Lilac Lane."

(b) Location. This Condominium is located on Lilac Lane, Dover, Strafford County, New Hampshire.

(c) Description of Land. A legal description by metes and bounds of the Land submitted to the Condominium is contained in Exhibit A. The Land is depicted as

Condominiums at Lilac Lane on a plan entitled "Revision IV to the Condominium Site Plan, Map H Lot 35-A, The New Meadows, Inc." prepared by MSC Civil Engineers & Land Surveyors, Inc. to be recorded in the Registry (the "Plan").

(d) Description of Units.

(i) Buildings. This Condominium shall consist of a maximum of one hundred twenty (120) units in five buildings designated on the Plan as Buildings 12, 13, 14, 15 and 16.

(ii) Units. Each of the Units is hereby declared to be held in fee simple and may be retained, occupied, conveyed, transferred, encumbered, inherited, or devised in the same manner as any other parcel of real property independent of the other individual Units. Annexed hereto and made a part hereof as Exhibit B is a list of the Units and their respective identifying numbers or Unit designations, and the undivided percentage interest in the Common Area appurtenant to each.

(iii) Unit Boundaries:

The boundaries of each Unit with respect to floors, ceilings, walls, doors, and windows thereof are as follows:

(A) Floors: The upper surface of the sub flooring.

(B) Ceilings: The plane of the upper surface of the wallboard, plasterboard or plaster of which the ceilings are constructed.

(C) Interior Building Walls between Units: The plane of the surface of the wall studs facing such unit.

(D) Exterior Building Walls, Doors and Windows. As to exterior walls, the plane of the interior surface of the wall studs; as to doors providing access and egress to the unit, the plane of the exterior surface thereof; and as to windows and doors containing glass, the planes of the exterior surfaces of the window and panel frames.

Except as provided herein:

(1) All lath, furring, wallboard, plasterboard, plaster, paneling tiles, wallpaper, paint, finish flooring, and any other materials constituting any part of the finished surfaces thereof are a part of the Unit and all other portions of the walls, floors, or ceilings are a part of the Common Area.

(2) If any chute, flue, duct, wire, conduit, bearing wall, bearing column, or any other fixture which lies partially within and partially outside the designated boundaries of a Unit, any portion thereof serving only that Unit is a Limited Common Area allocated solely to that Unit, and any portion thereof serving more than one Unit or any portion of the Common Area is a part of the Common Area.

(3) Subject to the provision of the preceding paragraph (2), all spaces, interior partitions, and other fixtures and improvements within the boundaries of a Unit are a part of the Unit.

(4) Any doorsteps, balconies, patios, and all exterior doors and windows or other fixtures designed to serve a single unit, but located outside the Unit's boundaries, are Limited Common Areas allocated exclusively to that Unit.

(e) Description of Common Area and Limited Common Area.

(i) Common Area. Common Area consists of the entire property other than the Units and includes, but not by way of limitation: the Land, driveways, parking area and walks, shrubbery and other plantings, and other land and interests in land included and described in Exhibit A hereto: the water supply, sewage disposal, electrical, telephone, and other utility systems serving the condominium to the extent said systems are located within the Property and are not owned by the supplier of the utility service (but not including any portions thereof servicing a single Unit and contained within a Unit); and the pipes, ducts, chutes, conduits, plumbing, wires, meters, meter housings, and other facilities for the furnishing of utility services or waste removal located within a Unit, which serve parts of the condominium other than the Unit within which they are located, and also those located within the yard areas, the roofs, foundations, bearing walls, bearing columns, and other structural portions of the buildings; the perimeter walls, ceilings, the floors bounding each Unit to the unfinished interior surfaces thereof and other walls which are not within a Unit; any detention pond and other drainage facilities, including, without limitation, pumping facilities; any other amenities constructed or to be constructed on the Land; and all other parts of the Condominium, including personal property acquired by the Association, necessary or convenient to its existence, maintenance and safety, or normally in common use, and including any easements serving the Property set forth in Exhibit A hereto and the Plan.

(ii) Limited Common Area. Certain decks, (whether open, or enclosed with a roof and windows and/or screens) patios and parking spaces are Limited Common Area, being reserved for the exclusive use of the Unit to which they are adjacent or assigned. Designations of the aforementioned Limited Common Area or of any other Limited Common Area shall be shown on the Plans recorded at the time of substantial completion of each building. Two parking spaces shall be assigned as Limited Common Area to each Unit. Certain garden areas and landscaping areas, either immediately adjacent to the unit or within the Limited Common Area to the unit, may be shown on the plans and shall be subject to such rules and regulations as may be adopted and amended from time to time by the Board of Directors of the Association. Each Limited Common Area is owned in common by all of the Owners, but is restricted to the use and benefit of the Unit or Units which it services.

(iii) Use. The use of the Common Area shall be limited to the owners in residence and to their tenants in residence, and to their guests. The use of each Limited Common Area shall be further restricted to the Owner of the Unit to which it is appurtenant, to his tenants in residence, and to his guests. The use, including responsibilities for maintenance and repair, of the Common Area and Limited Common Area shall be governed by the By-Laws

and by the Rules as adopted and amended from time to time by the Board of Directors of the Association.

(f) Reassignment of Limited Common Area. Limited Common Area may be reassigned pursuant to Section 19 of the Condominium Act. Pursuant to RSA 356-B:16, I (f), the Declarant reserves the right to designate additional limited common areas by amendment to this Declaration at any time prior to conveyance of any Unit.

(g) Allocation of Percentage Interests. All Units will have an equal fractional share or undivided percentage interest in the Common Areas as further described in Exhibit B.

(h) Statement of Purpose and Restrictions on Use. The Condominium and each of the Units are primarily intended for residential use and the following provisions, together with the provisions of the By-Laws and the Rules, are in furtherance of this purpose:

(i) Residential Use: Limitation. Each Unit shall be occupied and used only for residential purposes by the Owner and Owner's family, or by tenants and guests of the Owner, except for such limited professional use as the Association, upon application of the Owner; from time to time may authorize as not being incompatible with the residential character of the Condominium. This restriction shall not be construed to prohibit Owners from leasing their Units so long as the Lessees thereof occupy and use the leased premises in accordance with the provisions of this Declaration, and any rules and/or regulations adopted by the Board of Directors of the Association.

(ii) Easement to Facilitate Completion and Sales. Declarant shall be deemed to be the Owner of any Units which have not been sold and conveyed. Declarant and its duly authorized agents, representatives, and assigns may make such reasonable use of the Condominiums as may facilitate the sale and conveyance, including, without limiting the generality of the foregoing, the right to enter all Units and Common Area for construction purposes, and the right to store materials, the maintenance of a sales office and a rental office, the showing of property, and the displaying of signs. In addition, the Declarant and its duly authorized agents, representatives, and employees shall have the right to use any and all unsold and unconveyed Unit or Units as sales offices and/or model units. Such Units shall be Units within the meaning of this Declaration and the Condominium Act, and not parts of the Common Area. The Declarant shall have the absolute right to convey or lease such Units. Further, the Declarant reserves the right to enter into certain agreements with other Unit Owners who may agree to lease their Units to the Declarant for use by the Declarant as model units and/or sales offices.

(iii) Easement for Structural Encroachments. None of the rights and obligations of the Owners created herein, or in any deed conveying a Condominium Unit from the Declarant to a purchaser thereof, shall be altered in any way by encroachments as a result of construction of any structures or due to settling or shifting of structures. There shall be valid easements for the maintenance of such encroachments so long as they shall exist; provided, however, that in no event shall a valid easement for encroachment be created in favor of an Owner or Owners if said encroachment occurred due to the willful conduct of said Owner or Owners.

(iv) Occupancy Limitation. No Unit in any building shall be leased, sold, or occupied until the Owner thereof shall have received an occupancy permit for the Unit in accordance with the Zoning Ordinance and Building Code of the City of Dover.

(v) Pipes, Ducts, Cables, Wires, Conduits, Public Utility Lines, and Other Common Area Located Inside of Units: Support. Each Unit Owner shall have an easement in common with the Owners of all other Units to use all pipes, wires, ducts, cables, conduits, public utility lines, and other Common Area located in any of the other Units and serving his Unit. Each Unit shall be subject to an easement in favor of the Owners of all other Units to use the pipes, ducts, cables, wires, conduits, public utility lines, and other common Area serving such other Units and located in such Unit. The duly authorized representative of the Association shall have a right of access to each Unit to inspect the same, to remove violations therefrom, and to maintain, repair, or replace the Common Area contained therein or elsewhere in the building. Every portion of a Unit which contributes to the structural support of a building shall be burdened with an easement of structural support for the benefit of all other Units and the Common Area.

(vi) Owners Subject to Declaration, By-Laws, and Rules and Regulations. All present or future Owners, tenants, and occupants of Units, or any other person who might use the facilities of the Property in any manner are subject to the provisions of this Declaration, the By-Laws, and the Rules. The acceptance or the entering into occupancy of any Unit shall constitute an agreement that the provisions of this Declaration, the By-Laws, and the Rules, as they may be lawfully amended from time to time, are accepted and ratified by such Owner; tenant, or occupant, and all of such provisions shall be deemed and taken to be enforceable servitudes and covenants running with the land and shall bind any person having at any time any interest or estate in such Units, as though such provisions were recited and stipulated at length in each and every deed of conveyance or lease thereof.

The Declaration, By-Laws and Rules to be adopted by the Board of Directors of the Association, and the decisions and resolutions of the Association, or its representatives, as lawfully amended from time to time, all contain, or will contain certain restrictions as to use of the Units or other parts of the Condominium. Each Owner shall comply therewith and failure to comply with any such provisions, decision, or resolution shall be grounds for an action by the Association or any Unit Owner to recover sums due, for damages or for injunctive relief. All such actions in law or in equity by the Association shall be authorized by resolution of the Board of Directors, and the Association or Unit Owner shall be entitled to recover all reasonable costs and expenses of such actions, including attorneys' fees, as more particularly set forth in Article XII of the By-Laws.

(vii) Condominium Subject to Easements for Ingress and Egress and Use. Subject to the provisions of this Declaration, including, without limitation, Paragraph 4 hereof, the By-Laws and the Condominium Act, each Unit Owner shall have an easement in common with the Owners of all other Units for ingress and egress through, and use and enjoyment of all Common Area. Each Unit shall be subject to an easement for ingress and egress through, and use and enjoyment of, all Common Area by persons lawfully using or entitled to the same.

(viii) Property Subject to Covenants, Easements, and Restrictions of Record. The submission of the Property is subject to all covenants, conditions, easements, and restrictions of record.

(ix) Reservation of Utility Easements. The Declarant reserves on behalf of itself and its successors and assigns, perpetual easements over all Units and the Common Area for the installation, construction, reconstruction, maintenance, repair, operation, and inspection of all utility services necessary or desirable in connection with operation of the Condominium, including, without limitation, water, sewage disposal, telephone, heating and air conditioning, gas, cable television and electrical systems, all for the benefit of the respective Owners of the Condominium, which reservation includes the right to convey such easements directly to suppliers and/or distributors of such utility services.

(x) No Subdivision or Partition. No Unit may be divided or subdivided into a smaller Unit; no Unit or portion thereof shall be added to or incorporated into another Unit. The Common Area shall remain undivided and no Unit Owner or any other person shall bring any action for partition or division thereof; nor shall the Common Area be abandoned by act or omission, unless the Condominium shall be terminated pursuant to the Condominium Act.

(xi) No Harmful or Offensive Use of Condominium. No harmful or offensive use shall be made of any part of the Condominium and nothing shall be done therein which is or will become in the judgment of the Association an annoyance or nuisance to the other Unit Owners. No use shall be made of any part of the Condominium which will constitute a fire hazard, result in the cancellation of insurance on any part of the Condominium, or be in violation of any law, ordinance, or governmental regulation applicable thereto. No use shall be made of any part of the Condominium which would increase the rate of insurance on the Common Area without the prior written consent of the Association.

(xii) Sprinkler System. In the event that any Unit shall be equipped with a sprinkler system, nothing shall be hung from the sprinkler or any pipe or other structure comprising a part of the system, nor shall any such sprinklers, wiring, or components be painted, covered, or otherwise changed, tampered with or altered.

(xiii) Determination of Action Following Casualty Damage. In the event of damage to any portion of the Condominium by fire or other casualty, the proceeds of the master casualty policy shall, pursuant to Section 43, III of the Condominium Act, be used to repair, replace, or restore the structure or Common Area damaged, unless the Unit Owners vote to terminate the Condominium pursuant to Section 34 of the Condominium Act. The Board of Directors of the Association is hereby irrevocably appointed the agent for each Owner of a Unit and for each mortgagee of a Unit and for each Owner of any other interest in the Condominium to adjust all claims arising under such policy, or otherwise resulting from such damage, and to execute and deliver releases upon the payment of claims; and proceeds of insurance shall be payable to Condominium at Lilac Lane Unit Owners' Association, the Unit Owners, or any mortgagees as their interests may appear. The procedure for reconstruction and repair is set forth in Article VII of the By-Laws.

(xiv) Garbage. Garbage, trash and refuse may be removed at suitable regular intervals as directed by the Board of Directors of the Association. No dumping or burning of garbage, trash or refuse shall be permitted on condominium property. No garbage, trash or refuse may be stored in such a manner that may cause same to be transferred off-site by natural causes such as rain, wind, etc. All containers for garbage, trash and refuse shall be kept under cover from view, except for a reasonable time before removal.

(xv) Antennas. No unit owner shall erect, install, or maintain any outside television and/or radio antennas or satellite dish, except as may be approved by the Board of Directors in accordance with rules and regulations established by the Board of Directors, which regulations must be in compliance with state and federal law. Windmills are not permitted on any part of the condominium property.

(xvi) Recreational Vehicles. Recreational vehicles including, but not limited to, boats, trailers, campers, motor homes, snowmobiles, all-terrain vehicles, etc. shall not be allowed on any part of the condominium property except, however, as may be approved by the Board of Directors in accordance with rules and regulations establish by the Board of Directors.

(xvii) Exterior Lighting. No Unit Owner shall install any exterior lighting on any Unit or change the original exterior light fixtures installed by the Declarant.

(xviii) RSA 356 -B:41 -Upkeep of Condominium - Warranty Against Structural Defects.

A. Except to the extent otherwise provided by the condominium instruments, all powers and responsibilities with regard to maintenance, repair, renovation, restoration, and replacement of the condominium shall belong (a) to the individual Unit Owners' Association in the case of the common areas, and (b) to the individual unit owner in the case of any unit or any part thereof. Each unit owner shall afford to the unit owners' association and to any of its agents or employees such access through his unit as may be reasonably necessary to enable them to exercise and discharge their respective powers and responsibilities. But to the extent that damage is inflicted upon the common areas or any unit through which access is taken, the unit owner who caused the same, or the unit owners' association if it has caused the same, shall be liable for the prompt repair thereof.

B. Notwithstanding anything in this section to the contrary, the Declarant shall warrant or guarantee, against structural defects, each of the units for one (1) year from the date each is conveyed, and all of the common areas for one (1) year. The one-year referred to in the preceding sentence shall begin as to each of the common areas whenever the same has been completed or if later, (a) as to any common area within any additional land or portion thereof; at the time the first unit therein is conveyed. For the purposes of this paragraph, no unit shall be deemed conveyed unless conveyed to a bona fide purchaser. For the purposes of this paragraph, structural defects shall be those defects in components constituting any unit or common area which reduce the stability or safety of the part of the structure below accepted standards or restrict the normal intended use of all or part of the structure and which require repair, renovation, restoration or replacement. Nothing in this paragraph shall be construed to make the Declarant responsible for any items of maintenance relating to the units or common areas.

4. Amendment of Declaration.

Except as otherwise provided in the Condominium Act and in this Declaration and By-Laws, this Declaration and By-Laws may be amended by agreement of at least two-thirds of the Owners; provided, however, that (i) any such amendment shall be executed by such two-thirds of the Owners or by the President and Treasurer of the Association accompanied by a Certificate of Vote of the Clerk; (ii) evidence of such amendment shall be duly recorded at the Registry pursuant to Section 34, IV of the Condominium Act; (iii) so long as the Declarant owns one or more Units, no amendment to the Declaration shall be adopted that could interfere with the construction, sale, lease, or other disposition of such Unit(s); (iv) no such amendment shall be contrary to the provisions of the Condominium Act; (v) no such amendment shall affect any rights reserved to the Declarant herein or in the By-Laws without the written consent of the Declarant; (vi) any amendment of a material nature as defined in Section 402.02 of FNMA Lending documents dated January 1, 1983, shall have been approved in writing by 51% of the mortgagee or mortgagees holding first mortgages on Units, except, however, that the consent of said mortgagee or mortgagees may be presumed when the eligible mortgagee is sent a written request for approval of a proposed amendment by certified mail, return receipt requested, and then fails to submit a response within thirty (30) calendar days after receipt of said notice; and (vii) any such amendment shall not be contrary to any provisions of the City of Dover Zoning Ordinance and Building Code or Subdivision Regulations.

5. FNMA/FHLMC Compliance. Notwithstanding anything to the contrary elsewhere in the Condominium Instruments, the following provisions shall govern and be applicable insofar and for so long as the same are required in order to qualify mortgages of Units in the Condominium for sale to the Federal Home Loan Mortgage Corporation (FHLMC) or the Federal National Mortgage Association (FNMA) or the Federal Housing Administration (FHA) under the laws and regulations applicable thereto.

(a) Any holder, insurer, or guarantor of a first mortgage on a Unit in the Condominium shall, upon written request, be entitled to written notification from the Association of any of the following (holders of first mortgages who have submitted such written requests will be referred to as "Eligible Mortgage Holders"):

(i) A condemnation or loss which affects a material portion of the Property of such Unit on which such first mortgagee holds a first mortgage lien;

(ii) Any sixty (60) day delinquency in the payment of assessments or charges owed by a mortgagor of such Unit;

(iii) Any lapse, cancellation, or material modification of any insurance policy or fidelity bond maintained by the Association;

(iv) Any action for which the consent of Eligible Mortgage Holders is required pursuant to this Declaration;

(b) Any first mortgagee of a Unit in the Condominium who obtains title to the Unit pursuant to the remedies provided in the mortgage, or foreclosure of the mortgage, or deed

(of assignment) in lieu of foreclosure, shall take the property free of any claims for unpaid assessments or charges against the mortgaged Unit which accrue prior to the acquisition of title of such Unit by the mortgagee.

(c) Unless at least 51% of the Eligible Mortgage Holders (based upon votes appurtenant to Units subject to such mortgages) have given their prior written approval, the Owners and the Association shall not be entitled to: (i) by act or omission, seek to abandon or terminate the Condominium project; (ii) change the Percentage Interests or obligations of any Unit for purposes of (a) levying assessments or charges or allocating distributions of hazard insurance proceeds or condemnation awards or (b) determining the pro rata share of ownership of each Unit in the Common Area; (iii) partition or subdivide any Unit; (iv) by act or omission, seek to abandon, partition, subdivide, encumber, sell, or transfer, the Common Area (the granting of easements for public utilities or for other public purposes consistent with the intended use of the Common Area by the Declarant or the Association shall not be deemed a transfer within the meaning of this clause); (v) use hazard insurance proceeds for losses to the Property (whether to Units or to Common Area) for other than the repair, replacement, or reconstruction of such Property; or (vi) amend, modify, or otherwise change any material rights or obligations under this Declaration or the By-Laws. In the case of termination of the Condominium for any reason other than substantial destruction or condemnation, prior written approval of two-thirds of Eligible Mortgage Holders shall be required.

(d) The Board of Directors of the Association shall assure that its books, records, and financial statements, as well as current copies of the Declaration, By-Laws, and Rules are available for inspection by Unit Owners or holders, insurers, or guarantors of first mortgages on Units during normal business hours or under other reasonable circumstances.

(e) An adequate operating fund and a reserve fund for maintenance, repairs, and replacements of any Common Area which must be replaced on a periodic basis shall be established by the Association and shall be funded by regular monthly payments rather than by special assessments.

(f) No provision of this Declaration, the By-Laws, or the Rules shall be construed to grant to any Unit Owner, or to any other party, any priority over any rights of first mortgagees of the Condominium Units pursuant to their mortgages in the case of a distribution to Unit Owners of insurance proceeds or condemnation awards for losses to, or a taking of, Units and/or the Common Area or any portions thereof.

(g) This Declaration and the By-Laws contain provisions concerning various rights, priorities, remedies, and interests of first mortgagees of Units. Such provisions are to be construed as covenants for the protection of such mortgagees on which they may rely in making loans secured by mortgages on the Units. Accordingly, any Owner who gives a first mortgage on his Unit shall notify the Association of the name and address of the first mortgagee of such Unit. All mortgagees with respect to which the Association has received such notice shall be given written notice of any damage or loss where the cost of restoring the Common Area exceeds Ten Thousand ($10,000.00) Dollars, and the first mortgagee of a Unit shall be given written notice of damage or loss to the Unit covered by its mortgage where the cost of restoration of such damage or loss exceeds One Thousand ($1,000.00) Dollars, the Association is made aware of such damage or loss, and notice of such mortgage has been supplied to the Association.

(h) If FHLMC or FNMA or FHA holds any interest in one or more mortgages of Units:

(i) The Association shall be required to obtain and maintain, to the extent obtainable, and permitted by applicable law, such insurance other than that which may be required by Article VI of the By-Laws, in such amounts and containing such terms, as may be required from time to time by FHLMC, FNMA, or FHA, including, but not limited to, dishonest acts on the part of the officers of the Association, employees, or volunteers responsible for handling the Association's funds. All such insurance shall provide that an adjustment of loss shall be made by the Association and if FHLMC, FNMA, or FHA holds any interest in one or more mortgages on Units, all such policies shall be in such amounts and contain such terms as may be required from time to time by whichever of FHLMC, FNMA, or FHA (or all) holds such interests.

(ii) Whenever any Unit and/or Common Area is damaged by fire or other hazard, the Association shall give notice to such persons as may be required by FHLMC or FNMA or FHA.

(iii) Any holder, insurer, or guarantor, or grantor of a first mortgage on any Unit shall be entitled to have the Association provide a copy of the audited financial statement for the immediate preceding fiscal year of the Association. If no such audited statement exists, the requesting party is entitled to have an audited statement prepared at its own expense, or at its option to receive a copy of any unaudited statement. Upon such request, the Association must provide the financial statement to the requesting party within a reasonable time.

6. No Revocation or Partition. The Common Area shall remain undivided, and no Unit Owner or any other Person shall bring any action for partition or division thereof, nor shall the Common Area be abandoned by act or omission, unless the Condominium is terminated pursuant to Section 34 of the Condominium Act.

7. Invalidity. It is the intention of the Declarant that the provisions of this Declaration are severable so that if any provision, condition, covenant, or restriction hereof shall be invalid or void under any applicable federal, state, or local law or ordinance, the remainder shall be unaffected thereby. In the event that any provision, condition, covenant, or restriction hereof is, at the time of recording this Declaration, void, voidable, or unenforceable as being contrary to any applicable law or ordinance, the Declarant, its successors and assigns, and all persons claiming by, through, or under this Declaration, covenant and agree that any future amendments or supplements to the said laws having the effect of removing said invalidity, voidability, or unenforceability, shall be deemed to apply retrospectively to this Declaration thereby operating to validate the provisions of this instrument which otherwise might be invalid, and it is covenanted and agreed that any such amendments and supplements to the said laws shall have the effect herein declared as fully as if they had been in effect at the time of this instrument.

8. Waiver. No provision contained in this Declaration shall be deemed to have been abrogated or waived by reason of any failure to enforce the same (except where a right is

dependent upon notice to be given within a specified period), irrespective of the number of violations or breaches which may occur.

9. Gender. The use of the masculine gender in this Declaration shall be deemed to refer to the feminine gender and the use of the singular shall be deemed to refer to the plural and vice versa, whenever the context so requires.

10. Joint Use Agreement. The Condominiums at Lilac Lane are a portion of a larger development known as The Meadows at Dover, A Condominium created by Declaration dated January 6, 1988 recorded in the Registry at Book 1363, Page 749, as amended by Amendment to Condominium Declaration dated February 17, 1988 recorded in the Strafford County Registry of Deeds at Book 1369, Page 538, Second Amendment of Declaration dated July 7, 1995 recorded in the Strafford County Registry of Deeds at Book 1181, Page 9, Third Amendment of Declaration of Condominium dated January 13, 2005 recorded in the Strafford County Registry of Deeds at Book 3130, Page 853, and Fourth Amendment of Declaration of Condominium dated June 20, 2007 recorded in the Strafford County Registry of Deeds at Book 3544, Page 675. The Meadows at Dover consists of a total of 384 residential units. The Condominiums at Lilac Lane is being formed as a separate condominium containing 120 units out of the total of 384. In addition to the buildings and units of the Condominiums at Lilac Lane still to be constructed, the Declarant has the right to develop two sites on 5.33 acres for retail and office uses to be known as S&W Commercial Condominium. S&W Commercial Condominium is depicted on the Plan and is being created by Declaration of Condominium of even or near even date herewith to be recorded in the Registry. To provide for the use, repair and replacement of facilities in the development that benefit The Meadows at Dover, A Condominium, the Condominiums at Lilac Lane, S&W Commercial Condominium and the Declarant, these parties have entered into a Joint Use Agreement of even or near even date and to be recorded herewith. The terms of the Joint Use Agreement as they may be amended from time to time are hereby incorporated as an integral part of this Declaration.

Dated this 16 day of February, 2010.

THE NEW MEADOWS INC.

By:
William M. Pierce, President

STATE OF NEW HAMPSHIRE
COUNTY OF

On this 16th day of February, 2010, before me, the undersigned Officer, personally appeared William M. Pierce, who acknowledged himself to be the President of THE NEW MEADOWS, INC., and that he, as President, being authorized to do so, executed the foregoing instrument for the purposes therein contained.

Notary Public/~~Justice of the Peace~~

Commission Expires: 9/3/2013
[Stamp or Seal]

CONDOMINIUMS AT LILAC LANE
EXHIBIT A

A certain tract or parcel of land together with the buildings thereon situate on Lilac Lane in the City of Dover County of Strafford and State of New Hampshire, the same being more particularly delineated as The Condominiums at Lilac Lane on plan entitled "Revision IV to the Condominium Site Plan, Tax Map H Lot 35A, The New Meadows, Inc." prepared by MSC Civil Engineers & Land Surveyors, Inc. and to be recorded in the Strafford County Registry of Deeds, more particularly bounded and described as follows:

BEGINNING AT A POINT IN THE SIDELINE OF LILAC LANE N85°58'17" E A DISTANCE OF 106.40 FEET FROM AN ANGLE POINT OF THE MEADOWS AT DOVER, A CONDOMINIUM; THENCE PROCEEDING ALONG SAID MEADOWS AT DOVER, A CONDOMINIUM; THE FOLLOWING COURSES: N 82°23'50" E A DISTANCE OF 159.57 FEET; ALONG A CURVE TO THE LEFT HAVING A RADIUS OF 200.00 FEET, AN ARC LENGTH OF 111.91 FEET; N 50°20'18" E A DISTANCE OF 257.81 FEET; S 01°51'11" W A DISTANCE OF 77.45 FEET; S 35°45'41" W A DISTANCE OF 116.21 FEET; S 21°41'21" E A DISTANCE OF 91.13 FEET; S 54°57'20" E A DISTANCE OF 124.71 FEET; S 17°56'22" E A DISTANCE OF 130.70 FEET; S 53°06'12" E A DISTANCE OF 63.68 FEET; S 18°30'11" W A DISTANCE OF 241.19 FEET; S 09°54'53" W A DISTANCE OF 295.72 FEET; S 56°30'37" W A DISTANCE OF 82.94 FEET; S 78°01'45" W A DISTANCE OF 46.50 FEET; N 24°00'00" W A DISTANCE OF 915.20 FEET TO THE POINT OF BEGINNING.

CONTAINING: 7.18 ACRES, MORE OR LESS.

EXHBIT B

Building 12	Building 13	Building 14	Building 15	Building 16
Unit 1211	Unit 1311	Unit 1411	Unit 1511	Unit 1611
Unit 1212	Unit 1312	Unit 1412	Unit 1512	Unit 1612
Unit 1213	Unit 1313	Unit 1413	Unit 1513	Unit 1613
Unit 1214	Unit 1314	Unit 1414	Unit 1514	Unit 1614
Unit 1215	Unit 1315	Unit 1415	Unit 1515	Unit 1615
Unit 1216	Unit 1316	Unit 1416	Unit 1516	Unit 1616
Unit 1217	Unit 1317	Unit 1417	Unit 1517	Unit 1617
Unit 1218	Unit 1318	Unit 1418	Unit 1518	Unit 1618
Unit 1221	Unit 1321	Unit 1421	Unit 1521	Unit 1621
Unit 1222	Unit 1322	Unit 1422	Unit 1522	Unit 1622
Unit 1223	Unit 1323	Unit 1423	Unit 1523	Unit 1623
Unit 1224	Unit 1324	Unit 1424	Unit 1524	Unit 1624
Unit 1225	Unit 1325	Unit 1425	Unit 1525	Unit 1625
Unit 1226	Unit 1326	Unit 1426	Unit 1526	Unit 1626
Unit 1227	Unit 1327	Unit 1427	Unit 1527	Unit 1627
Unit 1228	Unit 1328	Unit 1428	Unit 1528	Unit 1628
Unit 1231	Unit 1331	Unit 1431	Unit 1531	Unit 1631
Unit 1232	Unit 1332	Unit 1432	Unit 1532	Unit 1632
Unit 1233	Unit 1333	Unit 1433	Unit 1533	Unit 1633
Unit 1234	Unit 1334	Unit 1434	Unit 1534	Unit 1634
Unit 1235	Unit 1335	Unit 1435	Unit 1535	Unit 1635
Unit 1236	Unit 1336	Unit 1436	Unit 1536	Unit 1636
Unit 1237	Unit 1337	Unit 1437	Unit 1537	Unit 1637
Unit 1238	Unit 1338	Unit 1438	Unit 1538	Unit 1638

The undivided interest in Common Area for each Unit shall be a fraction, the numerator of which is one (1) and the denominator of which is the number of completed Units in the Condominium. When all five (5) buildings are constructed, each of the 120 units shall have an equal undivided interest in the Common Area, i.e. a 1/120th interest in the Common Area.

EXHIBIT 2

Doc # 0002851 Mar 3, 2010 11:17 AM
Book 3816 Page 0474 Page 1 of 39
Register of Deeds, Strafford County

UPON RECORDING, PLEASE RETURN TO:

Cleveland, Waters and Bass, P.A.
P.O. Box 1137
Concord, New Hampshire 03302-1137
ATTN: Sharon Zavorotny

BY-LAWS OF CONDOMINIUMS AT LILAC LANE

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BY-LAWS

CONDOMINIUMS AT LILAC LANE

ARTICLE I

PLAN OF UNIT OWNERSHIP

1. Purpose. The administration of the Condominium shall be governed by these By-Laws, and all present and future holders of any interest in the Condominium shall be members of the Condominiums at Lilac Lane Association which is a "condominium management association" organized and operated to provide for the acquisition, construction, management, maintenance and care of an "association property" as those terms are defined in Section 528 of the Internal Revenue Code. No part of the net earnings of said Association shall inure (other than by acquiring, constructing or providing management, maintenance and care of association property pursuant to Article V, Section 1(c) hereof) to the benefit of any Owner.

2. Definitions. Capitalized terms not otherwise defined herein or in the Declaration shall have the meaning specified in Section 3 of the Condominium Act (New Hampshire R.S.A. 356-B:1, et seq).

3. By-Laws Applicability. The provisions of these By-Laws are applicable to the Property, and the use, occupancy, sale, lease and other transfer thereof. All present and future owners, tenants, future tenants, their guests, licensees, servants, agents, employees and any other person who shall use the facilities of the Condominium shall be subject to these By-Laws and to the Rules of the Condominium. The acceptance of a deed of conveyance or the entering into a lease or the act of occupancy of a Unit or any other portion of the Condominium shall constitute an acknowledgment that such Owner, tenant or occupant has accepted and ratified these By-Laws, the provisions of the Declaration and the Rules and will comply with them.

4. Office. The office of the Condominium and of the Board of Directors shall be located at the Condominium or at such other place as may be designated from time to time by the Board of Directors.

ARTICLE II

UNIT OWNERS' ASSOCIATION

1. Composition. All of the Unit Owners, acting as a group in accordance with the Condominium Act, the Declaration and these By-Laws, shall constitute the "Unit Owners Association" or "Association," which shall have the responsibility of administering the Condominium, establishing the means and methods of collecting the assessments for Common Expenses, arranging for the management of the Condominium, and performing all of the acts that may be required to be performed by the Association by the Condominium Act. Except as to those matters which the Act, the Declaration or these By-Laws specifically require to be performed by the vote of the Unit Owners, the administration of the Condominium shall be performed by the Board of Directors (as more particularly set forth in Article III).

2. Period of Control by Declarant. Notwithstanding any other provision of these By-Laws, until the earlier of two (2) years after recordation of the Declaration or the date on which seventy-five percent (75%) of the Units have been conveyed by Declarant (the "Transition Date"), the Declarant shall have the power, in its sole discretion, to (a) appoint or remove any or all officers and directors of the Unit Owners' Association at any time, without cause, and (b) exercise any or all powers and responsibilities otherwise assigned by the condominium instruments or the Condominium Act to the Unit Owners' Association, its officers, or its Board of Directors. For purposes of the preceding sentence "75% of the Units" means Units to which would ultimately appertain seventy-five percent (75%) of the undivided interests in the Common Area. The Declarant may relinquish its powers hereunder at any time by recording an appropriate statement at the Registry, in which event the date of such relinquishment shall be the "Transition Date." This section may not be amended without written consent of the Declarant.

3. Voting. Each completed Unit shall be entitled to one (1) vote. Since a Unit Owner may be more than one person, if only one of such persons is present at a meeting of the Association, that person shall be entitled to cast the vote appertaining to that Unit. But if more than one of such persons is present, the vote appertaining to that Unit shall be cast only in accordance with the agreement of a majority of them, and such consent shall be conclusively presumed if any one of them purports to cast the vote appertaining to that Unit without protest

being made forthwith by any of the others to the person presiding over the meeting. Except where a greater number is required by the Condominium Act, the Declaration or these By-Laws, a majority of the votes of Owners, in good standing, entitled to vote, and in attendance at any meeting in person or by proxy, is required to adopt decisions of the Association except for election of Directors which may be accomplished by a plurality of such votes. If the Declarant owns or holds title to one or more Units, the Declarant shall have the right at any meeting of the Association to cast the vote(s) to which such Unit(s) is entitled. No amendment shall affect the right given by the preceding sentence.

4. Place of Meeting. Meetings of the Association shall be held at the principal office of the Condominium or at such other suitable place as may be designated by the Board of Directors and stated in the notice of meeting.

5. Annual Meeting. The first annual meeting of the Association shall be held on March 31, 2012 or such earlier date as determined by the Declarant. Notice of such meeting shall be given in accordance with the provisions of Section 7 of this Article II. Thereafter, the annual meetings of the Association shall be held on the same date of each succeeding year, or on such other date within a thirty (30) day period prior to such date, as may be designated by the Board of Directors and reflected in the said notice. At such annual meetings following the Transition Date (as defined in Section 2 above), the Board of Directors shall be elected by ballot of the Owners in accordance with the requirements of Section 4 of Article III. The Association may also transact such other business as may properly come before it at such meetings.

6. Special Meetings. It shall be the duty of the President to a call a special meeting of the Association if so directed by resolution of the Board of Directors or upon a petition signed and presented to the Clerk by Owners having not less than thirty percent (30%) of the votes of all Owners. The notice of any special meeting shall state the time and place of such meeting and purpose thereof. No business shall be transacted at a special meeting except as stated in the notice.

7. Notice of Meeting. It shall be the duty of the Clerk to mail, by United States mail, return receipt requested, a notice of each annual meeting or special meeting of the Owners, at least twenty-one (21) days in advance of any annual meeting and at least seven (7) days in advance of a special meeting, stating the purpose thereof as well as the time and place where it is

to be held, to each Owner of record, at the address of their respective Units or at such other address as each Owner may have designated by notice in writing to the Clerk.

8. Voting Requirements. An Owner shall be deemed to be in good standing and entitled to vote at any annual meeting or at any special meeting of the Unit Owners' Association if, and only if, he shall have paid all assessments made or levied and due against him and his Unit by the Board of Directors as hereinafter provided, together with all interest, costs, attorney's fees, penalties and other expenses, if any, properly chargeable to him and against his Condominium Unit, as of the third business day prior to the date fixed for such annual or special meeting.

9. Proxies. The votes appertaining to any Unit may be cast pursuant to a proxy or proxies in accordance with the provisions of Section 39, IV of the Condominium Act. Where the Unit Owner is more than one Person, the proxy must be executed by or on behalf of all such Persons.

10. Quorum. A quorum shall be constituted as provided in Section 38 of the Condominium Act, as it may from time to time be amended.

11. Order of Business. The order of business at all meetings of the Association may be as follows: (a) roll call; (b) recitation of proof of notice of meeting; (c) reading of minutes of preceding meeting; (d) reports of officers; (e) report of Board of Directors; (f) election of directors, if applicable; (g) unfinished business; and (h) new business, any of which may be waived.

12. Conduct of Meeting. The President or his designate shall preside over all meetings of the Association and the Clerk shall keep the minutes of the meeting and record in a Record Book, all resolutions adopted by the meeting as well as all transactions occurring thereat. Robert's Rules of Order shall govern the conduct of all meetings of the Association when not in conflict with the Declaration, these By-Laws or the Condominium Act.

ARTICLE III

BOARD OF DIRECTORS

1. Powers and Duties. Subject to the provisions of Article II, Section 2, the affairs and business of the Condominium shall be managed by a Board of Directors (sometimes herein referred to as the "Board") which shall have all of the powers and duties necessary for the administration of the affairs of the Condominium and may act for the Association in all matters which are not by the Condominium Act or by these By-Laws directed to be exercised and done exclusively by the membership of the Association. The Board of Directors may delegate to one or more of its members the authority to act on behalf of the Board of Directors on all matters which might arise between meetings of the Board of Directors. In addition to the general duties imposed by these By-Laws, the Board of Directors shall have the power to and be responsible for the following:

(a) Preparing and adopting an annual budget, in connection with which there shall be established the assessment of each Owner of the Common Expenses;

(b) Making assessments against Owners to defray the Common Expenses of the Condominium, establishing the means and methods of collecting such assessments from the Owners, collecting said assessments, depositing the proceeds thereof in a bank depository which it shall approve, and using the proceeds to carry out the administration of the Property. Unless otherwise determined by the Board of Directors, the annual assessments against each Owner for his proportionate share of the Common Expenses shall be payable in equal monthly installments, each such installment to be due and payable in advance on the first day of each month for said month;

(c) Providing for the operation, management, repair, replacement and maintenance of all the Common Area and services of the Condominium, including designating, hiring and dismissing the personnel necessary therefor and providing services for the Property, and, where appropriate, providing for the compensation of such personnel and for the purchase or use of equipment, supplies and material to be used by such personnel in the performance of their duties, which supplies and equipment, if purchased, shall be deemed the common property of the Owners;

(d) Making and amending the Rules providing detail concerning the operation, use and enjoyment of the Property (subject to the condition that such Rules shall not be in conflict with the Condominium Act or with the Declaration or these By-Laws, and subject to the provisions of Section 11 of Article V hereof) and enforcing by legal means the provisions of the Declaration, these By-Laws and such Rules, and bringing any proceedings which may be instituted on behalf of the Owners;

(e) Obtaining and carrying insurance against casualty and liability, as provided in Article VI of these By-Laws, and paying the premium cost thereof and making, or contracting for the making of, repairs, additions and improvements to, or alterations of the Property and repairs to, and restoration of the Property, in accordance with the other provisions of these By-Laws;

(f) Opening bank accounts on behalf of the Association and designating signatories required therefore, and keeping books with detailed accounts of the receipts and expenditures affecting the Property, and the administration of the Condominium. The said books shall be available for examination by the Owners, their duly authorized agents or attorneys, at reasonable times and places. All books and records shall be kept in accordance with generally accepted accounting practices. A copy of the annual financial statement shall be supplied to any first mortgagee of any Unit in the Condominium who requests the same in writing to the Clerk;

(g) The Board of Directors shall have the irrevocable power as attorney-in-fact on behalf of all of the Owners, their heirs, successors and assigns to do the following things:

(i) To grant easements through the Common Area and to accept easements benefiting the Condominium or any portion thereof;

(ii) To negotiate, settle and litigate, including execution of any necessary documents, any proceeding by any governmental authority to condemn all or any portion of the Common Area, any dispute concerning the location of the boundaries of the Common Area, disputes concerning title to all or any portion of the Common Area and any other dispute which affects the Common Area;

(iii) To execute any documents necessary to encumber all or any portion of the Common Area to secure any borrowing, provided that such borrowing is authorized pursuant to Article V, Section 7 or Article VII, Section 2(b) hereof; and

(h) Doing such other things and acts not inconsistent with the Condominium Act and with the Declaration which it may be authorized to do by a resolution of the Unit Owners' Association.

2. Number of Directors and Initial Selection of Board. The Board of Directors shall be composed of five (5) persons. Until the Transition Date, all Directors shall be appointed by the Declarant, and may be any natural persons. After the Transition Date, all Directors elected by the Association or the Board must be Owners or spouses of Owners, or, where an Owner is not a natural person, any natural person having authority to execute deeds in behalf of such Person.

3. Elections and Term of Office. At the first election of Directors following the Transition Date, five (5) Directors shall be elected. The term of office of one (1) director shall expire at the first annual meeting thereafter, the term of office of two (2) Directors shall expire at the second annual meeting thereafter, and the term of office of Two (2) Directors shall expire at the third annual meeting thereafter. At the expiration of the initial term of office of each respective Director, each successor shall be elected at the subsequent annual meeting of the Association to serve a term of three (3) years. The Directors shall hold office until their respective successors have been elected and hold their first meeting.

4. Organization Meeting. The first meeting of the members of the Board of Directors following the annual meeting of the Unit Owners' Association shall be held immediately after, and no notice shall be necessary to the newly elected Directors in order legally to constitute such meeting, provided a majority of the whole Board shall be present thereat.

5. Regular Meetings. Regular meetings of the Board of Directors may be held without call or notice at such time and place as shall be determined, from time to time, by a majority of the Directors, provided that notice of the first regular meeting following any such determination shall be given to Directors not present when such determination is made. At least two (2) such meetings shall be held during each twelve (12) month period after the annual meeting of the Association.

6. Special Meetings. Special meetings of the Board of Directors may be called by the President on five (5) business days notice to each director. Such notice shall be given personally or by mail, e-mail, telephone or telegraph, and such notice shall state the time, place and purpose of the meeting. Special meetings of the Board of Directors shall be called by the

President or Clerk in like manner on like notice on the written request of the majority of the Directors.

7. Waiver of Notice. Before or within ten (10) days after any meeting of the Board of Directors, any director may, in writing, waive notice of such meeting and such waiver shall be deemed equivalent to the giving of such notice. Attendance by a director at any meeting of the Board shall be a waiver of notice by him of the time and place thereof. If all the directors are present at any meeting of the Board, no notice shall be required and any business may be transacted at such meeting.

8. Quorum of Board of Directors. At all meetings of the Board of Directors, a majority of the Directors shall constitute a quorum for the transaction of business, and the acts of the majority of the Directors present at a meeting at which a quorum is present shall be the acts of the Board of Directors. If, at any meeting of the Board of Directors, there shall be less than a quorum present, the majority of those present may adjourn the meeting from time to time. At any such adjourned meeting, any business which might have been transacted at the meeting as originally called may be transacted without further notice.

9. Vacancies. After the Transition Date, vacancies in the Board of Directors caused by any reason other than removal of a Director by a vote of the Association shall be filled by vote of the majority of the remaining Directors, at a special meeting of the Board of Directors held for the purpose promptly after the occurrence of any such vacancy, even though the directors present at such meeting may constitute less than a quorum of the Board; and each person so elected shall be a director for the remainder of the term of the director so replaced.

10. Removal of Directors. After the Transition Date a Director may be removed without cause, and his successor elected, at any duly called regular or special meeting of the Association at which a quorum is present, by an affirmative vote of a majority of the votes represented and voting. Any Director whose removal has been proposed by the Owners shall be given at least ten (10) days notice of the calling of the meeting and the purpose thereof and an opportunity to be heard at the meeting.

11. Compensation. No Director shall receive any compensation from the Condominium for acting as such.

12. Conduct of Meetings. The President, or, in his absence, a president pro tem elected by the Board, shall preside over all meetings of the Board of Directors and the Clerk shall keep the minutes of the meetings of the Board of Directors, recording therein all resolutions adopted by the Board of Directors and all transactions and proceedings occurring at such meetings, which minutes shall be filed in the Record Book of the Association.

13. Report of Board of Directors. The Board of Directors shall present at each annual meeting, and when called for by vote of the Association at any special meeting of the Association, a full and clear statement of the business and condition of the Condominium.

14. Dispensing with Vote. Any action by the Board of Directors required or permitted to be taken at any meeting may be taken without a meeting if all of the members of the Board of Directors shall individually or collectively consent in writing to such action. Such written consent or consents shall be filed with the minutes of the proceedings of the Board of Directors.

15. Liability of the Board of Directors. The members of the Board of Directors shall not be liable to the Owners for any mistake of judgment, negligence, or otherwise except for their own individual willful misconduct or bad faith or actions which are contrary to the provisions of the Condominium Act, the Declaration, or the By-Laws. The Owners shall indemnify and hold harmless each of the Directors from and against: (i) all liability to others arising out of contracts made or action taken or omitted on behalf of the Owners unless any such contract shall have been made, or action taken or omitted, in bad faith, due to willful misconduct, or contrary to the provisions of the Condominium Act, the Declaration, or the By-Laws; and (ii) against expenses (including attorney's fees), judgments, fines, and amounts paid in settlement incurred by such Director in connection with any threatened, pending or completed action, suit or proceeding unless he acted in bad faith or was guilty of willful misconduct or acted contrary to such provisions. It is intended that the members of the Board of Directors shall have no personal liability (except as Owners) with respect to any contract made or action taken or omitted by them on behalf of the Owners, unless made, taken or omitted in bad faith, due to willful misconduct or contrary to such provisions. It is also intended that the liability of any Owner arising out of any contract, action, or omission made by the Board of Directors or out of the aforesaid indemnity in favor of the members of the Board of Directors shall be limited to such proportion of the total liability thereunder as his undivided percentage interest in the Common Area. Every written

agreement made by the Board of Directors on behalf of the Owners shall, if obtainable, provide that the members of the Board of Directors are acting only as agents for the Owners and shall have no personal liability thereunder (except as Owners), and that each Owner's liability thereunder shall be limited to such proportion of the total liability thereunder as his undivided Percentage Interest in the Common Area.

ARTICLE IV

OFFICERS

1. Designation. The principal officers of the Association shall be a President, a Clerk, and a Treasurer, all of whom shall be elected by the Board (subject to the provisions of Article II, Section 2). The Board may appoint such other officers as in its judgment may be necessary. With the exception of the President, no officer need be a member of the Board. The offices of Treasurer and Clerk may be held by the same person.

2. Election of Officers. Subject to the provisions of Article II, Section 2, the officers of the Association shall be elected initially by the Board at a Special Meeting held on or near the date on which the Declaration is recorded at the Registry. Thereafter, officers of the Association shall be elected annually by the Board at the organization meeting of each new Board and shall hold office at the pleasure of the Board. Any vacancy in an office shall be filled by the Board at a regular meeting or special meeting called for such purpose.

3. Removal of Officers. Subject to the provisions of Article II, Section 2, the officers shall hold office until their respective successors are chosen and accept their offices. Any officer elected or appointed by the Board of Directors may be removed at any time without cause by the affirmative vote of a majority of the Board, and his successor may be elected at any regular meeting of the Board of Directors, or at any special meeting the Board of Directors calls for such purpose.

4. President. The President shall be the chief executive officer; he, or his designee, shall preside at meetings of the Association; he shall have general and active management of the business of the Condominium and shall see that all orders and resolutions of the Board are carried into effect. He shall have all the general powers and duties which are usually vested in or

incident to the office of president of a stock corporation organized under the laws of the State of New Hampshire.

5. Clerk. The Clerk shall attend all meetings of the Board of Directors and all meetings of the Association and shall record the minutes of all proceedings in the Record Book of the Association. He shall keep the Record Book current and in his custody. He shall give, or cause to be given, notice of all meetings of the Association and the Board and shall perform such other duties as may be prescribed by the Board or President. The Clerk shall compile and keep current at the principal office of the Association: (i) a complete list of the Owners and their last known post office addresses; (ii) a complete list of names and addresses of Unit mortgagees, together with conformed copies of mortgages, filed pursuant to Paragraph 5(g) of the Declaration; and (iii) copies of the Condominium Instruments. These lists and Condominium instruments shall be open to inspection by all Owners and other persons lawfully entitled to inspect the same, at reasonable hours during regular business days.

6. Treasurer. The Treasurer shall have the custody of funds and securities of the Association and shall keep full and accurate records of receipts and disbursements, shall prepare all required financial data, and shall deposit all monies and other valuable effects in such depositories as may be designated by the Board. Such records shall include, without limitation, chronological listings of all assessments and Common Expenses on account of the Common Area and each Unit, and the amounts due on such assessments by each Owner. He shall disburse funds as ordered by the Board, where possible taking proper vouchers for such disbursements, and shall render to the President and Directors, at the regular meetings of the Board, or whenever they may require it, an account of all of his transactions as Treasurer and of the financial condition of the Association. Owners shall have the right to examine the books of the Association at reasonable times and places.

7. Agreements, Contracts, Deeds, Checks, etc. All agreements, contracts, deeds, leases, checks and other instruments of the Association for expenditures or obligations shall be executed by any officer of the Association or by such other person or persons as may be designated by the Board of Directors.

8. Compensation of Officers. No officer shall receive any compensation from the Association for acting as officer unless voted by the Owners at an annual or special meeting.

9. Liability of Officers. Officers shall be liable to the Owners, and shall be indemnified by them, to the same extent as is provided for Directors in Article III, Section 15.

ARTICLE V

OPERATION OF THE PROPERTY

1. Determination of Common Expenses and Assessments Against Owners.

(a) Fiscal Year. The fiscal year of the Association shall consist of the twelve (12) month period commencing on January 1 of each year and terminating on December 31 of the same year, except that the first fiscal year shall begin at the date of organization and shall terminate on December 31. The fiscal year herein established shall be subject to change by the Board of Directors should the Board in its sole discretion deem such change to be in the best interest of the Association.

(b) Preparation and Approval of Budget. Each year the Board of Directors shall adopt a budget for the Association containing an estimate of the total amount which it considers necessary during the ensuing fiscal year for the cost of maintenance, management, repair and replacement of the Common Area and any parts of the Units as to which it is the responsibility of the Board of Directors to maintain, repair and replace, including the cost of compensation, materials, insurance premiums, supplies and other expenses that may be declared to be Common Expenses by the Condominium Act, the Declaration, these By-Laws or the Association. Such budget shall also include such reasonable reserves as the Board of Directors considers necessary to provide a general operating reserve, and reserves for contingencies and replacements. The Board of Directors shall make reasonable efforts to send to each Owner a copy of the budget, in a reasonably itemized form, which sets forth the amount of the Common Expenses payable by each Owner, at least fifteen days in advance of the fiscal year to which the budget applies. The said budget shall constitute the basis for determining each Owner's assessment for the Common Expenses of the Association.

(c) Assessment and Payment of Common Expenses. The total amount of the estimated funds set forth in the budget for the fiscal year adopted by the Board of Directors shall be assessed against each Owner of a completed Unit in proportion to the number of votes in the

Association pertaining to such Owner's Unit, and shall be a lien against each Owner's Unit in accordance with the Condominium Act. On or before the first day of each fiscal year, and the first day of each of the succeeding eleven (11) months in such fiscal year, each Owner shall be obligated to pay to the Association one-twelfth (1/12th) of the assessment for each fiscal year made pursuant to the foregoing provisions. For Units completed during any fiscal year, each Owner of newly created Units shall be obligated to pay the monthly assessment amount commencing on the first day of the month following completion. Within sixty (60) days after the end of each fiscal year, the Board of Directors shall supply to all Owners an accounting consisting of an itemized income and expense statement for the fiscal year just ended. Any amount accumulated in excess of the amount required for actual expense and budgeted reserves shall, in the discretion of the Board of Directors, either be rebated to the Owners in accordance with each Owner's votes in the Association by crediting same to the next successive monthly installments due from Owners under the then current fiscal year's budget, until exhausted, or shall be added to reserves. Any net shortage shall, if the Board of Directors deems it advisable, be added according to each Owner's votes in the Association to the installments due in the succeeding six (6) months after the rendering of the accounting.

(d) Reserves. The Board of Directors shall build up and maintain both an adequate operating reserve and an adequate reserve for contingencies and replacement of the Common Area, which shall be funded by regular monthly payments, as provided for hereinabove. At the end of each fiscal year, all funds accumulated during such year for reserves for contingencies and replacement of Common Area shall be placed in a separate bank account, segregated from the general operating funds, and used only for such purposes. If for any reason, including nonpayment of any Owner's assessment, the reserves are inadequate, the Board of Directors may at any time levy a further assessment, which shall be assessed against the Owners according to their respective votes in the Association, and which may be payable in a lump sum or in installments as the Board of Directors may determine. The Board of Directors shall serve notice of any such further assessments on all Owners by a statement in writing giving the amount and reasons therefore, and such further assessment shall, unless otherwise specified in the notice, become effective with the next monthly payment which is due more than ten (10) days after the delivery or mailing of such notice of further assessment. All owners shall be obligated to pay the

adjusted monthly amount or, if the additional assessment is not payable in installments, the amount of such assessments.

(e) Initial Assessment. When the members of the first Board of Directors take office, they shall determine the budget, as defined in this section, for the period commencing upon the recordation of the Declaration at the Registry and ending on the last day of the fiscal year in which their election occurs. Assessments shall be levied against the Owners during said period as provided in paragraph (c) of this Section. The Board of Directors shall establish an initial operating reserve through special assessment of each Owner upon the initial sale or rental of each Unit by the Declarant. This special assessment shall be three (3) times the amount of the current regular monthly assessment for such Unit.

(f) Effect of Failure to Prepare or Adopt Budget. The failure or delay of the Board of Directors to prepare or adopt the annual budget for any fiscal year shall not constitute a waiver or release in any manner of an Owner's obligation to pay his allocable share of the Common Expenses as herein provided, whenever the same shall be determined, and in the absence of any annual budget or adjusted budget, each Owner shall continue to pay the monthly charge at the then existing monthly rate established for the previous fiscal period until ten (10) days after a statement has been mailed or delivered, showing the monthly payment which is due under the new annual or adjusted budget.

2. Payment of Common Expenses. All owners shall be obligated to pay the Common Expenses assessed by the Board of Directors pursuant to the provisions of Section 1 of this Article V. No Owner may exempt himself from liability for his contribution toward Common Expenses by waiver of the use or enjoyment of any of the Common Area or by abandonment of his Unit. No Owner shall be liable for the payment of any part of the Common Expenses assessed against his Unit subsequent to a sale, transfer or other conveyance by him of such Unit. The purchaser of a Unit or other acquiring Owner by virtue of any transfer or other conveyance shall be jointly and severally liable with the transferring Owner for all unpaid assessments against the latter for his proportionate share of the Common Expenses up to the time of the transfer without prejudice to the acquiring Owner's right to recover from the transferring Owner the amounts paid by the acquirer therefor; subject however, to the provisions of Section 3

of this Article V relative to recordable statements of unpaid assessments and subject to the provisions of Paragraph 5(b) of the Declaration relative to first mortgagees.

3. Recordable Statement of Unpaid Assessment. Any such acquiring Owner or transferring Owner shall be entitled to a recordable statement of the Board of Directors setting forth the amount of the unpaid assessments against the transferring Owner and such acquiring Owner shall not be liable for, nor shall the Unit conveyed be subject to a lien for, any unpaid assessments in excess of the amount therein set forth. Failure to furnish such a statement, in the manner in which notices are provided pursuant to Section 1 of Article XI, within ten (10) business days from receipt of such a request by the Board, shall extinguish the lien for unpaid assessments. Payment of a fee not exceeding the maximum allowable under the Condominium Act may be required as a prerequisite for issuance of such a statement.

4. Collection of Assessments. The Board of Directors shall take prompt action to collect any assessments for Common Expenses due from any owner which remain unpaid for more than sixty (60) days from the due date for payment thereof.

5. Uncollectible Assessments. Any assessments which are not collectible due to a waiver or limitation imposed by the provisions of Section 3 above or due to the provisions of Paragraph 5(b) of the Declaration relative to first mortgagees shall be collectible from all Owners, including the purchaser or foreclosing mortgagee, in proportion to their respective votes in the Association.

6. Maintenance and Repair.

(a) By the Board of Directors. Except as otherwise provided in Section 6(b) below, the Board of Directors shall be responsible for the maintenance, repair and replacement (unless necessitated by the negligence, misuse, or neglect of an Owner, or of a person gaining access with said Owner's actual or implied consent, in which case such expense shall be specially assessed to such Owner) of all of the Common Area, whether located inside or outside of the Units, and whether presently existing or hereafter constructed, the cost of which shall be charged to all Owners as a Common Expense.

(b) By the Owner. Except for the portions of his Unit required to be maintained, repaired or replaced by the Board of Directors, and except as provided as Article VII hereof relating to repair and reconstruction after fire or other casualty, each Owner shall be

responsible for the maintenance, repair and replacement, at his own expense, of his Unit, and any part thereof, including, but not limited to, any interior walls, finished interior surface of ceiling and floors; window glass, entrance doors, and window frames; kitchen and bathroom fixtures and appliances, and those parts of the heating and air conditioning, plumbing and electrical systems which are wholly contained within his Unit and serve no other. Each Owner shall be responsible for performing the normal maintenance for any Limited Common Area which is appurtenant to his Unit, including keeping it in a clean and sanitary condition and free and clear of snow, ice and any accumulation of water, and shall make, at his own expense, all repairs thereto, beyond normal maintenance, caused or necessitated by his negligence, misuse or neglect. Repairs to Limited Common Area which are not caused or necessitated by the negligence, misuse, or neglect of any individual Owner shall be the responsibility of the Board of Directors. Each Owner shall keep the interior of his Unit and its equipment and appurtenances in good order and condition, and shall do all redecorating, painting and varnishing which may at any time be necessary to maintain the good appearance and condition of his Unit. In addition, each Owner shall be responsible for all damage to any and all other Units or to the Common Area resulting from his failure to make any of the repairs required to be made by him by this Section. Each Owner shall perform his responsibility in such a manner as shall not unreasonably disturb or interfere with the other Owners. Each Owner shall promptly report to the Board of Directors any defects or need for repairs for which the Board of Directors is responsible. If an Owner fails to discharge any duty imposed by this subsection, or pay for any damage caused by such failure, the Board of Directors may after sixty (60) days' written notice, or reasonable notice in an emergency, itself discharge the duty or pay for the damage, and specially assess the expense against the Owner.

(c) Manner of Repair and Replacement. All repairs and replacements shall be substantially similar to the original construction and installation, and shall be of first class quality. The method of approving payment vouchers for all repairs and replacement shall be determined by the Board of Directors.

7. Additions, Alterations or Improvements by Board of Directors. Whenever in the judgment of the Board of Directors the Common Area shall require additions, alterations or improvements costing in excess of One Thousand Dollars ($1,000.00) during any period of

twelve (12) consecutive months, and the making of such additions, alterations or improvements shall have been approved by a majority of the Owners, the Board of Directions shall proceed with such additions, alterations or improvements and shall assess all Owners for the cost thereof as a Common Expense. Any additions, alterations or improvements costing One Thousand Dollars ($1,000.00) or less during any period of twelve (12) consecutive months may be made by the Board of Directors without approval of the Owners and the cost thereof shall constitute part of the Common Expenses. Notwithstanding the foregoing, if, in the opinion of not less than sixty per cent (60%) of the members of the Board of Directors, such additions, alterations or improvements are exclusively or substantially exclusively for the benefit of a limited number of Owner or Owners requesting the same, such requesting Owners shall be specially assessed therefor in such proportion as they jointly approve or, if they are unable to agree thereon, in such proportions as may be determined by the Board of Directors. If in any of the above cases all or any portion of such assessments are not available to the board prior to the time that the amounts thereof are needed to provide payment of the authorized costs, the Board may borrow such amounts, on behalf of the Association, and may secure such borrowing by assignment of the liens relative thereto arising pursuant to Section 2 of Article XII of these By-Laws.

8. Additions, Alterations or Improvements by Owners. No Owner shall make any structural addition, alteration or improvement in or to his Unit or Limited Common Area appurtenant to his Unit without the prior written consent thereto of the Board of Directors. No Owner shall paint, decorate or otherwise change the external appearance of his Unit or Limited Common Area, including the doors and windows, without the prior written consent thereto of the Board of Directors. The Board of Directors shall be obligated to answer any written request by an Owner for approval of such proposed structural addition, alteration or improvement or such external change within 30 days after its receipt of such request, and its failure to do so within the stipulated time shall constitute a consent by the Board of Directors to the proposed addition, alteration, improvement or change. If any application to any governmental authority for a permit to make any such structural addition, alteration or improvement in or to any Unit or Limited Common Area requires execution by the Association, and provided consent has been given by the Board of Directors, then the application shall be executed on behalf of the Association by the Board of Directors only, without, however, incurring any liability on the part of the Board of

Directors, or any of them to anyone on account of such addition, alteration or improvement. The Clerk shall record any necessary amendment to the Declaration to effect such action as provided in Sections 31 and 32 of the Condominium Act, provided, however, until Units owned by the Declarant shall have been completed and initial deeds of conveyance of such Units shall have been recorded, the Declarant shall have the right to make such alterations to such Units without the consent of the Board of Directors, and the Board of Directors shall execute any such application required.

9. Restrictions on Use of Units. To assist the Association in providing for congenial occupancy and the protection of the value of the Units, it is necessary that the Board of Directors have the right and authority to exercise reasonable controls over the use of the Units. Violation of the following enumerated prohibitions shall not be permitted, and the Board of Directors is hereby authorized to take all steps necessary to prevent or discontinue any violations thereof, all at the expense of the violator (which expense shall be specially assessed against any responsible Owner):

(a) No decorations, awnings, screens, sunshades or covers, air conditioning equipment, fans, advertisements, signs or posters of any kind shall be affixed to the exterior of the building or otherwise placed or posted in or on the Property except as authorized by the Board. This restriction shall not apply to advertisements, signs or posters utilized by the Declarant, or its agents, in selling or renting the Units.

(b) No clothing, laundry, rugs, or other objects shall be hung, shaken or thrown from any window or exterior portion of a Unit or otherwise left or placed in such a way as to be exposed to public view. All interior window covering exposed or facing the exterior of the Unit will be of a solid white color. All refuse and trash shall be placed in the location specifically designated by the Board, and no garbage or trash shall be permitted to remain in public view.

(c) No animal, other than common household pets with the consent of the Board, shall be kept or maintained on the Property, nor shall common household pets be kept, bred or maintained for commercial purposes on the Property. No more than one such common household pet shall be allowed to be kept or maintained in any Unit. Pets shall not be permitted outside of Units unless they are accompanied by an adult person and carried or leashed. The

Board of Directors may make further provisions in the Rules for the control and regulation of household pets in the Condominium. The Owner of a Unit where a pet is kept or maintained shall be responsible and may be assessed by the Board of Directors for all damages to the Property resulting from the maintenance of said pet, and any costs incurred by the Association in enforcing the Rules prescribed or to be prescribed by the Board of Directors for the control and regulation of pets in the Condominium and each such Owner shall be deemed to indemnify and hold the Board harmless against such loss or liability resulting from said pet.

(d) No nuisances shall be allowed on the Property nor shall any use or practice be allowed which is an unreasonable source of annoyance to its residents or which unreasonably interferes with the peaceful possession or proper use of the Condominium by others. Without limiting the foregoing, no owner, tenant, occupant or their guests shall play music or otherwise create noise in the Common Areas or Limited Common Area, which disturbs any other owner, tenant or occupant.

(e) No Owner, tenant or guest shall allow the installation of wiring for electrical or telephone use, television antennae, air conditioning unit or other machine or equipment, which protrudes through the wall or the roof of any building or is otherwise visible on the exterior of a building except as presently installed or as authorized by the Board.

(f) No Unit or Common Area of the Condominium may be used for any unlawful, immoral or improper purpose.

(g) Nothing shall be done in any Unit or in, on, or to the Common Area which may impair the structural integrity of the Property, or which would structurally change a building or improvements thereon except as provided in the Declaration or these By-Laws. Nothing shall be altered or constructed in or removed from the Common Area, except upon the written consent of the Board of Directors.

(h) Unless authorized by the Board of Directors, no Owner, tenant or guest shall direct or engage any employee of the Condominium on any private business, nor shall he direct, supervise or in any manner attempt to assert control over any such employee.

(i) No activity shall be done or maintained in any Unit or upon any Common Area which will increase the rate of insurance on any Unit or the Common Area or result in the

cancellation of insurance thereon, unless such activity is first approved in writing by the Board of Directors. No waste shall be committed in the Common Area.

In the use of the Units and the Common Area of the Condominium, Owners shall obey and abide by all valid laws, ordinances and zoning and other governmental regulations affecting the same and all applicable Rules adopted by the Board. The Common Area shall be used only for the furnishing of the services and facilities for which it is reasonably suited and which are incident to the use and occupancy of the Units.

(j) Owners shall not be entitled to maintain more than two motor vehicles, including not more than one truck, within the Condominium at one time. No service, repairs or other maintenance shall be performed upon any such automobile or truck within any Common Area or Limited Common Area. No motorbikes, motorcycles, minibikes or snowmobiles shall be operated within the Condominium. No motorbikes, minibikes, snowmobiles, motorized boats, trailers, campers or all terrain vehicles shall be parked or allowed to remain within the Condominium except with the approval of and in an area designated by the Board.

(k) Owners shall be entitled to rent or lease their Unit, but not for any period less than thirty (30) days. The Board may adopt Rules, to govern the leasing of Units, including Rules requiring deposits to pay the costs of any damage caused to the Condominium. Such Rules may require a minimum initial term of up to six (6) months for any rental, but shall not otherwise restrict the term of rental.

(l) No woodstove of any nature whatsoever shall be installed in any Unit. All authorizations required of the Board of Directors by this Section 9 shall be in writing signed by the Board and shall be upon such terms, conditions and limitations as the Board deems advisable.

10. <u>Right to Access</u>. A right of access shall exist to each Unit in favor of the Board of Directors, or any other person authorized by the Board for the purpose of making inspection or for the purpose of correcting any condition originating in the Unit and threatening another Unit or Common Area, or for the purpose of performing installation, alterations or repairs to the mechanical or electrical services or other Common Area in the Unit provided that requests for entry are made in advance and that any such entry is at a time reasonably convenient to the

Owner. In case of emergency, such right of entry shall be immediate whether the Owner is present at the time or not.

11. Rules. Rules concerning the operation and use of the Common Area may be promulgated and amended by the Board of Directors, provided that such Rules are not contrary to or inconsistent with the Condominium Act, the Declaration or these By-Laws. Copies of the Rules shall be furnished by the Board of Directors to each Owner prior to the time when the same shall become effective. A vote of the majority of the Owners present in person or by proxy at a meeting of the Association may overrule and declare void any Rule adopted by the Board; provided that notice of the proposal to overrule shall be included in the notice of such meeting.

ARTICLE VI

INSURANCE

1. Insurance Required. The Board of Directors shall obtain: (i) a master casualty policy affording fire and extended coverage in an amount equal to the full replacement value of the structures within the Condominium in the name of the "Condominiums at Lilac Lane", for the use and benefit of the individual Owners; (ii) a master liability policy covering the Association, the Board, and agents or employees of the foregoing with respect to the Condominium, and all owners and other persons entitled to occupy any portion of the Condominium (nothing herein shall be deemed to require that the Board obtain what is commonly known as "officers and directors liability" insurance coverage); (iii) fidelity bonds covering designated officers and directors of the Association; and (iv) such other policies as specified herein below, which insurance shall be governed by the following provisions to the extent obtainable or possible:

(a) Fire insurance with standard extended coverage endorsement, vandalism and malicious mischief endorsements insuring all the buildings in the Condominium including, without limitation, all such portions of the interior of such buildings as are for insurance purposes normally deemed to constitute part of the building and customarily covered by such insurance, such as heating and air conditioning and other service machinery, interior walls, all finished wall surfaces, ceiling and floor surfaces, including any wall to wall floor coverages,

bathroom and kitchen cabinets and fixtures, including appliances which are affixed to the buildings or sold as part of a Unit, heating and lighting fixtures, any other fixtures, equipment, or personal property inside a Unit sold as part of the Unit, and fixtures, building service equipment and common personal property and supplies belonging to the Association, but not improvements made by individual Owners which exceed a total value of One Thousand Dollars ($1,000.00) and are not reported to the insurer, such insurance to be in an amount at least equal to the replacement value of the buildings (including the Units) and to be payable to the Board as trustee for the Owners and their mortgagees as their respective interests may appear. The deductible amount under such insurance shall be no greater than the lesser of $10,000.00 or one percent (1%) of the policy face amount.

(b) Public liability insurance in such amounts as the Board may from time to time determine, but in no event shall the limits of liability be less than One Million Dollars ($1,000,000.00) for bodily injury and property damage per occurrence, insuring the Association and all individuals referred to in Section 1(ii) above, against any liability to anyone, and with cross liability coverage with respect to liability claims of any one insured thereunder against any other insured thereunder. This insurance, however, shall not insure against individual liability of an Owner or other person entitled to occupy a Unit for negligence of such Owner or other person occurring within that Unit or within the Limited Common Area of which that Unit has exclusive use.

(c) Fidelity bonds for designated officers and directors of the Association, covering all persons who either handle or are responsible for funds, whether or not they receive compensation for their services, in the amount of the greater of: (i) the maximum funds that will be in the custody of the Association at any time; or (ii) the sum of three (3) months' assessments on all Units plus the Association's reserve funds.

(d) Workmen's compensation insurance as required by Law.

(e) Such other insurance as the Board may determine.

2. General Insurance Provisions.

(a) The Board shall deal with the insurer or insurance agent in connection with the adjusting of all claims covered by insurance policies provided for under Paragraph 1 above and shall review with the insurer or insurance agent, not less than once in each three (3)

year period, the coverage under said policies, said review to include an appraisal of improvements within the Condominium, and shall make any necessary changes in the policy provided for under Paragraph 1 (a) above in order to meet the coverage requirements of such Paragraph.

(b) The Board shall be required to make every effort to see that all policies of physical damage insurance provided for under Article VI, Section 1 above: (i) shall contain waivers by the insurer as to subrogation claims against the Association, its employees and agents, members of the Board, and Owners and their guests, licensees, tenants, employees, and members of their family who reside with them, except in cases of arson and fraud; (ii) shall contain a waiver of defense of invalidity or prejudice on account of the conduct of any of the Owners over which the Association has "no control"; (iii) shall contain a waiver of defense of invalidity or prejudice by failure of the insured, or Owners collectively, to comply with any warranty or condition with regard to any portion of the Condominium over which the insured, or Owners collectively, have no control; (iv) shall provide that such policies may not be cancelled or substantially modified without at least thirty (30) days' written notice to all of the insured thereunder and all first mortgagees of Units named in the policies; (v) shall provide that the insurance under said policies shall be primary insurance, and that in no event shall the insurance under said policies be brought into contribution with insurance purchased individually by Owners or their mortgagees; (vi) shall provide that policies obtained by individual Owners shall not be considered under any "no other insurance" clause, and shall not in any way decrease the insurance under the master policies; (vii) shall provide that, until the expiration of thirty (30) days after the insurer gives notice in writing to the mortgagee of any Unit, the mortgagee's insurance coverage will not be affected or jeopardized by any act or conduct of the Owner of such Unit, the other Owners, the Board of Directors, or any of their agents, employees or household members, nor cancelled for nonpayment of premiums; (viii) shall contain Agreed Amount and Inflation Guard Endorsement, any available Construction Code Endorsements, and Steam Boiler and Machinery Coverage Endorsement; (ix) shall provide that any Insurance Trust Agreement will be recognized; (x) shall include in the "loss payable" clause the Association as trustee for each Unit Owner and the holders of each Unit's mortgages; and (xi) shall contain the

standard mortgage clause naming each first mortgagee (or servicer) and its successors and assigns, and FNMA or FHLMC or FHA, if applicable.

(c) The Board shall be required to make every reasonable effort to see that all policies of liability insurance provided for under Article VI, Section 1 above: (i) shall cover all common areas, public ways and any other areas under the supervision of the Association; (ii) shall provide coverage for bodily injury and property damage resulting from the operation, maintenance or use of the Common Area; (iii) shall provide coverage for any legal liability resulting from lawsuits related to employment contracts in which the Association is a party; (iv) shall, if they do not include a "severability of interest" clauses, provide that no Unit Owner's claim will be denied because of negligent acts of the Association or other Unit Owners; and (v) shall provide that such policies may not be cancelled or substantially modified without at least thirty (30) days' written notice to all of the insureds thereunder and all first mortgagees of Units named in the policies.

(d) The Association's fidelity bond required above should name the Association as obligee. Fidelity bonds must provide that they may not be cancelled or substantially modified without at least thirty (30) days' written notice to all of the insureds thereunder and all first mortgagees of Units named in the policies.

3. Individual Policies.

(a) Any Owner and any mortgagee may obtain at his own expense additional insurance (including, without limitation, a "Condominium unit –owner's endorsement") for improvements and betterments to a Unit made or acquired at the expense of the Owner and not covered under the master casualty policy referred to in Article VI, Section 1(a) above. Such insurance should contain the same waiver of subrogation provision as that set forth in Section 2(b) of this Article VI. No such policy shall be written so as to decrease the coverage under any of the policies obtained by the Board pursuant to Section 1(a) above, and each Owner hereby irrevocably assigns to the Board, as trustee for the Owners and their mortgagees, the proceeds of any such policy to the extent that any such policy does in fact result in a decrease in such coverage, said proceeds to be applied pursuant to the terms hereof as if produced by such coverage. Copies of all such policies (except policies covering only personal property, owned or supplied by individual Owners) shall be filed with the Association.

(b) It is recommended that each Owner obtain at his own expense, in addition to the insurance hereinabove provided to be obtained by the Board of Directors, a "Tenant Homeowner's Policy," or equivalent, to insure against loss or damage to personal property used or incidental to the occupancy of his Unit or Limited Common Area, addition living expense, vandalism or malicious mischief, theft, personal liability and the like. Any such insurance should cover any loss, injury or damage to persons or to floor coverings, appliances and other personal property not covered in the master policy, and all improvements to his Unit which are not reported to the Board.

(c) In addition to the other requirements of law or imposed by the Declaration or these By-Laws, each Owner, prior to commencement of construction of improvements to his Unit, shall, for insurance purposes, notify the Board of all proposed improvements to his Unit (except personal property other than fixtures) and upon receipt of such notice, the Board shall notify the insurer under any policy obtained pursuant to Section 1(a) hereof, of any such improvements.

4. Notice to Unit Owners. When any policy of insurance has been obtained on behalf of the Association, written notice of the obtainment thereof and of any subsequent changes therein or termination thereof shall be promptly furnished to each Unit Owner by the Clerk of the Association. Such notice shall be sent to all Unit Owners of record at the address of their respective Units and to such other addresses of any of them may have designated to the Clerk; or such notice may be hand delivered by the Clerk.

ARTICLE VII

REPAIR AND RECONSTRUCTION AFTER FIRE OR OTHER CASUALTY

1. When Repair and Reconstruction are Required. Subject to the provisions of Paragraph 3 (xviii) of the Declaration, in the event of damage to or destruction of all or part of the buildings in the Condominium as a result of fire or other casualty, the Board of Directors shall arrange for and supervise the prompt repair and restoration of the damaged or destroyed portion of the buildings. Notwithstanding the foregoing, each Owner shall have the right to supervise the redecorating work in his own Unit.

2. Procedure for Reconstruction and Repair.

(a) Immediately after a fire or other casualty causing damage to a building, the Board of Directors shall obtain reliable and detailed estimates of the cost of repairing and restoring the damage to a condition as good as that existing before such casualty. Such costs may also include professional fees and premiums for such bonds as the Board of Directors determines to be necessary. The Board shall contract for such repair and restoration and in doing so shall exercise its sole discretion in selecting from among said estimates.

(b) If the proceeds of insurance, paid to the Board as trustee for the Owners and their mortgagees pursuant to Sections 1(a) and 3(a) of Article VI hereof, are not sufficient to defray the said estimated costs of reconstruction and repair, or if, upon completion of the reconstruction and repair, the funds for the payment of the costs thereof are insufficient, assessments in sufficient amounts to provide payment of such costs shall be made against the Owners in proportion to their respective votes in the Association. If all or any portion of such assessments are not available to the Board prior to the time that the amounts thereof are needed to provide payment of such costs, the Board may borrow such amounts, on behalf of the Association, and may secure such borrowing by assignment of the liens relative thereto arising pursuant to Section 2 of Article XII of these By-Laws.

(c) Any such reconstruction or repair shall be substantially in accordance with the original plans and specifications under which the damaged building was originally constructed.

(d) Encroachments upon or in favor of Units which may be created as a result of such reconstruction or repair shall not constitute a claim or basis for any proceeding or action by the Owner upon whose property such encroachment exists, provided that such reconstruction is substantially in accordance with the original plans and specifications under which the damaged building was originally constructed. Such encroachments shall be allowed to continue in existence for so long as the building (as reconstructed) shall stand.

3. Disbursements of Construction Funds.

(a) The net proceeds of insurance collected on account of a casualty and any additional amounts collected by the Board of Directors from assessments against Owners on account of such casualty (or borrowed by the Board as provided in Article VII, Section 2(b) above) shall constitute a construction fund which shall be disbursed in payment of the cost of reconstruction and repair by the Board of Directors.

(b) The construction fund shall be paid by the Board of Directors in appropriate progress payments, to such contractors, suppliers and personnel engaged in performing the work or supplying materials or services for the repair and reconstruction of the building as are designated by the Board of Directors.

(c) It shall be presumed that the first monies disbursed in payment of the cost of reconstruction and repair shall be from insurance proceeds; and if there is a balance in the construction fund after the payment of all of the cost of the reconstruction and repair for which the fund is established, such balance shall first be applied to any borrowing pursuant to Article VII, Section 2(b) above, and the remainder, if any, shall be distributed to the Owners to repay them for assessments, if any, pursuant to said Article VII, Section 2(b). Otherwise, any remainder shall be added to the reserve for contingencies and replacements of Common Area.

ARTICLE VIII

SALES, LEASES, MORTGAGES AND RESALES OF UNITS

1. No Severance of Ownership. No Owner shall execute any deed, lease, mortgage, or instrument conveying or mortgaging the title to his Unit without including therein the undivided interest of such Unit in the Common Area, it being the intention hereof to prevent any severance of such combined ownership. Any such deed, lease, mortgage, or other instrument purporting to affect one or more of such interests, without including all such interests, shall be deemed and taken to include the interest or interests so omitted, even though the latter shall not be expressly mentioned or described therein. Except to the extent otherwise expressly provided by the Declaration, these By-Laws or the Condominium Act, the undivided interest in the Common Area allocated to any Unit shall not be altered, and any purported transfer, encumbrance, or other disposition of that interest without the Unit to which it appertains shall be void.

2. Payment of Assessment. No Owner shall be permitted to convey, mortgage, sell, lease, give or devise his Unit unless and until he (or his personal representative) shall have paid in full to the Board of Directors all unpaid Common Expenses theretofore assessed by the Board of Directors with respect to his Unit, and shall have satisfied all unpaid liens with respect to his Unit, except liens of mortgage. Where this provision is satisfied at the time of execution of a mortgage, there shall be no requirement that it again be satisfied at the time of a subsequent foreclosure of such mortgage, or deed in lieu of such foreclosure. In the event that the Unit is subject to any outstanding assessment previously levied against such Unit, and the acquiring Owner or the transferring Owner requests a recordable statement pursuant to Section 3 of Article V, the statement shall expressly state any waiver of, or failure or refusal to exercise, the right of the Association to prevent the disposition of such Unit, in any case where such waiver, failure or refusal may exist. Failure or refusal to furnish such a statement as provided in said Section 3 shall not only constitute a waiver of such assessment, but also make the above-mentioned prohibition inapplicable to any such disposition of the Unit.

3. Leases. Leases must be in writing, shall be for a minimum term of six months, and shall be subject to the requirements of the Condominium Declaration and By-Laws. A copy of the Declaration and By-Laws shall be available for review by tenants. Tenants shall be provided with copies of any rules or regulations promulgated by the Board of Directors, and shall acknowledge their receipt and acceptance of the terms and conditions therein.

4. Resales. In the even of a resale of a Unit or any interest in a Unit by any persons other than the Declarant, the purchaser shall have the right to obtain from the Association prior to the contract date of the disposition, the following:

(a) A recordable statement setting forth the amount of unpaid assessments currently levied against the Unit. Pursuant to RSA 356-B:46, VIII, the Association may charge Ten ($10.00) Dollars for the issuance of the statement, or the maximum as shall be allowed by statute, whichever is greater.

(b) A statement of any capital expenditures and major maintenance expenditures anticipated by the Association within the current or succeeding two (2) fiscal years.

(c) A statement of the status and amount of any reserve for the major maintenance or replacement fund and any portion of such fund earmarked for any specified project by the Board of Directors.

(d) A copy of the income statement and balance sheet of the Association for the last fiscal year for which such statement is available.

(e) A statement of the status of any pending suits or judgments in which the Association is a party defendant.

(f) A statement setting forth which insurance coverage is provided for all Unit Owners by the Association and what additional insurance coverage would normally be secured by each individual Unit Owner.

(g) A statement that any improvements or alterations made to the Unit, or the Limited Common Area assigned thereto, by the prior Unit Owner, are not known to be in violation of the condominium instruments.

(h) A copy of the Condominium Declaration, By-Laws and any formal rules of the association.

(i) A statement of the amount of monthly and annual fees and any special assessments made within the last three (3) years.

(j) Any other disclosure required by the Condominium Act.

For the foregoing disclosures, the Association may charge such fee or fees as shall be allowed by statute.

ARTICLE IX

AMENDMENT TO BY-LAWS

1. Amendments. Except as otherwise provided in the Condominium Act, the Declaration and herein, these By-Laws may be modified or amended by the procedure, and subject to the limitations, set forth in the Declaration. Notwithstanding the foregoing, so long as the Declarant is the Owner of one or more Units, no amendment to the By-Laws or Rules may be adopted which could interfere with the construction, display, sale, lease or other disposition of such Unit or Units.

2. Recording. A modification or amendment of these By-Laws shall become effective only when it has been duly evidenced and recorded in accordance with the provisions of Section 34, IV of the Condominium Act.

3. Conflicts. No modification or amendment of these By-Laws may be adopted which shall be inconsistent with the provisions of the Condominium Act or with the provisions of the Declaration. A modification or amendment once adopted and recorded as provided for herein shall then constitute part of the official By-Laws of the Condominium and all Owners shall be bound to abide by such modification or amendment.

4. Approval of Mortgagees. These By-Laws contain provisions concerning various rights, priorities, remedies and interests of the first mortgagees of Units. Such provisions in these By-Laws are to be construed as covenants for the protection of such mortgagees on which they may rely in making loans secured by mortgages on the Units. Accordingly, all Eligible Mortgage Holders (as defined in the Declaration) shall be given thirty (30) days' notice of all proposed amendments, and no amendment or modification of these By-Laws materially impairing or affecting the rights, priorities, remedies or interest of such Eligible Mortgage Holders (including their use of a secondary mortgage market, i.e. the saleability of mortgages to Mortgage Guaranty Insurance Corporation, Federal National Mortgage Association, Federal Home Loan Mortgage Corporation, etc.) shall be adopted without the prior written consent of at least fifty-one percent (51%) of them (based upon votes appurtenant to Units subject to their mortgages).

ARTICLE X

MORTGAGES

1. Notice to Board. An owner who mortgages his Condominium Unit shall notify the Board in writing of the name and address of all mortgagees. The Board shall maintain suitable records pertaining to such mortgages.

2. Notice of Unpaid Assessments for Common Expense. The Board whenever so requested in writing by a mortgagee of a Condominium Unit, shall promptly report any then unpaid assessments for Common Expenses due from, or any other default by, the owner of the mortgaged Condominium Unit.

3. Notice of Default. No suit or other proceeding may be brought to foreclose the lien for any assessment levied pursuant to the Declaration or these By-Laws except after ten (10) days' written notice to the holder of the first mortgage on the Unit which is the subject matter of such suit or proceeding, provided that the Board has been given notice of such mortgage in the manner set forth in the Declaration.

ARTICLE XI

NOTICE

1. Manner of Notice. Except as otherwise provided in the Declaration and these By-Laws, all notices, demands, bills, statements or other communications provided for or required under these By-Laws shall be in writing and shall be deemed to have been duly given if delivered personally or if sent by U.S. Mail, return receipt requested, first class postage prepaid: (i) if to an Owner, at the address of his Unit and at such other address as the Owner may have designated by notice in writing to the Clerk, or (ii) if to the Association or the Board of Directors at the Condominium or at such other address as shall be designated by notice in writing to the Owners pursuant to this Section.

2. Waiver of Notice. Whenever any notice is required to be given under the provisions of the statutes, the Declaration or these By-Laws, a waiver thereof, in writing, signed by the person or persons entitled to such notice, whether signed before or after the time stated therein, shall be deemed equivalent thereto, unless such waiver is ineffective under the provisions of the Condominium Act.

ARTICLE XII

DEFAULT

1. Default. Each Owner shall be governed by, and shall comply with, all of the terms of the Condominium Act, Declaration, these By-Laws and the Rules, and any amendments of the same. The Board shall give written notice to an Owner of any default by the Owner in the performance of any obligations under the Act, Declaration, By-Laws, or Rules. A default by an Owner shall entitle the Association, acting through the Board of Directors, to the following relief:

(a) Legal Proceedings. Failure to comply with any of the terms of the Condominium Act, the Declaration, these By-Laws, or the Rules shall be grounds for relief which may include, without limiting the same, an action to recover the sums due, for money damages, injunctive relief, foreclosure of the lien for payment of all assessments, any other relief provided for in these By-Laws, or any combination thereof, and any other relief afforded by a court of competent jurisdiction, all of which relief may be sought by the Association, the Board of Directors, or, if appropriate, by the aggrieved Owner.

(b) Additional Liability. Each Owner shall be liable for the expenses of all maintenance, repair or replacement rendered necessary by his acts, neglect or carelessness or the act, neglect or carelessness of any member of his family or his tenants, guests, employees, agents or invitees, but only to the extent that such expense is not covered by the proceeds of insurance carried by the Association. Such liability shall include any increase in fire insurance rates occasioned by use, misuse, occupancy or abandonment of any Unit or its appurtenances. Nothing contained herein, however, shall be construed as modifying any waiver by an insurance company of its rights of subrogation.

(c) Costs and Attorneys' Fees. In any proceeding arising out of any alleged default by an Owner, the prevailing party shall be entitled to recover the costs of the proceeding, and such reasonable attorneys' fees as may be determined by the Court.

(d) No Waiver of Rights. The failure of the Association, the Board of Directors, or of an Owner to enforce any right, provision, covenant, or condition which may be granted by the Condominium Act, the Declaration, these By-Laws, or the Rules shall not constitute a waiver of the right of the Association, the Board of Directors, or any Owner to enforce such right, provision, covenant, or condition in the future. All rights, remedies, and privileges granted to the Association, the Board of Directors or any Owner pursuant to any term,

provision, covenant or condition of the Condominium Act, the Declaration, these By-Laws, or the Rules shall be deemed to be cumulative and the exercise of any one or more thereof shall not be deemed to constitute an election of remedies, nor shall it preclude the party exercising the same from exercising such privileges as may be granted to such party by the Condominium Act, the Declaration, these By-Laws or the Rules, or at law or in equity.

(e) Interest. In the event of a payment default by any Owner which continues for a period in excess of thirty (30) days, such Owner shall be obligated to pay interest at eighteen percent (18%) per annum from the due date thereof. In addition, the Board of Directors shall have the authority to impose a late payment charge on such defaulting Owners in an amount not to exceed $15.00 or six cents ($0.06) per dollar on any amount so overdue, whichever is greater.

(f) Abatement and Enjoinment of Violations by Owners. The violation of any Rule adopted by the Board of Directors, or the breach of any By-Law contained herein, or the breach of any provision of the Declaration, shall give the Board of Directors the right, in addition to any other rights set forth in these By-Laws: (i) to enter the Unit in which, or as to which, such violation or breach exists and summarily to abate, at the expense of the defaulting Owner, any condition that may exist therein contrary to the intent and meaning of the provisions hereof, and the Board of Directors shall not thereby be deemed guilty in any manner of trespass (except that this subsection shall not apply to the alteration or demolition of any items of construction); (ii) to enjoin, abate or remedy by appropriate legal proceedings, either at law or in equity, the continuance of any such breach; or (iii) to suspend or limit the right of the Owner committing the violation to use any part of the Common area during the continuance of such violation.

2. Lien for Assessments.

(a) The total annual assessment of each Owner for the Common Expenses or any special assessment levied pursuant to these By-Laws, is hereby declared to be a lien levied against the Unit of such Owner as provided in (including, without limitation, the priority provisions set forth in Section 46 thereof) the Condominium Act, which lien shall be effective when perfected in accordance with said Act.

(b) In any case, where an assessment against an Owner is payable in installments, upon a default by such Owner in the payment of any single installment, which

continues for ten (10) days after written notice of such default has been sent to the Owner, the maturity of the remaining total of the unpaid installments of such assessments may be accelerated, at the option of the Board of Directors, and the then balance owing may be declared due and payable in full by the service of notice to such effect upon the defaulting Owner by the Board of Directors. The Association, in order to perfect such lien, shall file before the expiration of six (6) months from the time that the delinquent assessment (or installments, where such assessment is payable in installments) became due and payable a memorandum in the Registry in the form and manner prescribed in the said Act.

(c) The lien assessments shall include interest, costs and attorneys' fees as provided in Section 1 of this Article XII and may be foreclosed in the manner provided by the laws of the State of New Hampshire for the foreclosure of power of sale mortgages (including, without limitation, RSA 479:25 B 27-a) or by suit brought in the name of the Board of Directors, acting on behalf of the Association.

(d) Suit to recover a money judgment for unpaid assessments shall be maintainable without foreclosure or waiving the lien securing the same, and foreclosure shall be available without bringing suit to recover a money judgment.

(e) If a Unit Owner fails to pay any and all assessments, the Board of Directors, as authorized by the By-Laws of the Association, and pursuant to New Hampshire R.S.A. 356-B:46(IX), after thirty (30) days' prior written notice to the Unit Owner, may terminate the delinquent Unit's common privileges and cease supplying a delinquent Unit with any and all services normally supplied or paid for by the Association. These services shall be restored upon payment of all assessments.

(f) In accordance with R.S.A. 356-B:46-a, the Association may collect rent due from a tenant of a unit subject to an unpaid assessment.

ARTICLE XIII

COMPLIANCE, CONFLICT, AND MISCELLANEOUS PROVISIONS

1. Compliance. These By-Laws are set forth in compliance with the requirements of the Condominium Act.

2. Severability. In case any of the By-Laws are in conflict with the provisions of any applicable New Hampshire law, the provisions of applicable New Hampshire law will apply. If any provision of these By-Laws or any section, sentence, clause, phrase or word, or the application thereof in any circumstance is held invalid, the validity of the remainder of these By-Laws shall not be affected thereby and, to this end, the provisions hereof are declared to be severable.

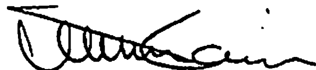
3. Waiver. No provision of these By-Laws shall be deemed to have been abrogated or waived by reason of any failure or failures to enforce the same (except where a right is dependent upon notice to be given within a specified period), irrespective of the number of violations or breaches which may occur.

4. Captions. The captions contained in these By-Laws are for convenience only and are not part of these By-Laws and are not intended in any way to limit or enlarge the terms and provisions of these By-Laws.

5. Gender, etc. Whenever in these By-Laws the context so requires, the singular number shall include the plural and the converse; and the use of any gender shall be deemed to include all genders.

IN WITNESS WHEREOF, the Declarant has caused these By-Laws to be executed by its duly authorized president this 16th day of February, 2010.

CONDOMINIUMS AT LILAC LANE

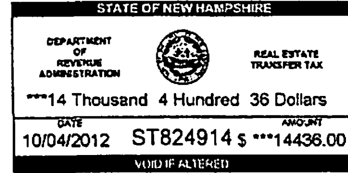


William M. Pierce, President

EXHIBIT 3

Doc # 0015614 Oct 4, 2012 11:14 AM
Book 4059 Page 0452 Page 1 of 3
Register of Deeds, Strafford County

Upon recording return to:
FRASCA & FRASCA, PA
2 AUBURN STREET
NASHUA, NH 03064



DEED

For consideration paid, The New Meadows, Inc., a New Hampshire corporation, grants to Monument Garden, LLC, a limited liability company organized under the laws of the State of Maine with a principal place of business at 21 Continental Blvd., Suite 101, Merrimack, New Hampshire 03054, with the covenants set out below, the following described real estate, improvements and development rights in, on or pertaining to Condominiums at Lilac Lane situate in Dover, Strafford County, New Hampshire (the "Condominium"):

A. A certain tract or parcel of land situated on Lilac Lane in the City of Dover County of Strafford and State of New Hampshire, the same being more particularly delineated as Condominiums at Lilac Lane on plan entitled "Revision IV to the Condominium Site Plan, Tax Map H Lot 35A, The New Meadows, Inc." prepared by MSC Civil Engineers & Land Surveyors, Inc., dated February 23, 2009 and recorded in the Strafford County Registry of Deeds (the "Registry") as Plans #98-094 through 98-098 (the "Site Plan"), more particularly bounded and described as follows:

BEGINNING AT A POINT IN THE SIDELINE OF LILAC LANE N85°58'17" E A DISTANCE OF 106.40 FEET FROM AN ANGLE POINT OF THE MEADOWS AT DOVER, A CONDOMINIUM; THENCE PROCEEDING ALONG SAID MEADOWS AT DOVER, A CONDOMINIUM; THE FOLLOWING COURSES: N 82° 23' 50" E A DISTANCE OF 159.57 FEET; ALONG A CURVE TO THE LEFT HAVING A RADIUS OF 200.00 FEET, AN ARC LENGTH OF 111.91 FEET; N 50° 20' 18" E A DISTANCE OF 257.81 FEET; S 01° 51' 11" W A DISTANCE OF 77.45 FEET; S 35° 45' 41" W A DISTANCE OF 116.21 FEET; S 21° 41' 21 E A DISTANCE OF 91.13 FEET; S 54° 57' 20" E A DISTANCE OF 124.71 FEET; S 17° 56' 22" E A DISTANCE OF 130.70 FEET; S 53° 06' 12" E A DISTANCE OF 63.68 FEET; S 18° 30' 11" W A DISTANCE OF 241.19 FEET; S 09° 54' 53" W A DISTANCE OF 295.72 FEET; S 56° 30' 37" W A DISTANCE OF 82.94 FEET; S 78° 01' 45" W A DISTANCE OF 46.50 FEET; N 24° 00' 00" W A DISTANCE OF 915.20 FEET TO THE POINT OF BEGINNING.

CONTAINING: 7.18 ACRES, MORE OR LESS.

Excepting therefrom twenty-four (24) Units in Building 12 of the Condominium shown on the Site Plan, as Units 1211 through 1218, 1221 through 1228 and 1231 through 1238, inclusive, and the undivided interest of said Units in the common area of the Condominium.

B. Ninety-six (96) Units to be constructed in Buildings 13, 14, 15 and 16 of the Condominium consisting of:

(i) Units 1311 through 1318, 1321 through 1328 and 1331 through 1338 in Building 13;

(ii) Units 1411 through 1418, 1421 through 1428 and 1431 through 1438 in Building 14;

(iii) Units 1511 through 1518, 1521 through 1528 and 1531 through 1538 in Building 15; and

(iv) Units 1611 through 1618, 1621 through 1628 and 1631 through 1638 in Building 16;

as the above listed Units are described, defined and identified in the Declaration of Condominiums at Lilac Lane dated February 16, 2012, recorded in the Registry at Book 3816, Page 458 (as amended, the "Declaration") and the Bylaws of Condominiums at Lilac Lane recorded in the Registry at Book 3816, Page 474 (as amended, the "Bylaws") and the Site Plan and floor plans for the Condominium recorded in the Registry as Plans #99-071 through 99-073 (the "Plans"); together with the undivided interest of each such Unit in the common area of the Condominium as defined in the Declaration, Bylaws and Plans.

C. All improvements constructed in or on the Condominium except Building 12 previously constructed and sold by grantor, including the partially completed Building 13, utilities, base coat paving of parking areas and access ways, curbing, lighting and any other site improvements (collectively the "Improvements").

D. All development rights of the grantor as declarant of the Condominium as set out and defined in N.H. RSA 356-B, the Declaration, Bylaws and Plans (collectively the "Development Rights").

E. Any and all federal, state and local approvals and permits issued to grantor for development of the Condominium (collectively the "Permits"), to the extent the Permits can be assigned or transferred.

The real estate and Units listed in "A" and "B" above are conveyed with quitclaim covenants. The Improvements ("C" above), Development Rights ("D" above), and the Permits ("E" above) conveyed are AS IS, WHERE IS, WITH ALL FAULTS, without any covenant, warranty or representation whatsoever, express or implied.

This conveyance is made together with and subject to the rights and easements set forth in the Declaration, Bylaws and Plans, as may be amended, and is further subject to: (i) the provisions of N.H. RSA 356-B, as may be amended; (ii) all other terms, conditions, rights, restrictions and matters set forth in the Declaration, Bylaws, Plans and all rules, regulations and agreements lawfully made and/or entered into from time to time pursuant to the provisions of N.H. RSA 356-B, the Declaration and Bylaws; and (iii) all other agreements, easements, rights, covenants, conditions and restrictions of record affecting the Condominium.

For grantor's title, see deed of Sylvester J. Pierce dated June 30, 1995 and recorded in the Registry at Book 1810, Page 194.

This is not homestead property.

EXECUTED this 3rd day of October, 2012.

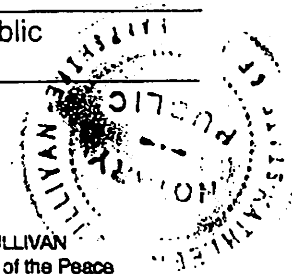
THE NEW MEADOWS, INC.

By: [signature]
William M. Pierce, President
Duly Authorized

STATE OF NEW HAMPSHIRE
COUNTY OF Hillsborough, ss

The foregoing instrument was acknowledged before me this 3rd day of October, 2012 by William M. Pierce, the President of The New Meadows, Inc., as his free act and deed and as the free act and deed of said corporation.

[signature]
Justice of the Peace/Notary Public
My Commission Expires:________
[Stamp or Seal]



KATHLEEN N. SULLIVAN
Notary Public / Justice of the Peace
My Commission Expires June 8, 2016

EXHIBIT 4

LOCATION PLAN

LEGEND

- AC. — ACRES
- BK — BOOK
- NHDES — NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL SERVICES
- PG — PAGE
- L — LENGTH
- R — RADIUS
- Δ — CENTRAL ANGLE
- EOW — EDGE OF WETLANDS
- PRA — PASSIVE RECREATION AREA
- PSNH — PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
- SCRD — STRAFFORD COUNTY REGISTRY OF DEEDS
- S.F. — SQUARE FEET
- NETel — NEW ENGLAND TELEPHONE & TELEGRAPH
- TAX MAP & LOT NUMBER
- PROPERTY LINE
- EDGE OF RIVER
- EDGE OF WETLAND
- FENCE LINE
- WETLAND
- IRON ROD SET

MAGNETIC 1987

KNOX MARSH ROAD (PUBLIC RIGHT OF WAY)

LILAC LANE

KNOX MARSH BROOK

BELLAMY RIVER

- CITY OF DOVER
- PUBLIC SERVICE COMPANY OF NH
- N/F PROGRESS REALTY INV. PART. BK.1294 PG.215
- DOANE RUGGLES INC. C/O IRVING OIL CORP.
- N/F SWIFT AND CO. BK.877 PG.214
- THE SAMPSON SUPERMARKETS
- CROSS HILL HOUSING ASSOCIATES BK.1752 PG.514
- SAME AS H-41D
- N/F MSM BROTHERS, INC. BK.1602 PG.363
- WESTGATE DRIVE R.O.W.
- EILEEN & MICHAEL CECCHETTI
- JAMES P. GRIFFIN BK.1068 PG.815
- TYRA INC. BK.1776 PG.176
- PROVEN AGGREGATES INC BK.1703 PG.20
- GRAVEL PIT PUMP HOUSE
- IRELAND WELL PUMP HOUSE

PROPOSED 20,000 SF RETAIL & OFFICE BUILDING "NOT YET BEGUN"

S&W COMMERCIAL CONDOMINIUM SUBMITTED LAND AREA= 5.3± ACRES

AREA TO BE SUBMITTED= 424,415± S.F. 9.74± ACRES (SEE NOTE 4)

"PROPOSED 70'x60' MAINTENANCE BUILDING "NOT YET BEGUN"

THE MEADOWS AT DOVER, A CONDOMINIUM SUBMITTED LAND AREA= 50.52± ACRES

80,000 S.F. ACTIVE RECREATIONAL AREA "COMMON AREA" FOR THE MEADOWS AT DOVER, A CONDOMINIUM

CONDOMINIUM AT LILAC LANE SUBMITTED LAND AREA= 7.10± ACRES

PROPOSED 20,000 SF RETAIL & OFFICE BUILDING "NOT YET BEGUN"

NOTE: THE CONSERVATION EASEMENT IS 55' FROM THE CENTERLINE OF THE KNOX MARSH BROOK FROM THIS POINT NORTHWARD

EXISTING CONSERVATION EASEMENT LINE (SEE PLAN REFERENCE #3)

CONSERVATION EASEMENT TO DOVER CONSERVATION COMMISSION SCRD BK 3381 PG 005

TRAIL EASEMENT TO CITY OF DOVER SCRD BK 3381 PG 001

400,000 S.F. PASSIVE RECREATIONAL AREA

12,000 S.F. ACTIVE RECREATIONAL AREA (1 BASKETBALL COURT 1 PLAYGROUND)

NOTE: THE CONSERVATION EASEMENT EXTENDS TO THE NORTHERLY EDGE OF THE BELLAMY RIVER

EXISTING NATURE TRAIL EASEMENT TO CITY OF DOVER

20' WATER EASEMENT TO THE CITY OF DOVER SEE SCRD BK.3713 PG.2203

PROTECTIVE WELL RADIUS EASEMENT TO THE CITY OF DOVER SCRD BK 3381 PG 001

TIME OF 200 DAY TRAVEL LINE (SEE NOTE 6)

Δ=98°12'43" R=752.00' L=1289.02'

CONSERVATION EASEMENT LINE

100' PSNH POWER EASEMENT S.C.R.D. 792-186

SHEET 2 OF 5 / SHEET 3 OF 5 / SHEET 4 OF 5 / SHEET 5 OF 5 / SHEET 6 OF 5

EXISTING PLAYGROUND

EXISTING POND

SHED

CHAIN LINK FENCE

TENNIS COURTS

LAUNDRY BUILDING

20' SEWER EASEMENT SEE SCRD 891-290

EXISTING PAVED PARKING

EXISTING BUILDING 1 UNITS 111 - 138

EXISTING BUILDING 2 UNITS 211 - 238

EXISTING BUILDING 3 UNITS 311 - 338

EXISTING BUILDING 4 UNITS 411 - 438

EXISTING BUILDING 8 UNITS 811 - 838

EXISTING BUILDING 10 UNITS 1011 - 1038

EXISTING BUILDING 11 UNITS 1111 - 1138

WITHDRAWABLE AREA CIVIL SECOND AMENDMENT SCRD BK.4181 PG.0093 TO BE SUBMITTED 425,355 S.F. (SEE NOTE 4)

LINE	LENGTH	BEARING
L1	27.22'	[illegible]
L2	41.19'	[illegible]
L3	62.95'	[illegible]
L4	[illegible]	[illegible]
L5	61.45'	[illegible]
L6	32.95'	[illegible]
L7	32.65'	[illegible]
L8	13.19'	[illegible]
L9	30.41'	[illegible]
L10	20.87'	[illegible]
L11	11.27'	[illegible]
L12	[illegible]	[illegible]
L13	15.27'	[illegible]
L14	21.87'	[illegible]

NOTES:

1) PARCEL IS AS SHOWN ON CITY OF DOVER ASSESSOR'S MAP H AS LOT 35-A.
2) OWNER OF RECORD: THE NEW MEADOWS, INC. 1 LILAC LANE DOVER, NH SCRD 1834-808, 1868-0029, 1870-0238, 3730-0853
3) PARCEL IS LOCATED IN ZONE RM20.
4) TOTAL PARCEL AREA = 78 Ac. +/-
   - COMMON AREA: 63.03 ACRES ±
   - SUBMITTED AREA: 63.03 ACRES ±
   - SUBMITTED AREA THE MEADOWS AT DOVER, A CONDOMINIUM: 50.52 ACRES ±
   - SUBMITTED AREA CONDOMINIUMS AT LILAC LANE: 7.10 ACRES ±
   - SUBMITTED AREA S&W COMMERCIAL CONDOMINIUMS: 5.33 ACRES ±
   - TOTAL AREA TO BE SUBMITTED THIS REVISION—449,730± S.F.
5) THE PARCEL IS LOCATED IN THE IRELAND WELL SECONDARY GROUNDWATER PROTECTION ZONE.
6) THE 200 DAY TIME OF TRAVEL LINE IS THE EDGE OF A PROTECTIVE WELL RADIUS EASEMENT TO THE CITY OF DOVER
7) PROPERTY IS ENCUMBERED BY PSNH AND VERIZON EASEMENTS. SEE SCRD BK.3067 PG.280.
8) THE THREE CONDOMINIUMS SHOWN HEREON ARE SUBJECT TO A JOINT USE AGREEMENT TO BE RECORDED IN THE SCRD HEREWITH.
9) SEE ORIGINAL DECLARATION OF CONDOMINIUM SCRD BK.1383 PG.749; SECOND AMENDMENT OF DECLARATION OF CONDOMINIUM SCRD BK.1811 PG.8; THIRD AMENDMENT OF DECLARATION OF CONDOMINIUM SCRD BK.3130 PG.853; FOURTH AMENDMENT OF DECLARATION OF CONDOMINIUM SCRD BK.3348 PG.678; THE FIFTH AMENDMENT OF DECLARATION OF CONDOMINIUM TO BE RECORDED IN THE SCRD HEREWITH.
10) FEATURES SHOWN HEREON ARE A COMPILATION OF FIELD LOCATIONS AND FROM PROPOSED SITE PLANS. FIELD LOCATIONS WERE PERFORMED UNDER SNOW COVER.
11) WETLANDS DELINEATION WAS DONE BY NEW HAMPSHIRE SOILS CONSULTANTS, INC. IN ACCORDANCE WITH 1987 CORPS OF ENGINEERS WETLANDS DELINEATION MANUAL ON AUGUST 27, 1996 AND FIELD LOCATED BY RICHARD P. MILLETTE AND ASSOCIATES. WETLANDS IN THE VICINITY OF LAUNDRY BUILDING WERE DELINEATED IN ACCORDANCE WITH 1987 CORPS OF ENGINEERS WETLANDS DELINEATION MANUAL IN JUNE 2007 AND FIELD LOCATED BY MSC, INC.

REV.	DATE	DESCRIPTION
#4	02/15/10	REVISE PER REGISTRY REVIEW
#3	10/13/09	REVISE PER ATTORNEY COMMENTS
#2	10/05/09	REVISE CONDOMINIUM NAMES, TITLE BLOCK
#1	06/18/09	REVISE CONDOMINIUM SUBMITTED LAND AREAS

"I CERTIFY THAT THIS PLAN IS ACCURATE AND IS IN COMPLIANCE WITH THE PROVISIONS OF NEW HAMPSHIRE RSA 356-B:20(I), AND THAT ALL UNITS SHOWN ARE EXISTING OR PROPOSED AS NOTED."

PURSUANT TO NEW HAMPSHIRE REVISED STATUTES ANNOTATED 676:18,III AND IV AND 672:14

"I CERTIFY THAT THIS SURVEY PLAT IS NOT A SUBDIVISION PURSUANT TO THIS TITLE AND THAT THE LINES OF STREETS AND WAYS SHOWN ARE THOSE OF PUBLIC OR PRIVATE STREETS OR WAYS ALREADY ESTABLISHED AND THAT NO NEW WAYS ARE SHOWN."

A COPY OF THIS PLAN HAS BEEN FILED WITH THE LOCAL PLANNING BOARD.

STATE OF NEW HAMPSHIRE — LICENSED LAND SURVEYOR — No. 844 J. COREY COLWELL

LICENSED LAND SURVEYOR — 2/16/10 — DATE

PLAN REFERENCES:

1) "CONDOMINIUM SITE PLAN OF THE MEADOWS AT DOVER FOR THE CABRAL GROUP, KNOX MARSH ROAD, DOVER, N.H.", BY RICHARD P. MILLETTE AND ASSOCIATES DATED SEPTEMBER 28, 1987. SCRD PLAN #33-100.
2) "REVISED CONDOMINIUM SITE PLAN OF THE MEADOWS AT DOVER FOR THE CABRAL GROUP, KNOX MARSH ROAD, DOVER, N.H.", BY RICHARD P. MILLETTE AND ASSOCIATES DATED SEPTEMBER 28, 1987 WITH REVISION #3 DATED JAN. 27, 1988. SCRD PLAN #33-179.
3) "CONSERVATION EASEMENT PLAN FOR THE NEW MEADOWS, INC. KNOX MARSH ROAD, COUNTY OF STRAFFORD, DOVER, N.H.", BY MILLETTE, SPRAGUE & COLWELL, INC. DATED SEPTEMBER 28, 2004 REV 1 DATED 01/03/05. SCRD PLAN #78-42.
4) "REVISION I TO THE CONDOMINIUM SITE PLAN FOR THE NEW MEADOWS, INC. MAP H LOT 35-A, KNOX MARSH ROAD COUNTY OF STRAFFORD DOVER, NH", BY MILLETTE, SPRAGUE & COLWELL, INC. DATED JANUARY 20, 2005 REV 1 DATED 01/31/05. SCRD PLAN #78-42.
5) "REVISION II TO THE CONDOMINIUM SITE PLAN, MAP H LOT 35-A, THE NEW MEADOWS, INC. SHOWING THE LIMITED COMMON AREA KNOWN AS "CONDOMINIUM AT LILAC LANE", KNOX MARSH ROAD, COUNTY OF STRAFFORD, DOVER, NH", BY AMES MSC DATED WITH REVISIONS I DATED 08/23/07. SCRD PLAN #90-77.

THE PURPOSES OF THIS PLAN ARE TO ADD 449,730 ± S.F. TO THE SUBMITTED LAND FOR "THE MEADOWS AT DOVER, A CONDOMINIUM" AND TO CREATE THREE SEPARATE CONDOMINIUMS FROM THE TOTAL SUBMITTED LAND: "THE MEADOWS AT DOVER, A CONDOMINIUM", "CONDOMINIUMS AT LILAC LANE" & "S&W COMMERCIAL CONDOMINIUM". THIS PLAN IS TO BE RECORDED TOGETHER WITH THE FIFTH AMENDMENT TO DECLARATION OF CONDOMINIUM FOR "THE MEADOWS AT DOVER, A CONDOMINIUM" AND THE DECLARATIONS OF CONDOMINIUM FOR "CONDOMINIUMS AT LILAC LANE" & "S&W COMMERCIAL CONDOMINIUM".

MSC CIVIL ENGINEERS & LAND SURVEYORS, INC

PHONE: 603-431-2222
FAX: 603-431-0910
www.mscengineers.com

JOHN HART MANSION
403 THE HILL
P.O. Box 427
PORTSMOUTH, NH 03802-0427

REVISION IV TO THE CONDOMINIUM SITE PLAN

TAX MAP H LOT 35-A
THE NEW MEADOWS, INC.
SHOWING THE SUBMITTED LAND OF THE CONDOMINIUMS AT LILAC LANE, S&W COMMERCIAL CONDOMINIUM & THE MEADOWS AT DOVER, A CONDOMINIUM
KNOX MARSH ROAD

DOVER, NH — COUNTY OF STRAFFORD

DATE: FEBRUARY 23, 2009 — (IN FEET) — 1" = 100'

DRAWN BY: SMO — CHECKED BY: JCC

<03121CSP-IV> — SHEET 1 OF 5 — #03121

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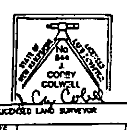
LEGEND



2/16/10

LICENSED LAND SURVEYOR

DATE

MSC
CIVIL ENGINEERS & LAND SURVEYORS, INC

PHONE: 603-431-2222
FAX: 603 431 0910

JOHN HART MANSION
403 THE HILL
P.O. Box 427
PORTSMOUTH, NH 03802-0427

REVISION IV TO THE CONDOMINIUM SITE PLAN

TAX MAP H LOT 35-A
THE NEW MEADOWS, INC.
SHOWING THE SUBMITTED LAND OF THE CONDOMINIUMS AT LILAC LANE, S&W COMMERCIAL CONDOMINIUM & THE MEADOWS AT DOVER, A CONDOMINIUM
KNOX MARSH ROAD

DOVER, NH — COUNTY OF STRAFFORD

DATE: FEBRUARY 23, 2008

SHEET 2 OF 5

#03121

KNOX MARSH ROAD (PUBLIC RIGHT OF WAY)

THE MEADOWS AT DOVER, A CONDOMINIUM SUBMITTED LAND AREA= 50.52± ACRES

WITHDRAWABLE AREA (SEE SECOND AMENDMENT SCRD BK.1811 PG.009) TO BE SUBMITTED (25,320 S.F.)

EXISTING PAVED PARKING

"I CERTIFY THAT THIS PLAN IS ACCURATE AND IS IN COMPLIANCE WITH THE PROVISIONS OF NEW HAMPSHIRE RSA 356-B:20(I), AND THAT ALL UNITS SHOWN ARE EXISTING OR PROPOSED AS NOTED."

PURSUANT TO NEW HAMPSHIRE REVISED STATUTES ANNOTATED 676:18,III AND IV AND 672:14:

"I CERTIFY THAT THIS SURVEY PLAT IS NOT A SUBDIVISION PURSUANT TO THIS TITLE AND THAT THE LINES OF STREETS AND WAYS SHOWN ARE THOSE OF PUBLIC OR PRIVATE STREETS OR WAYS ALREADY ESTABLISHED AND THAT NO NEW WAYS ARE SHOWN."

A COPY OF THIS PLAN HAS BEEN FILED WITH THE LOCAL PLANNING BOARD.

STATE OF NEW HAMPSHIRE — No. 844 J. COREY COLWELL — LICENSED LAND SURVEYOR

LICENSED LAND SURVEYOR — 2/16/10 DATE

THE PURPOSES OF THIS PLAN ARE TO ADD 449,733 ± S.F. TO THE SUBMITTED LAND FOR "THE MEADOWS AT DOVER, A CONDOMINIUM" AND TO CREATE THREE SEPARATE CONDOMINIUMS FROM THE TOTAL SUBMITTED LAND: "THE MEADOWS AT DOVER, A CONDOMINIUM", "CONDOMINIUMS AT LILAC LANE" & "B&W COMMERCIAL CONDOMINIUM". THIS PLAN IS TO BE RECORDED TOGETHER WITH THE FIFTH AMENDMENT TO DECLARATION OF CONDOMINIUM FOR "THE MEADOWS AT DOVER, A CONDOMINIUM" AND THE DECLARATIONS OF CONDOMINIUM FOR "CONDOMINIUMS AT LILAC LANE" & "B&W COMMERCIAL CONDOMINIUM".

REV.	DATE	DESCRIPTION
#4	02/16/10	REVISE PER REGISTRY REVIEW
#3	12/13/09	REVISE PER ATTORNEY COMMENTS
#2	10/03/09	REVISE CONDOMINIUM NAMES, TITLE BLOCK
#1	09/18/09	REVISE CONDOMINIUM SUBMITTED LAND AREAS

MSC CIVIL ENGINEERS & LAND SURVEYORS, INC

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JOHN HART MANSION
403 THE HILL
P.O. Box 427
PORTSMOUTH, NH 03802-0427

REVISION IV TO THE CONDOMINIUM SITE PLAN

TAX MAP H LOT 35-A
THE NEW MEADOWS, INC.
SHOWING THE SUBMITTED LAND OF THE CONDOMINIUMS AT LILAC LANE, B&W COMMERCIAL CONDOMINIUM & THE MEADOWS AT DOVER, A CONDOMINIUM
KNOX MARSH ROAD

DOVER, NH — COUNTY OF STRAFFORD

DATE: FEBRUARY 23, 2009 — (IN FEET) — 1" = 60'

DRAWN BY: SMO — CHECKED BY: JCC

<03121CSP-IV-SC50> SHEET 3 OF 5 #03121

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Plan DP09-097 1 of 1
Register of Deeds, Strafford County

CONDOMINIUMS AT LILAC LANE SUBMITTED LAND AREA= 7.18 ± ACRES

S&W COMMERCIAL CONDOMINIUM SUBMITTED LAND AREA= 3.34 ± ACRES

THE MEADOWS AT DOVER, A CONDOMINIUM SUBMITTED LAND AREA= 50.52 ± ACRES

12,000 S.F. ACTIVE RECREATIONAL AREA (1 BASKETBALL COURT 1 PLAYGROUND)

400,000 S.F. PASSIVE RECREATIONAL AREA

PROPOSED 20,000 SF RETAIL & OFFICE BUILDING "NOT YET BEGUN"

PROPOSED PAVED PARKING

PAVED PARKING UNDER CONSTRUCTION

EXISTING NATURE TRAIL EASEMENT TO CITY OF DOVER

NOTE: THE CONSERVATION EASEMENT IS 35' FROM THE CENTERLINE OF THE KNOX MARSH BROOK FROM THIS POINT NORTHWARD

EXISTING CONSERVATION EASEMENT LINE (SEE PLAN REFERENCE #3) (SEE SHEET 1 OF 5)

CONSERVATION EASEMENT TO DOVER CONSERVATION COMMISSION SCRD BK 2391 PG 075

TRAIL EASEMENT TO CITY OF DOVER SCRD BK 3381 PG 031

NOTE: THE CONSERVATION EASEMENT EXTENDS TO THE NORTHERLY EDGE OF THE BELLAMY RIVER

IRON ROD SET (TYP.)

KNOX MARSH BROOK

BELLAMY RIVER

EDGE OF PRA

SHEET 2 OF 5
SHEET 4 OF 5

SHEET 4 OF 5
SHEET 5 OF 5

MAGNETIC 1987

LEGEND

BK.	BOOK
CMP	CORRUGATED METAL PIPE
EP	EDGE OF PAVEMENT
NHDES	NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL SERVICES
PG	PAGE
L	LENGTH
R	RADIUS
Δ	CENTRAL ANGLE
EOW	EDGE OF WETLANDS
PRA	PASSIVE RECREATION AREA
PSNH	PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
PVC	POLYVINYL CHLORIDE
RCP	REINFORCED CONCRETE PIPE
R.O.W.	RIGHT OF WAY
SCRD	STRAFFORD COUNTY REGISTRY OF DEEDS
S.F.	SQUARE FEET
NET&T	NEW ENGLAND TELEPHONE & TELEGRAPH
SGC	SLOPED GRANITE CURB
UGE	UNDERGROUND ELECTRIC
UGU	UNDERGROUND UTILITIES
	TAX MAP & LOT NUMBER
	PROPERTY LINE
	EDGE OF RIVER
	EDGE OF WETLAND
	FENCE LINE
	WETLAND
	HYDRANT
	DRAINAGE MANHOLE
	SEWER MANHOLE
	CATCH BASIN
	MONITORING WELL
	WATER VALVE
	SIGN
	CENTER OF STREAM
	IRON ROD SET
	UTILITY POLE
	LIGHT POST
	GUY POLE
	WELL
	GAS SHUTOFF
	WATER SHUTOFF
	GAS VALVE
—G—	EXISTING GAS
—W—	EXISTING WATER
—D—	EXISTING DRAINAGE
—S—	EXISTING SEWER
—SL—	SEWER LATERAL
—OHU—	OVERHEAD UTILITIES

"I CERTIFY THAT THIS PLAN IS ACCURATE AND IS IN COMPLIANCE WITH THE PROVISIONS OF NEW HAMPSHIRE RSA 356-B:20(I), AND THAT ALL UNITS SHOWN ARE EXISTING OR PROPOSED AS NOTED."

PURSUANT TO NEW HAMPSHIRE REVISED STATUTES ANNOTATED 676:18,III AND IV AND 672:14

"I CERTIFY THAT THIS SURVEY PLAT IS NOT A SUBDIVISION PURSUANT TO THIS TITLE AND THAT THE LINES OF STREETS AND WAYS SHOWN ARE THOSE OF PUBLIC OR PRIVATE STREETS OR WAYS ALREADY ESTABLISHED AND THAT NO NEW WAYS ARE SHOWN."

A COPY OF THIS PLAN HAS BEEN FILED WITH THE LOCAL PLANNING BOARD.

J. COREY COLWELL No. 844 LICENSED LAND SURVEYOR

2/16/10
DATE

THE PURPOSES OF THIS PLAN ARE TO ADD 446,736 ± S.F. TO THE SUBMITTED LAND FOR "THE MEADOWS AT DOVER, A CONDOMINIUM" AND TO CREATE THREE SEPARATE CONDOMINIUMS FROM THE TOTAL SUBMITTED LAND: "THE MEADOWS AT DOVER, A CONDOMINIUM", "CONDOMINIUMS AT LILAC LANE" & "S&W COMMERCIAL CONDOMINIUM". THIS PLAN IS TO BE RECORDED TOGETHER WITH THE FIFTH AMENDMENT TO DECLARATION OF CONDOMINIUM FOR "THE MEADOWS AT DOVER, A CONDOMINIUM" AND THE DECLARATIONS OF CONDOMINIUM FOR "CONDOMINIUMS AT LILAC LANE" & "S&W COMMERCIAL CONDOMINIUM".

REV.	DATE	DESCRIPTION
4	02/16/10	REVISE PER REGISTRY REVIEW
3	10/13/09	REVISE PER ATTORNEY COMMENTS
2	10/05/09	REVISE CONDOMINIUM NAMES, TITLE BLOCK
1	09/16/09	REVISE CONDOMINIUM SUBMITTED LAND AREAS

MSC CIVIL ENGINEERS & LAND SURVEYORS, INC

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JOHN HART MANSION
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P.O. Box 437
PORTSMOUTH, NH 03802 0437

REVISION IV TO THE CONDOMINIUM SITE PLAN

TAX MAP H LOT 35-A
THE NEW MEADOWS, INC.
SHOWING THE SUBMITTED LAND OF THE CONDOMINIUMS AT LILAC LANE, S&W COMMERCIAL CONDOMINIUM & THE MEADOWS AT DOVER, A CONDOMINIUM
KNOX MARSH ROAD

DOVER, NH — COUNTY OF STRAFFORD

DATE: FEBRUARY 23, 2009 — (IN FEET) — 1" = 60'
DRAWN BY: SMD — CHECKED BY: JCC

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<03121CSP-IV-SC60> SHEET 4 OF 5 #03121

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Plan 96-098 1 of 1
Register of Deeds, Strafford County

SHEET 3 OF 5
SHEET 5 OF 5

SHEET 4 OF 5
SHEET 5 OF 5

THE MEADOWS AT DOVER, A CONDOMINIUM SUBMITTED LAND AREA= 30.32± ACRES

PROTECTIVE WELL RADIUS EASEMENT TO THE CITY OF DOVER SCRD BK 3381 PG 001

EXISTING NATURE TRAIL EASEMENT TO CITY OF DOVER

TIME OF 200 DAY TRAVEL LINE (SEE NOTE 8 SHEET 1 OF 5)

CONSERVATION EASEMENT LINE

WESTGATE DRIVE R.O.W

NHDES PROTECTIVE WELL RADIUS

BELLAMY RIVER

LEGEND

BK	BOOK
CMP	CORRUGATED METAL PIPE
EP	EDGE OF PAVEMENT
NHDES	NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL SERVICES
PG	PAGE
L	LENGTH
R	RADIUS
Δ	CENTRAL ANGLE
EOW	EDGE OF WETLANDS
PRA	PASSIVE RECREATION AREA
PSNH	PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
PVC	POLYVINYL CHLORIDE
RCP	REINFORCED CONCRETE PIPE
R.O.W.	RIGHT OF WAY
SCRD	STRAFFORD COUNTY REGISTRY OF DEEDS
S.F.	SQUARE FEET
NET&T	NEW ENGLAND TELEPHONE & TELEGRAPH
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	TAX MAP & LOT NUMBER
	PROPERTY LINE
	EDGE OF RIVER
	EDGE OF WETLAND
	FENCE LINE
	WETLAND
	HYDRANT
	DRAINAGE MANHOLE
	SEWER MANHOLE
	CATCH BASIN
	MONITORING WELL
	WATER VALVE
	SIGN
	CENTER OF STREAM
	IRON ROD SET
	UTILITY POLE
	LIGHT POST
	GUY POLE
	WELL
	GAS SHUTOFF
	WATER SHUTOFF
	GAS VALVE
G	EXISTING GAS
W	EXISTING WATER
D	EXISTING DRAINAGE
S	EXISTING SEWER
SL	SEWER LATERAL
OHU	OVERHEAD UTILITIES

N
MAGNETIC 1987

DETAIL
NOT TO SCALE

"I CERTIFY THAT THIS PLAN IS ACCURATE AND IS IN COMPLIANCE WITH THE PROVISIONS OF NEW HAMPSHIRE RSA 356-B:20(I), AND THAT ALL UNITS SHOWN ARE EXISTING OR PROPOSED AS NOTED."

PURSUANT TO NEW HAMPSHIRE REVISED STATUTES ANNOTATED 676:18,III AND IV AND 672:14:

"I CERTIFY THAT THIS SURVEY PLAT IS NOT A SUBDIVISION PURSUANT TO THIS TITLE AND THAT THE LINES OF STREETS AND WAYS SHOWN ARE THOSE OF PUBLIC OR PRIVATE STREETS OR WAYS ALREADY ESTABLISHED AND THAT NO NEW WAYS ARE SHOWN."

A COPY OF THIS PLAN HAS BEEN FILED WITH THE LOCAL PLANNING BOARD.

STATE OF NEW HAMPSHIRE — J. COREY COLWELL — No. 844 — LICENSED LAND SURVEYOR

LICENSED LAND SURVEYOR — DATE 2/16/10

THE PURPOSES OF THIS PLAN ARE TO ADD 440,730 ± S.F. TO THE SUBMITTED LAND FOR "THE MEADOWS AT DOVER, A CONDOMINIUM" AND TO CREATE THREE SEPARATE CONDOMINIUMS FROM THE TOTAL SUBMITTED LAND, "THE MEADOWS AT DOVER, A CONDOMINIUM", "CONDOMINIUMS AT LILAC LANE" & "S&W COMMERCIAL CONDOMINIUM". THIS PLAN IS TO BE RECORDED TOGETHER WITH THE FIFTH AMENDMENT TO DECLARATION OF CONDOMINIUM FOR "THE MEADOWS AT DOVER, A CONDOMINIUM" AND THE DECLARATIONS OF CONDOMINIUM FOR "CONDOMINIUMS AT LILAC LANE" & "S&W COMMERCIAL CONDOMINIUM".

REV	DATE	DESCRIPTION
#4	02/16/10	REVISE PER REGISTRY REVIEW
#3	10/13/09	REVISE PER ATTORNEY COMMENTS
#2	10/05/09	REVISE CONDOMINIUM NAMES, TITLE BLOCK
#1	09/15/09	REVISE CONDOMINIUM SUBMITTED LAND AREAS

MSC
CIVIL ENGINEERS & LAND SURVEYORS, INC

PHONE: 603-431-2222
FAX: 603 431 0910
www.mscengineers.com

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403 THE HILL
P.O. Box 427
PORTSMOUTH, NH 03802-0427

REVISION IV TO THE CONDOMINIUM SITE PLAN

TAX MAP H LOT 35-A
THE NEW MEADOWS, INC.
SHOWING THE SUBMITTED LAND OF THE CONDOMINIUMS AT LILAC LANE, S&W COMMERCIAL CONDOMINIUM & THE MEADOWS AT DOVER, A CONDOMINIUM
KNOX MARSH ROAD
DOVER, NH COUNTY OF STRAFFORD

(IN FEET) 1" = 80'

DATE: FEBRUARY 23, 2009
DRAWN BY: SJO
CHECKED BY: JCC

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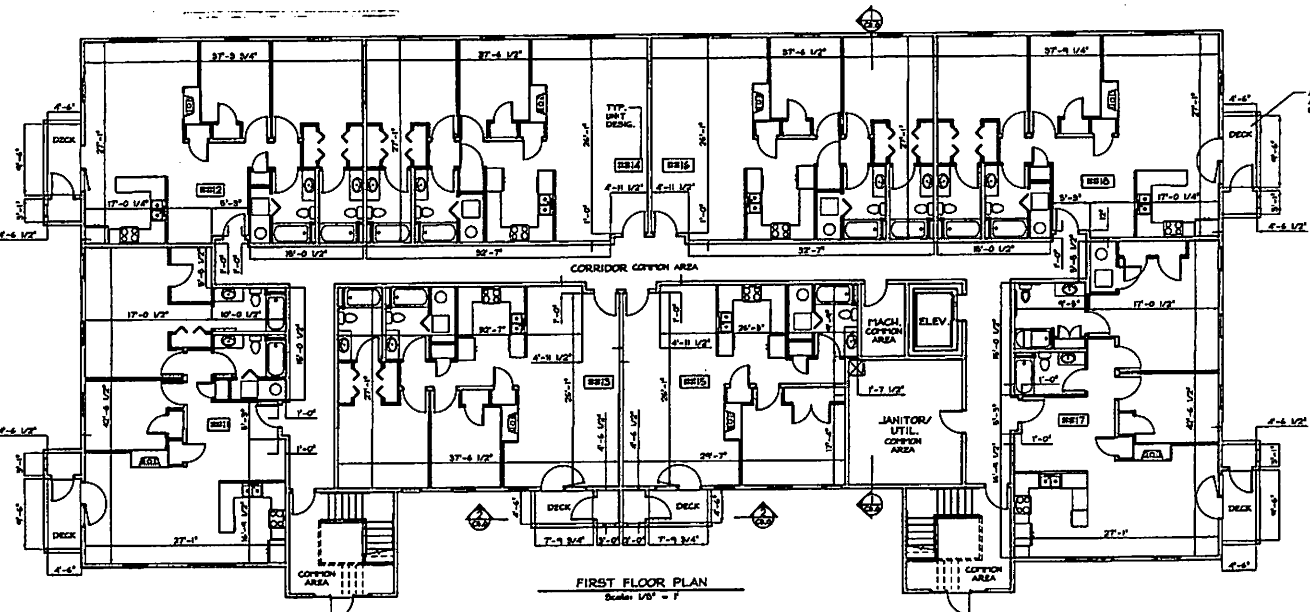
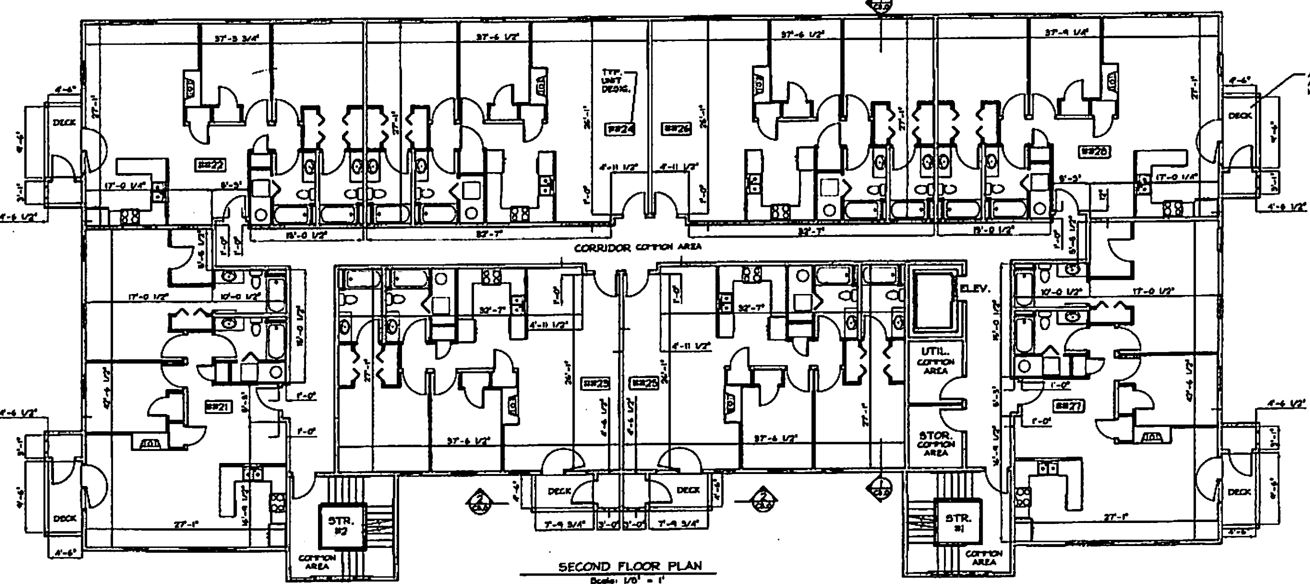
<03121CSP-IV-SC50> SHEET 5 OF 5 #03121

Doc # 0009423 Jul 15, 2010 10:33 AM
Plan D0099-071 1 of 1
Register of Deeds, Strafford County



FIRST FLOOR PLAN
Scale: 1/8" = 1'



SECOND FLOOR PLAN
Scale: 1/8" = 1'

BUILDING STATUS

BUILDING 12: SUBSTANTIALLY COMPLETE
BUILDING 13: WEATHER TIGHT SHELL COMPLETE, INTERIOR NOT YET COMPLETE
BUILDING 14: NOT YET BEGUN
BUILDING 15: NOT YET BEGUN
BUILDING 16: NOT YET BEGUN

KEY TO UNIT DESIGNATIONS

####

FIRST TWO NUMBERS INDICATE BUILDING NUMBER (BUILDING 12, 13 ETC.)
THIRD NUMBER INDICATES THE FLOOR A UNIT ENTRY IS ON (FLOOR 1, 2 OR 3).
FOURTH NUMBER INDICATES UNIT NUMBER (UNIT 1, 2, 3 ETC.)

EXAMPLE: UNIT 1234 IS IN BUILDING 12, THIRD FLOOR, UNIT 4.

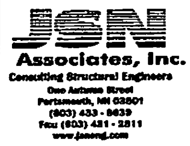
NOTE:

1. HORIZONTAL BOUNDARIES AT INTERIOR SPACES FACE OF SHEETROCK TO FACE OF SHEETROCK.
2. HORIZONTAL BOUNDARIES AT DECKS FACE OF SIDING TO INBOARD FACE OF BALLUSTRADE.
3. VERTICAL BOUNDARIES IN FINISHED AREAS TOP OF FLOOR SHEATHING TO FACE OF CEILING SHEETROCK.
4. VERTICAL BOUNDARIES IN UNFINISHED AREAS (ATTICS) TOP OF FLOOR SHEATHING TO UNDERSIDE OF RAFTER ABOVE.
5. VERTICAL BOUNDARIES AT DECKS TOP OF FLOOR DECKING TO UNDERSIDE OF FLOOR JOIST ABOVE.

I HEREBY CERTIFY THAT THIS PLAN ACCURATELY DEPICTS THE DIMENSIONS OF THE INDIVIDUAL UNITS AND THAT SAID UNITS AS SHOWN ON THIS PLAN FOR BUILDING 12 ARE SUBSTANTIALLY COMPLETE. THIS PLAN COMPLIES WITH THE PROVISIONS OF R.S.A. 356-B:20

DATE: 7/09/10

JEFFREY S. NAWROCKI, P.E.



JSN Associates, Inc.
Consulting Structural Engineers
One Autumn Street
Portsmouth, NH 03801
(603) 433-8639
Fax: (603) 431-2811
www.jsneng.com

Condominiums at Lilac Lane
Buildings 12-16
Dover, NH

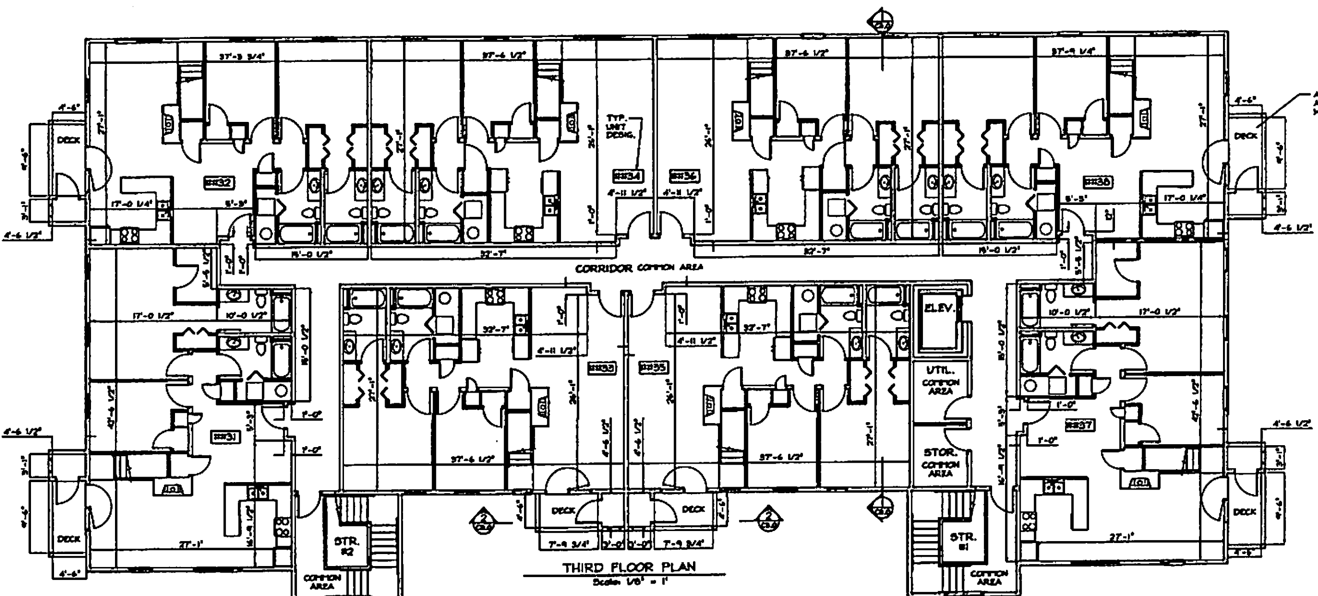
for
The New Meadows, Inc.

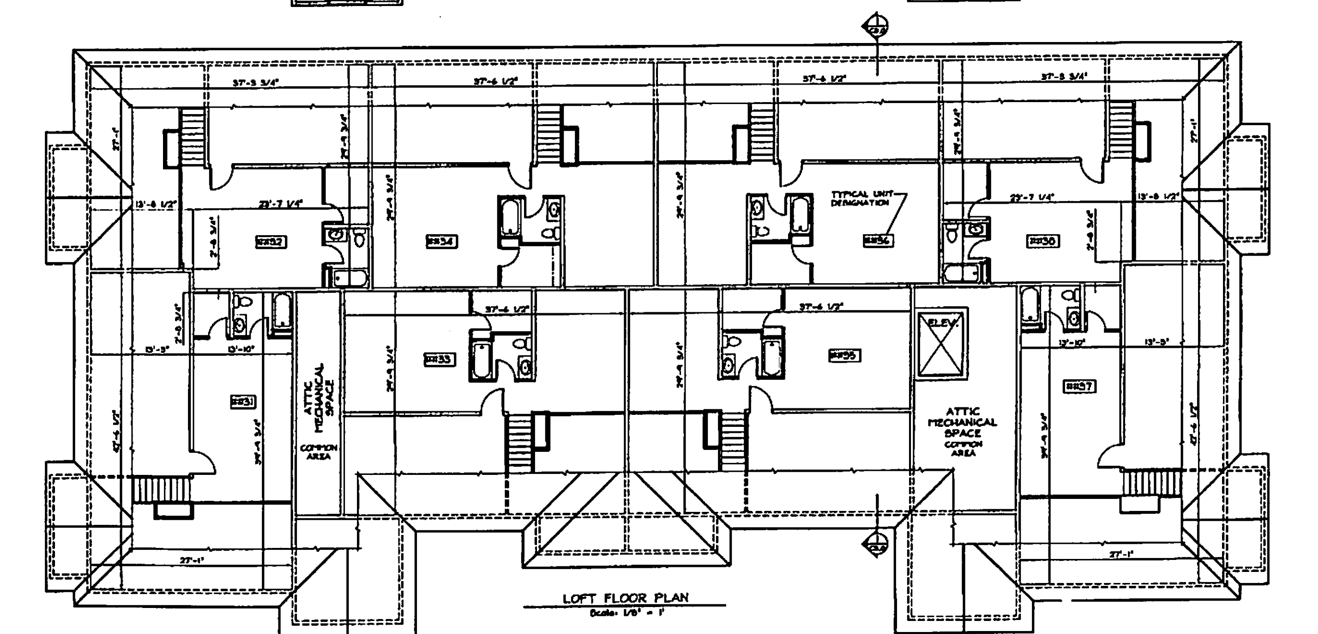
Drawn By:	RB
Date:	June 21, 2010
Scale:	As Noted
File:	
Checked By:	
Approved By:	

Revisions

First and Second Floor Plans
C1.0
Project No. 08050

Doc # 0000423 Jul 13, 2010 10:23 AM
Plan DR89-072 1 of 1
Register of Deeds, Strafford County





BUILDING STATUS

BUILDING 12- SUBSTANTIALLY COMPLETE

BUILDING 13- WEATHER TIGHT SHELL COMPLETE, INTERIOR NOT YET COMPLETE

BUILDING 14- NOT YET BEGUN

BUILDING 15- NOT YET BEGUN

BUILDING 16- NOT YET BEGUN

KEY TO UNIT DESIGNATIONS

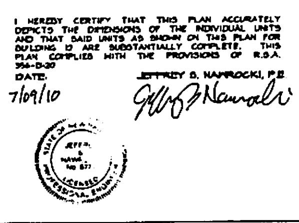
FIRST TWO NUMBERS INDICATE BUILDING NUMBER (BUILDING 12, 13 ETC.)

THIRD NUMBER INDICATES THE FLOOR A UNIT ENTRY IS ON (FLOOR 1, 2 OR 3).

FOURTH NUMBER INDICATES UNIT NUMBER (UNIT 1, 2, 3 ETC.)

####

EXAMPLE: UNIT 1234 IS IN BUILDING 12, THIRD FLOOR, UNIT 4



I HEREBY CERTIFY THAT THIS PLAN ACCURATELY DEPICTS THE DIMENSIONS OF THE INDIVIDUAL UNITS AND THAT SAID UNITS AS SHOWN ON THIS PLAN FOR BUILDING 12 ARE SUBSTANTIALLY COMPLETE. THIS PLAN COMPLIES WITH THE PROVISIONS OF R.S.A. 356-B:20

DATE: 7/09/10

JEFFREY S. NAWROCKI, P.E.

JSN Associates, Inc.
Consulting Structural Engineers
One Autumn Street
Portsmouth, NH 03801
(603) 433-8639
Fax: (603) 431-2511
www.jsneng.com

Condominiums at Lilac Lane Buildings 12-16

Dover, NH

for
The New Meadows, Inc.

Drawn By:	RB
Date:	June 21, 2010
Scale:	As Noted
File:	
Checked By:	
Approved By:	

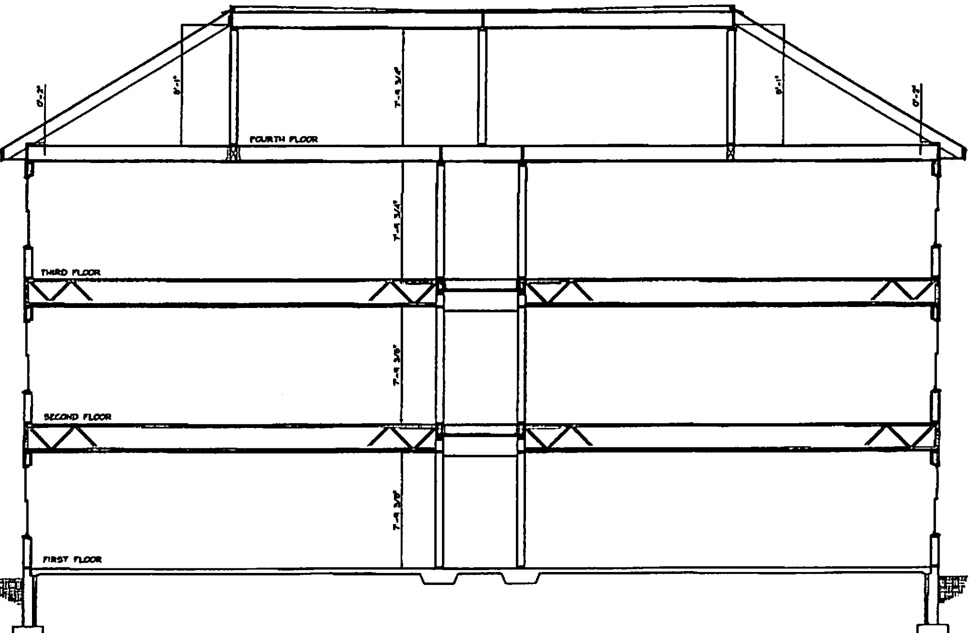
Revisions

Third and Fourth Floor Plans

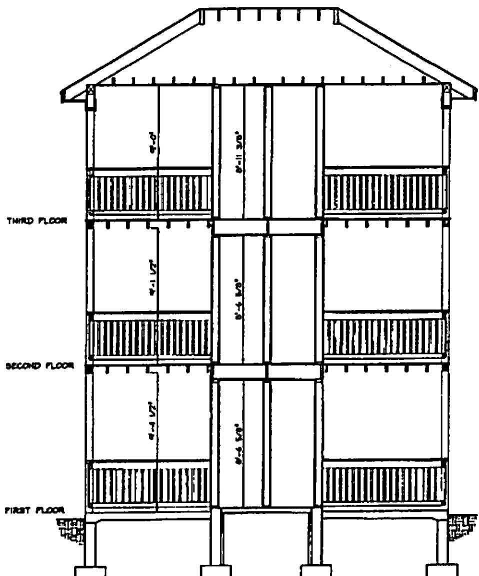
C2.0

Project No: 060501

Doc # 0008427 Jul 15, 2010 10:25 AM
Plan DR99-073 1 of 1
Register of Deeds, Strafford County



1 C3.0 SECTION AT MAIN BUILDING
Scale: 1/4" = 1'



2 C3.0 SECTION AT TYPICAL DECK
Scale: 1/4" = 1'

BUILDING STATUS

BUILDING 12: SUBSTANTIALLY COMPLETE
BUILDING 13: WEATHER TIGHT SHELL COMPLETE, INTERIOR NOT YET COMPLETE
BUILDING 14: NOT YET BEGUN
BUILDING 15: NOT YET BEGUN
BUILDING 16: NOT YET BEGUN

I HEREBY CERTIFY THAT THIS PLAN ACCURATELY DEPICTS THE DIMENSIONS OF THE INDIVIDUAL UNITS AND THAT SAID UNITS AS SHOWN ON THIS PLAN FOR BUILDING 12 ARE SUBSTANTIALLY COMPLETE. THIS PLAN COMPLIES WITH THE PROVISIONS OF R.S.A. 356-B:20

DATE: 7/09/10

JEFFREY S. NAWROCKI, P.E.

JSN Associates, Inc.
Consulting Structural Engineers
One Autumn Street
Portsmouth, NH 03801
(603) 433-8639
Fax (603) 431-2811
www.jsnaeng.com

Condominiums at
Lilac Lane
Buildings 12-16

Dover, NH

for
The New Meadows, Inc.

Drawn By:	RB
Date:	June 21, 2010
Scale:	As Noted
File:	
Checked By:	
Approved By:	

Revisions

Sections

C3.0

Project No. 080501

EXHIBIT 5

LOCATION PLAN

LEGEND

KNOX MARSH ROAD (PUBLIC RIGHT OF WAY)

KNOX MARSH BROOK

BELLAMY RIVER

LILAC LANE

MAGNETIC 1987

S&W COMMERCIAL CONDOMINIUM SUBMITTED LAND AREA = 5.33± Ac.

THE MEADOWS AT DOVER, A CONDOMINIUM SUBMITTED LAND AREA= 50.52± ACRES

CONDOMINIUMS AT LILAC LANE SUBMITTED LAND AREA= 7.18 ± ACRES

NOTE: THE CONSERVATION EASEMENT IS 35' FROM THE CENTERLINE OF THE KNOX MARSH BROOK FROM THIS POINT NORTHWARD

EXISTING CONSERVATION EASEMENT LINE (SEE PLAN REFERENCE #3)

CONSERVATION EASEMENT TO DOVER CONSERVATION COMMISSION SCRD BK 3381 PG 005

TRAIL EASEMENT TO CITY OF DOVER SCRD BK 3381 PG 001

400,000 S.F. PASSIVE RECREATIONAL AREA

12,000 S.F. ACTIVE RECREATIONAL AREA (1 BASKETBALL COURT 1 PLAYGROUND)

NOTE: THE CONSERVATION EASEMENT EXTENDS TO THE NORTHERLY EDGE OF THE BELLAMY RIVER

EXISTING NATURE TRAIL EASEMENT TO CITY OF DOVER

200 DAY TIME OF TRAVEL LINE (SEE NOTE 6)

PROTECTIVE WELL RADIUS EASEMENT TO THE CITY OF DOVER SCRD BK 3381 PG 001

SHEET 2 OF 5 / SHEET 3 OF 5 / SHEET 4 OF 5 / SHEET 5 OF 5

NOTES:

1) PARCEL IS AS SHOWN ON CITY OF DOVER ASSESSOR'S MAP H AS LOT 35-D.
2) OWNER OF RECORD:
THE NEW MEADOWS, INC.
1 LILAC LANE
DOVER, NH
SCRD 1634-608, 1668-0029, 1670-0778, 3130-0853, 3544-0875
3) PARCEL IS LOCATED IN ZONES RM-SU AND B-4
4) TOTAL PARCEL AREA = 78 Ac +/-

COMMON AREA:	63.03 ACRES ±
SUBMITTED AREA	63.03 ACRES ±
SUBMITTED AREA THE MEADOWS AT DOVER, A CONDOMINIUM.	50.52 ACRES ±
SUBMITTED AREA CONDOMINIUMS AT LILAC LANE.	7.18 ACRES ±
SUBMITTED AREA S&W COMMERCIAL CONDOMINIUMS.	5.33 ACRES ±

5) THE PARCEL IS LOCATED IN THE IRELAND WELL SECONDARY GROUNDWATER PROTECTION ZONE.
6) THE 200 DAY TIME OF TRAVEL LINE IS THE EDGE OF A PROTECTIVE WELL RADIUS EASEMENT TO THE CITY OF DOVER.
7) PROPERTY IS ENCUMBERED BY PSNH AND VERIZON EASEMENTS. SEE SCRD BK 3057 PG 235.
8) THE THREE CONDOMINIUMS SHOWN HEREON ARE SUBJECT TO A JOINT USE AGREEMENT TO BE RECORDED IN THE SCRD HEREWITH.
9) SEE ORIGINAL DECLARATION OF CONDOMINIUM SCRD BK 1363 PG 748, SECOND AMENDMENT OF DECLARATION OF CONDOMINIUM SCRD BK 1811 PG 8; THIRD AMENDMENT OF DECLARATION OF CONDOMINIUM SCRD BK 3130 PG 853; FOURTH AMENDMENT OF DECLARATION OF CONDOMINIUM SCRD BK 3544 PG 875; THE FIFTH AMENDMENT OF DECLARATION OF CONDOMINIUM TO BE RECORDED IN THE SCRD HEREWITH.
10) FEATURES SHOWN HEREON ARE A COMPILATION OF FIELD LOCATIONS AND FROM PROPOSED SITE PLANS. FIELD LOCATIONS WERE PERFORMED UNDER SNOW COVER.
11) WETLANDS DELINEATION WAS DONE BY NEW HAMPSHIRE SOILS CONSULTANTS, INC. IN ACCORDANCE WITH 1987 CORPS OF ENGINEERS WETLANDS DELINEATION MANUAL ON AUGUST 27, 1998 AND FIELD LOCATED BY RICHARD P. MILLETTE AND ASSOCIATES. WETLANDS IN THE VICINITY OF LAUNDRY BUILDING WERE DELINEATED IN ACCORDANCE WITH 1987 CORPS OF ENGINEERS WETLANDS DELINEATION MANUAL IN JUNE 2007 AND FIELD LOCATED BY MSC, INC.
12) UTILITIES SHOWN HEREON ARE A COMPILATION OF FIELD LOCATION AND RECORD PLANS. THEY ARE APPROXIMATE LOCATION ONLY. CONTACT DIGSAFE 1-888-DIGSAFE TO VERIFY UTILITIES.

REV.	DATE	DESCRIPTION
2	12/17/13	UPDATE ZONING
1	12/10/13	REMOVE PROPOSED BUILDINGS FROM LAND UNIT AREAS

MSC CIVIL ENGINEERS & LAND SURVEYORS, INC

PHONE: 603-431-2222 FAX 603 431 0910 www.mscengineers.com
170 COMMERCE WAY, SUITE 102 PORTSMOUTH, NH 03801

REVISION V TO THE CONDOMINIUM SITE PLAN

TAX MAP H LOT 35-D
THE NEW MEADOWS, INC.
SHOWING THE SUBMITTED LAND OF THE CONDOMINIUMS AT LILAC LANE, S&W COMMERCIAL CONDOMINIUM & THE MEADOWS AT DOVER, A CONDOMINIUM
KNOX MARSH ROAD

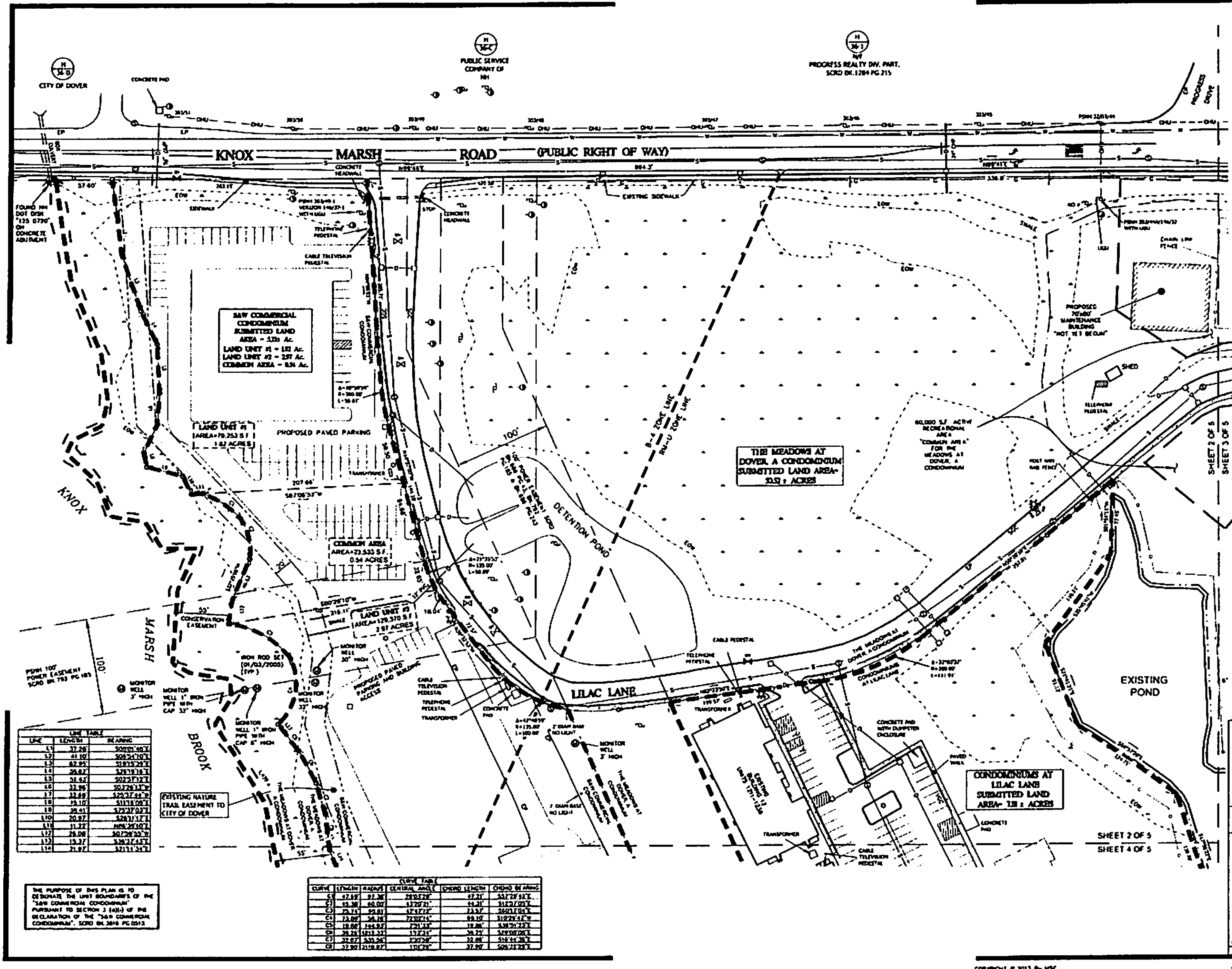
DOVER, NH COUNTY OF STRAFFORD

(IN FEET) 1" = 100'

DATE: NOVEMBER 15, 2013
DRAWN BY: SMO
CHECKED BY: JCC

<03121CSP-V> SHEET 1 OF 5 #03121/13020

12-17-13


LEGEND
KNOX MARSH ROAD (PUBLIC RIGHT OF WAY)
CITY OF DOVER
PUBLIC SERVICE COMPANY OF NH
PROGRESS REALTY DIV. PART.
PROGRESS DRIVE
S&W COMMERCIAL CONDOMINIUM SUBMITTED LAND
PROPOSED PAVED PARKING
COMMON AREA
DETENTION POND
THE MEADOWS AT DOVER, A CONDOMINIUM SUBMITTED LAND AREA
LILAC LANE
CONDOMINIUMS AT LILAC LANE SUBMITTED LAND AREA
EXISTING POND
KNOX
MARSH
BROOK
EXISTING NATURE TRAIL EASEMENT TO CITY OF DOVER
SHEET 2 OF 5
SHEET 3 OF 5
SHEET 4 OF 5
MAGNETIC 1987
12-17-13
MSC
CIVIL ENGINEERS & LAND SURVEYORS, INC
REVISION V TO THE
CONDOMINIUM SITE PLAN
TAX MAP H LOT 35-D
THE NEW MEADOWS, INC.
SHOWING THE SUBMITTED LAND OF THE CONDOMINIUMS
AT LILAC LANE, S&W COMMERCIAL CONDOMINIUM
& THE MEADOWS AT DOVER, A CONDOMINIUM
KNOX MARSH ROAD
DOVER, NH
COUNTY OF STRAFFORD
SHEET 2 OF 5
#03121/13020

Doc # 0020585 Dec 23 2013 10 09 AM
Plan 108-070 1 of 1
Register of Deeds, Strafford County

LEGEND

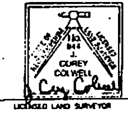
BK	BOOK
CMP	CORRUGATED METAL PIPE
EP	EDGE OF PAVEMENT
NHDES	NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL SERVICES
PG	PAGE
L	LENGTH
R	RADIUS
Δ	CENTRAL ANGLE
EOW	EDGE OF WETLANDS
PRA	PASSIVE RECREATION AREA
PSNH	PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
PVC	POLYVINYL CHLORIDE
RCP	REINFORCED CONCRETE PIPE
R.O.W.	RIGHT OF WAY
SCRD	STRAFFORD COUNTY REGISTRY OF DEEDS
S.F.	SQUARE FEET
NET&T	NEW ENGLAND TELEPHONE & TELEGRAPH
SGC	SLOPED GRANITE CURB
UGE	UNDERGROUND ELECTRIC
UGU	UNDERGROUND UTILITIES
	TAX MAP & LOT NUMBER
	PROPERTY LINE
	EDGE OF RIVER
	EDGE OF WETLAND
	FENCE LINE
	WETLAND
	HYDRANT
	DRAINAGE MANHOLE
	SEWER MANHOLE
	CATCH BASIN
	MONITORING WELL
	WATER VALVE
	SIGN
	CENTER OF STREAM
	IRON ROD SET
	UTILITY POLE
	LIGHT POST
	GUY POLE
	POST AND RAIL FENCE
	WELL
	GAS SHUTOFF
	WATER SHUTOFF
	GAS VALVE
—G—	EXISTING GAS
—W—	EXISTING WATER
—D—	EXISTING DRAINAGE
—S—	EXISTING SEWER
—SL—	SEWER LATERAL
—OHU—	OVERHEAD UTILITIES

"I CERTIFY THAT THIS PLAN IS ACCURATE AND IS IN COMPLIANCE WITH THE PROVISIONS OF NEW HAMPSHIRE RSA 356 B.20(I), AND THAT ALL UNITS SHOWN ARE EXISTING OR PROPOSED AS NOTED."

PURSUANT TO NEW HAMPSHIRE REVISED STATUTES ANNOTATED 676:18,III AND IV AND 672:14.

"I CERTIFY THAT THIS SURVEY PLAT IS NOT A SUBDIVISION PURSUANT TO THIS TITLE AND THAT THE LINES OF STREETS AND WAYS SHOWN ARE THOSE OF PUBLIC OR PRIVATE STREETS OR WAYS ALREADY ESTABLISHED AND THAT NO NEW WAYS ARE SHOWN."

A COPY OF THIS PLAN HAS BEEN FILED WITH THE LOCAL PLANNING BOARD



LICENSED LAND SURVEYOR

12-17-13
DATE

THE PURPOSE OF THIS PLAN IS TO DESIGNATE THE UNIT BOUNDARIES OF THE "S&W COMMERCIAL CONDOMINIUM" PURSUANT TO SECTION 3 (d)(1) OF THE DECLARATION OF THE "S&W COMMERCIAL CONDOMINIUM". SCRD BK 3016 PG 0313

REV.	DATE	DESCRIPTION
2	12/17/13	NO REVISIONS THIS SHEET
1	12/10/13	NO REVISIONS THIS SHEET

MSC
CIVIL ENGINEERS & LAND SURVEYORS, INC
PHONE: 603-431-2222 FAX: 603-431-0910 www.mscengineers.com
170 COMMERCE WAY, SUITE 102 PORTSMOUTH, NH 03801

REVISION V TO THE CONDOMINIUM SITE PLAN

TAX MAP H LOT 35-D
THE NEW MEADOWS, INC.
SHOWING THE SUBMITTED LAND OF THE CONDOMINIUMS AT LILAC LANE, S&W COMMERCIAL CONDOMINIUM & THE MEADOWS AT DOVER, A CONDOMINIUM
KNOX MARSH ROAD
DOVER, NH **COUNTY OF STRAFFORD**

DATE: NOVEMBER 15, 2013 (IN FEET) 1" = 60'
DRAWN BY: SMO CHECKED BY: JCC

COPYRIGHT © 2013 By MSC <03121CSP-V-SC50> SHEET 3 OF 5 #03121/13020

KNOX MARSH ROAD (PUBLIC RIGHT OF WAY)

THE MEADOWS AT DOVER, A CONDOMINIUM SUBMITTED LAND AREA= 33.32 ± ACRES

DOANE RUGGLES INC. C/O IRVING OIL CORP.
N/F SWIFT AND CO. SCRD BK 877 PG 214
THE SAMPSON SUPERMARKETS
CROSS HILL HOUSING ASSOCIATES SCRD BK 1752 PG 514
N/F HSM BROTHERS, INC. SCRD BK 1602 PG 365
WESTGATE DRIVE R.O.W.
SHEET 2 OF 5 SHEET 3 OF 5
SHEET 3 OF 5 SHEET 5 OF 5
EXISTING PAVED PARKING

LEGEND

BK	BOOK
CMP	CORRUGATED METAL PIPE
EP	EDGE OF PAVEMENT
NHDES	NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL SERVICES
PG	PAGE
L	LENGTH
R	RADIUS
Δ	CENTRAL ANGLE
EOW	EDGE OF WETLANDS
PRA	PASSIVE RECREATION AREA
PSNH	PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
PVC	POLYVINYL CHLORIDE
RCP	REINFORCED CONCRETE PIPE
R.O.W.	RIGHT OF WAY
SCRD	STRAFFORD COUNTY REGISTRY OF DEEDS
S.F.	SQUARE FEET
NET&T	NEW ENGLAND TELEPHONE & TELEGRAPH
SGC	SLOPED GRANITE CURB
UGE	UNDERGROUND ELECTRIC
UGU	UNDERGROUND UTILITIES
	TAX MAP & LOT NUMBER
	PROPERTY LINE
	EDGE OF RIVER
	EDGE OF WETLAND
	FENCE LINE
	WETLAND
	HYDRANT
	DRAINAGE MANHOLE
	SEWER MANHOLE
	CATCH BASIN
	MONITORING WELL
	WATER VALVE
	SIGN
	CENTER OF STREAM
	IRON ROD SET
	UTILITY POLE
	LIGHT POST
	GUY POLE
	POST AND RAIL FENCE
	WELL
	GAS SHUTOFF
	WATER SHUTOFF
	GAS VALVE
G	EXISTING GAS
W	EXISTING WATER
D	EXISTING DRAINAGE
S	EXISTING SEWER
SL	SEWER LATERAL
OHU	OVERHEAD UTILITIES

MAGNETIC 1987

SHEET 2 OF 5
SHEET 4 OF 5
SHEET 4 OF 5
SHEET 5 OF 5

CONDOMINIUMS AT LILAC LANE SUBMITTED LAND AREA= 7.18 ± ACRES

S&W COMMERCIAL CONDOMINIUM SUBMITTED LAND AREA= 3.51± ACRES

THE MEADOWS AT DOVER, A CONDOMINIUM SUBMITTED LAND AREA= 33.52 ± ACRES

12,000 S.F. ACTIVE RECREATIONAL AREA (1 BASKETBALL COURT 1 PLAYGROUND)

400,000 S.F. PASSIVE RECREATIONAL AREA

PAVED PARKING UNDER CONSTRUCTION

PROPOSED PAVED PARKING

EXISTING NATURE TRAIL EASEMENT TO CITY OF DOVER

NOTE: THE CONSERVATION EASEMENT IS 55' FROM THE CENTERLINE OF THE KNOX MARSH BROOK FROM THIS POINT NORTHWARD

EXISTING CONSERVATION EASEMENT LINE (SEE PLAN REFERENCE #3) (SEE SHEET 1 OF 5)

CONSERVATION EASEMENT TO DOVER CONSERVATION COMMISSION SCRD BK 3381 PG 005

TRAIL EASEMENT TO CITY OF DOVER SCRD BK 3381 PG 001

NOTE: THE CONSERVATION EASEMENT EXTENDS TO THE NORTHERLY EDGE OF THE BELLAMY RIVER

TYRA INC. SCRD BK 1776 PG 178

KNOX MARSH BROOK

BELLAMY RIVER

B-4 ZONE LINE
PM-U ZONE LINE

IRON ROD SET (TYP.)

"I CERTIFY THAT THIS PLAN IS ACCURATE AND IS IN COMPLIANCE WITH THE PROVISIONS OF NEW HAMPSHIRE RSA 356-B:20(I), AND THAT ALL UNITS SHOWN ARE EXISTING OR PROPOSED AS NOTED."

PURSUANT TO NEW HAMPSHIRE REVISED STATUTES ANNOTATED 676:18 III AND IV AND 672:14

"I CERTIFY THAT THIS SURVEY PLAT IS NOT A SUBDIVISION PURSUANT TO THIS TITLE AND THAT THE LINES OF STREETS AND WAYS SHOWN ARE THOSE OF PUBLIC OR PRIVATE STREETS OR WAYS ALREADY ESTABLISHED AND THAT NO NEW WAYS ARE SHOWN."

A COPY OF THIS PLAN HAS BEEN FILED WITH THE LOCAL PLANNING BOARD

COREY COLWELL No. 844
LICENSED LAND SURVEYOR
12-17-13
DATE

THE PURPOSE OF THIS PLAN IS TO DESIGNATE THE UNIT BOUNDARIES OF THE "S&W COMMERCIAL CONDOMINIUM" PURSUANT TO SECTION 3 (d)(i) OF THE DECLARATION OF THE "S&W COMMERCIAL CONDOMINIUM", SCRD BK. 3618 PG. 0513

MSC CIVIL ENGINEERS & LAND SURVEYORS, INC
PHONE: 603-431-2222 FAX: 603-431-0910 www.mscengineers.com
170 COMMERCE WAY, SUITE 102 PORTSMOUTH, NH 03801

REVISION V TO THE CONDOMINIUM SITE PLAN
TAX MAP H LOT 35-D
THE NEW MEADOWS, INC.
SHOWING THE SUBMITTED LAND OF THE CONDOMINIUMS AT LILAC LANE, S&W COMMERCIAL CONDOMINIUM & THE MEADOWS AT DOVER, A CONDOMINIUM
KNOX MARSH ROAD
DOVER, NH COUNTY OF STRAFFORD

DATE: NOVEMBER 15, 2013
DRAWN BY: SMO
CHECKED BY: JCC
1" = 50'

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03121CSP-V-SC50
SHEET 4 OF 5
#03121/13020

Doc # 0020587 Dec 23, 2013 10:08 AM
Plan 108-072 1 of 1
Register of Deeds Strafford County

SHEET 3 OF 5
SHEET 5 OF 5

SHEET 4 OF 5
SHEET 5 OF 5

GRAVEL ROAD
36" RCP
12" PVC
EOW
STOCKADE FENCE DUMPSTER ENCLOSURE
ELECTRIC PEDESTAL
TELEPHONE PEDESTAL
GAS MARKER
EXISTING BUILDING B UNITS 811-838
EXISTING BUILDING C UNITS 711-738
EXISTING BUILDING UNITS 811-838
ELECTRIC TRANSFORMER
EXISTING PLAYGROUND
ELECTRIC
ELECTRICAL PEDESTAL
GAS (TYP.)
30' WIDE WATER EASEMENT
30' WATER EASEMENT
WESTGATE DRIVE R.O.W.

Δ=98°12'43"
R=752.00'
L=1289.02'

200 DAY TIME OF TRAVEL LINE (SEE NOTE 6 SHEET 1 OF 5)

THE MEADOWS AT DOVER, A CONDOMINIUM SUBMITTED LAND AREA= 33.52 ± ACRES

PROTECTIVE WELL RADIUS EASEMENT TO THE CITY OF DOVER SCRD BK 3381 PG 001

EDGE OF PRA
CONSERVATION EASEMENT LINE
SAME AS H-41B
296.84'±
111.13'
185.71'
S28°41'18"W

EXISTING NATURE TRAIL EASEMENT TO CITY OF DOVER

NHDES PROTECTIVE WELL RADIUS

BELLAMY RIVER

LEGEND

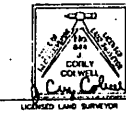
BK	BOOK
CMP	CORRUGATED METAL PIPE
EP	EDGE OF PAVEMENT
NHDES	NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL SERVICES
PG	PAGE
L	LENGTH
R	RADIUS
Δ	CENTRAL ANGLE
EOW	EDGE OF WETLANDS
PRA	PASSIVE RECREATION AREA
PSNH	PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
PVC	POLYVINYL CHLORIDE
RCP	REINFORCED CONCRETE PIPE
R.O.W.	RIGHT OF WAY
SCRD	STRAFFORD COUNTY REGISTRY OF DEEDS
S.F.	SQUARE FEET
NET&T	NEW ENGLAND TELEPHONE & TELEGRAPH
SGC	SLOPED GRANITE CURB
UGE	UNDERGROUND ELECTRIC
UGU	UNDERGROUND UTILITIES
(H/41B)	TAX MAP & LOT NUMBER
	PROPERTY LINE
	EDGE OF RIVER
	EDGE OF WETLAND
	FENCE LINE
	WETLAND
	HYDRANT
	DRAINAGE MANHOLE
	SEWER MANHOLE
	CATCH BASIN
	MONITORING WELL
	WATER VALVE
	SIGN
	CENTER OF STREAM
	IRON ROD SET
	UTILITY POLE
	LIGHT POST
	GUY POLE
	POST AND RAIL FENCE
	WELL
	GAS SHUTOFF
	WATER SHUTOFF
	GAS VALVE
G	EXISTING GAS
W	EXISTING WATER
D	EXISTING DRAINAGE
S	EXISTING SEWER
SL	SEWER LATERAL
OHU	OVERHEAD UTILITIES

"I CERTIFY THAT THIS PLAN IS ACCURATE AND IS IN COMPLIANCE WITH THE PROVISIONS OF NEW HAMPSHIRE RSA 356-B:20(I), AND THAT ALL UNITS SHOWN ARE EXISTING OR PROPOSED AS NOTED."

PURSUANT TO NEW HAMPSHIRE REVISED STATUTES ANNOTATED 676:18,II AND IV AND 672:14.

"I CERTIFY THAT THIS SURVEY PLAT IS NOT A SUBDIVISION PURSUANT TO THIS TITLE AND THAT THE LINES OF STREETS AND WAYS SHOWN ARE THOSE OF PUBLIC OR PRIVATE STREETS OR WAYS ALREADY ESTABLISHED AND THAT NO NEW WAYS ARE SHOWN."

A COPY OF THIS PLAN HAS BEEN FILED WITH THE LOCAL PLANNING BOARD



LICENSED LAND SURVEYOR

12-17-13
DATE

THE PURPOSE OF THIS PLAN IS TO DESIGNATE THE UNIT BOUNDARIES OF THE "S&W COMMERCIAL CONDOMINIUM" PURSUANT TO SECTION 3 (d)(1) OF THE DECLARATION OF THE "S&W COMMERCIAL CONDOMINIUM", SCRD BK 3918 PG 0513

REV.	DATE	DESCRIPTION
2	12/13/13	NO REVISIONS THIS SHEET
1	12/10/13	NO REVISIONS THIS SHEET

MSC
CIVIL ENGINEERS & LAND SURVEYORS, INC
PHONE: 603-431-2222 FAX: 603-431-0910 www.mscengineers.com
170 COMMERCE WAY, SUITE 102 PORTSMOUTH, NH 03801

REVISION V TO THE CONDOMINIUM SITE PLAN

TAX MAP H LOT 35-D
THE NEW MEADOWS, INC.
SHOWING THE SUBMITTED LAND OF THE CONDOMINIUMS AT LILAC LANE, S&W COMMERCIAL CONDOMINIUM & THE MEADOWS AT DOVER, A CONDOMINIUM
KNOX MARSH ROAD
DOVER, NH COUNTY OF STRAFFORD

(IN FEET) 1" = 60'

DATE: NOVEMBER 15, 2013
DRAWN BY: SMO
CHECKED BY: JCC

COPYRIGHT © 2013 By MSC

<03121CSP-V-SC50>

SHEET 5 OF 5

#03121/13020

EXHIBIT 6

Doc # 0005611 Apr 13, 2012 10:46 AM
Book 4009 Page 0002 Page 1 of 2
Register of Deeds, Strafford County

After recording return to:
Cleveland, Waters and Bass, P.A.
Two Capital Plaza, P.O. Box 1137
Concord, NH 03302-1137

MEMORANDUM OF UNDERSTANDING
(PHASING PLAN)

This Memorandum of Understanding is made this 10th day of April, 2012, by **THE NEW MEADOWS, INC.** ("New Meadows"), a New Hampshire corporation, having an address of One Lilac Lane, Dover, New Hampshire 03820, with respect to a certain condominium in located in the City of Dover, Strafford County, State of New Hampshire, known as "The Condominiums at Lilac Lane" (the "Condominium").

Reference is made to the following:

A. The Condominium is more particularly described in the Declaration of Condominiums at Lilac Lane, dated February 16, 2010, recorded in Strafford County Registry of Deeds at Book 3816, Page 458, as heretofore or hereafter amended, and the site and floor plans recorded in said Registry of Deeds as Plans #98-094 through 98-098 and Plans #99-071 through 99-073 (the "Plans").

B. The Condominium consists of a total of 120 Units, with 24 Units in "Building 12" and another 24 Units to be constructed in each of four (4) other buildings ("Buildings 13-16"), all as shown on the Plans.

C. New Meadows is the Declarant of the Condominium and the owner of Units 1215 and 1234 in Building 12 and the 96 Units in Buildings 13-16 (the latter of which are referred to herein as the "New Units").

NOW THEREFORE, New Meadows hereby states as follows:

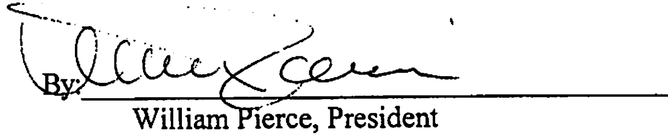
1. Building 12 is the first phase of the development and is completely constructed and sold out, except for Units 1215 and 1234. New Meadows intends to finish the construction of and sell the New Units in subsequent phases. Each new phase shall consist of the New Units located in a single building. Phases may be constructed and sold in any order, at New Meadows' discretion. At the present time, New Meadows intends to finish the construction of and sell the New Units in Building #13 as the next phase of the development. New Meadows may designate or modify subsequent phases by amendment to this Memorandum.

2. To ensure a suitable volume of Units for sale at any one time, New Meadows may commence marketing of succeeding phases before any previous phase is sold out based on New Meadows' determination of market conditions.

3. The purpose of this Memorandum is to describe the status of the first phase of the development and New Meadow's present plans for the construction and sale of the New Units. It shall not be binding upon New Meadows, its successors or assigns, and shall not be deemed to benefit or create any rights in any Unit Owner or third-party.

EXECUTED as of the date and year first set forth above.

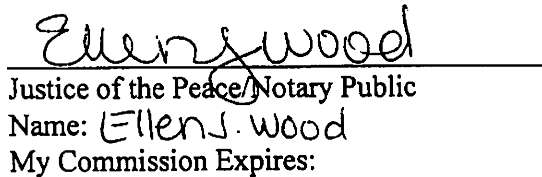
THE NEW MEADOWS, INC.



By: ______________________
William Pierce, President

STATE OF NEW HAMPSHIRE
COUNTY OF STRAFFORD, ss

The foregoing instrument was acknowledged before me this 10th day of April, 2012 by William Pierce as his free act and deed and as the free act and deed of The New Meadows, Inc.



____
Justice of the Peace/Notary Public
Name: Ellen J. Wood
My Commission Expires:

Ellen J. Wood
Commissioner of Deeds, State of New Hampshire
My Commission Expires October 06, 2015

H:\clients\N\New Meadows Inc.-18716\Lilac Lane - Sale of Units - 004\Documents\Memorandum of Understanding (Phasing).doc

EXHIBIT 7

Anthony Stevens, President
Condominiums at Lilac Lane
1237 Lilac Lane
Dover, New Hampshire 03820

RE: Call for Special Meeting

Dear Mr. Stevens:

Pursuant to Article II, Paragraph 6 of the Condominiums at Lilac Lane Bylaws, the undersigned Owners of the designated Units, comprising more than 30% of the votes in the Association, request that you call a Special Meeting of the Association to remove you as a member of the Board of Directors.

While this is certainly against your interests, we are hopeful you will nonetheless schedule the meeting as quickly as possible.

We would request that the meeting be held at Great North Property Management's office located at 3 Holland Way in Exeter at 6:00pm on one of the following dates: Tuesday, July 14th, Wednesday, July 15th or Thursday, July 16th.

Should you have any questions, please let us know. If not, we await notice of the scheduled Special Meeting and appreciate your prompt attention to this matter.

Thank you.

Date:

Kenneth Anderson
Monument Garden, LLC
Owner, Units #1213, 1214, 1226, 1311 - 1338, 1411 - 1438

Stephen Fee
Monument Garden, LLC
Owner, Units #1213, 1214, 1226, 1311 - 1338, 1411 - 1438

Cc: Board of Directors
Great North Property Management
Unit Owners
File

EXHIBIT 8

Doc # 0012187 Sep 30, 2014 11:57 AM
Book 4246 Page 0140 Page 1 of 18
Register of Deeds, Strafford County

Return to:
William C. Tucker, Esquire
Wadleigh, Starr & Peters, P.L.L.C.
95 Market Street
Manchester, New Hampshire 03101

MORTGAGE AND SECURITY AGREEMENT

KNOW ALL MEN BY THESE PRESENTS that ***Monument Garden, LLC***, a Maine limited liability company (the "Borrower"), having a principal place of business at and a mailing address of 21 Continental Boulevard, Merrimack, New Hampshire 03054 (hereinafter with its successors, legal representatives and assigns referred to as the "Mortgagor"), for consideration paid by ***Centrix Bank & Trust***, a New Hampshire banking corporation, having a place of business at 1 Atwood Lane, Bedford, New Hampshire 03110 hereinafter collectively with its successors, legal representatives, assigns and participants, if any, referred to as the "Mortgagee"), the receipt and sufficiency of which Mortgagor does hereby acknowledge, hereby grants to Mortgagee, with Mortgage Covenants, to secure the:

A. Payment of the principal sum of ***Four Million Eight Hundred Sixty Four Thousand Nine Hundred Forty Three Dollars and Seven Five Cents ($4,864,943.75)*** together with interest thereon provided for in a Promissory Note of even date, made by Mortgagor as, when and in the manner required thereby, together with and including all future advances made under said Note pursuant to a certain Loan Agreement of even date herewith (the "Loan Agreement");

B. Payment of all sums now or hereafter advanced by the Mortgagee in accordance herewith to protect the security of this Mortgage with interest thereon as provided for hereinafter;

C. Payment, performance and satisfaction of Mortgagor's financial liabilities and other obligations under the terms, conditions, representations, warranties and covenants contained in this Mortgage, the Loan Agreement, and in the Promissory Note referred to in paragraph A and any and all amendments, deferrals, extensions, renewals and substitutions thereto and therefor (hereinafter referred to as the "Note"), the following premises (the "Mortgaged Premises"):

Those certain tracts or parcels of land, together with the buildings and other improvements now or hereafter thereon, located in Dover, Strafford County, New Hampshire, and as more particularly described in Exhibit A attached hereto and incorporated herein by reference.

Mortgagor hereby represents and warrants that the Mortgagor is the owner of the fee simple interest in the real property described in Exhibit A attached hereto subject only to those matters set forth in a title policy delivered to Mortgagee.

Together with all and singular of the tenements, hereditaments, easements, rights of way, licenses, profits privileges and other appurtenances belonging, relating or pertaining to the Mortgaged Premises.

AND for the consideration aforesaid, Mortgagor hereby releases, discharges and waives all rights of exemption from attachment and levy or sale on execution and all other rights of any and every nature whatsoever in and to the Mortgaged Premises and in each and every portion thereof as are or may hereafter be reserved, secured or afforded Mortgagor under, or by virtue of the laws of the State of New Hampshire or the United States of America including, without limiting the generality of the foregoing, any exemptions now or hereafter available to Mortgagor under Section 522 of the federal Bankruptcy Code of 1978, 11 USC §522, as such statute now exists or is amended hereafter, or any successor statute of similar import (the "Bankruptcy Code"), or any successor statute or similar import and all other rights, title and interests of any and every nature whatsoever of Mortgagor in and to the Mortgaged Premises.

SECTION 1
Additional Security

As security for the payment and performance of the indebtedness and other obligations, covenants and agreements secured hereby, Mortgagor hereby:

1.01 Collaterally assigns, transfers and sets over unto Mortgagee all purchase and sale agreements for the sale of condominium units constructed or to be constructed upon the Mortgaged Premises, now existing or hereafter entered into and to carry out the foregoing, Mortgagor agrees (1) to execute and deliver to Mortgagee such conditional assignments of purchase and sale agreements as Mortgagee may from time to time request while this Mortgage and the debt secured hereby are outstanding and (2) not to cancel, accept a surrender of, or reduce the price of any such purchase and sale agreement without Mortgagee's prior written consent, or after written notice from Mortgagee of its desire to consent thereto, modify or otherwise amend any purchase and sale agreements without such consent. Nothing herein shall obligate the Mortgagee to perform the duties and obligations of the Mortgagor as seller or contractor under any such purchase and sale agreements, which duties and obligations Mortgagor hereby covenants and agrees to well and punctually perform.

1.02 Collaterally assigns, transfers, and sets over unto Mortgagee all leases of, and rental agreements pertaining to the Mortgaged Premises, or any portion thereof, together with all of Mortgage's rights, title, and interests as lessor thereunder and all deposits made thereon, and, in furtherance of this assignment, Mortgagor agrees (i) to execute and deliver to Mortgagee such collateral assignments of such leases as Mortgagee may from time to time request while this Mortgage and the financial liabilities and other obligations of Mortgagor secured hereby are outstanding and (ii) not to cancel, accept a surrender of, modify, reduce the rent payable under or otherwise amend any such lease without Mortgagee's prior, written consent. Nothing herein shall obligate Mortgagee to perform the duties and obligations of Mortgagor as lessor under any such lease; all of which duties and obligations, Mortgagor hereby covenants and agrees to punctually and completely perform.

1.03 Collaterally assigns, transfers and sets over unto Mortgagee all judgments, awards of damages and settlements hereafter made as a result of, or in lieu of any taking of the Mortgaged Premises or any interest therein or part thereof under the power of eminent domain, or for any damage (whether caused by such taking or otherwise) to the Mortgaged Premises, including the buildings and other improvements, fixtures and other personal property thereon or therein, or any part thereof, including any award for change of grade of or access to or from streets. Mortgagee may apply all such sums or any part thereof so received to the indebtedness secured hereby, whether matured or not, in such manner as Mortgagee elects or, at Mortgagee's option, the entire amount or any part thereof so received may be released. Mortgagor hereby irrevocably authorizes and appoints Mortgagee as Mortgagor's attorney-in-fact to collect and receive any such judgments, awards and settlements from the authorities or entities making the same, to appear in any proceeding therefor, and to give receipts and acquittances therefor; and Mortgagor will execute and deliver to Mortgagee on demand such assignments and other instruments as Mortgagee may require for such purposes and will reimburse the Mortgagee for Mortgagee's costs (including reasonable counsel fees) incurred in the collection of such judgments and settlements. Neither the receipt of deposits, awards or any other monies or any evidence thereof pursuant to the provisions of this paragraph nor any disposition of the same by Mortgagee shall constitute a waiver of the right of foreclosure by Mortgagee in the event of default or failure of performance by Mortgagor of any covenant or agreement contained herein.

1.04 Collaterally assigns, transfers, grants a security interest in and sets over unto Mortgagee all of the following articles now and hereafter on the Mortgaged Premises or used therein or therewith: All equipment, machinery, and articles of personal property owned by Mortgagor and now or hereafter affixed to, placed upon or used in connection with the construction, development and operation of the Mortgaged Premises, together with cash and noncash proceeds of any and all of the foregoing, all of which are subject to this Mortgage, whether or not such property is subject to prior conditional sales agreements, security interests or other liens (all such personal property is hereinafter referred to as the "Collateral). If the lien of this Mortgage on any such fixtures or other personal property shall be subject to a conditional sales agreement, security interest or other lien, then, in the event of any default hereunder, all of the rights, title and interests of Mortgagor in and to any and all deposits made thereon or therefor are hereby assigned to Mortgagee, together with the benefit of any payments now or hereafter made by Mortgagor thereon. There are also transferred, set over and assigned to Mortgagee hereby all conditional sales agreements, leases and use agreements of or pertaining to the equipment,

machinery, furniture and furnishings and other articles of personal property of Mortgagor of the kinds or types described above under which Mortgagor is the purchaser or lessee of, or otherwise entitled to the use of such items, and Mortgagor agrees to execute and deliver to Mortgagee specific, separate assignments thereof in such form as Mortgagee may require. Nothing herein shall obligate Mortgagee to perform the duties and obligations of Mortgagor under any such lease or use agreement; all of which duties and obligations, Mortgagor hereby covenants and agrees to punctually and completely perform.

SECTION 2
Mortgagor's Continuing Warranties

In addition to Mortgagor's representations and warranties which are included within the term Mortgage Covenants and incorporated herein by operation of law, Mortgagor acknowledges, represents and warrants to Mortgagee that:

2.01 Mortgagor executed and delivered this Mortgage and the Note, and Loan Documents in connection with a business and commercial loan, as such term is used in Regulation Z as amended, promulgated by the Federal Reserve Board, made by the Mortgagee to Mortgagor.

2.02 Mortgagor is and will continue to be the sole and exclusive owner of the Collateral and will defend the same to Mortgagee against the claims and demands of any and all persons at any time claiming any right, title or interest therein adverse to Mortgagee.

2.03 There is no financing statement or other notice of any attachment, lien or other involuntary or voluntary encumbrance on record with any Uniform Commercial Code or other public recording office situated in any jurisdiction evidencing or perfecting a security interest in and to or an attachment lien or other involuntary or voluntary encumbrance against any of the Collateral which is presently effective.

2.04 All of the acknowledgments, representations and warranties made by Mortgagor in the Loan Documents and loan application are incorporated herein by reference as fully as if completely set forth herein and are and shall be deemed to be continuing and will be true on each day during the term of this Mortgage as if made by Mortgagor on such day.

SECTION 3
Certain Covenants of Mortgagor

Mortgagor further covenants and agrees with Mortgagee as follows:

3.01 Mortgagor will pay the Note hereby secured and interest thereon and all other sums becoming due or recoverable thereunder as, when and in the manner required thereby, will pay all amounts due and payable pursuant to the Loan Agreement, and will also punctually and completely perform and satisfy all of Mortgagor's other obligations to Mortgagee under the terms, conditions and covenants thereof, of this Mortgage and of the Loan Documents.

3.02 Mortgagor will not without the prior, written consent of Mortgagee (i) Except for the sale and leasing of condominium units in the ordinary course of business, grant, sell, bargain, convey, transfer or otherwise alienate all, or any part of the Mortgaged Premises or the Collateral, whether by deed, bill of sale, bond for deed, contract for the sale of real estate, lease with option to purchase or any other means (for purposes hereof, a transfer of any of the member interest of the Mortgagor, other than by reason of death of a member shall be deemed a transfer of the Mortgaged Premises), (ii) mortgage, grant a security interest in or to, lease or voluntarily encumber all, or any part of the Mortgaged Premises or the Collateral, (iii) permit, consent to or suffer the existence of any lien, attachment or other encumbrance upon all, or any part of the Mortgaged Premises or Collateral, or (iv) permit or suffer the assumption of this Mortgage by any person.

3.03 Mortgagor: (i) will not suffer any strip or waste of the Mortgaged Premises; and (ii) shall keep and maintain the Mortgaged Premises and the Collateral in such repair and condition as the same now exist or as bettered hereafter and shall keep the Mortgaged Premises and the Collateral in good working condition, reasonable wear and tear and damage from insured casualties excepted, so that the Mortgagor may at all times conduct Mortgagor's business affairs and operations in accordance with prudent management principals and sound business practices; and (iii) has complied and will comply at all times hereafter with any and all federal and state statutes, local laws and ordinances and administrative regulations promulgated under any of the foregoing which govern, restrict or regulate the use or occupation or the manner of use or occupation of the Mortgaged Premises or Collateral, or the conduct of Mortgagor's business including, without limitation, building, fire, planning, subdivision and zoning laws, codes and regulations.

3.04 Mortgagor will pay, when due, all taxes, assessments, special assessments, utility rates, water and sewerage charges, insurance premiums on policies of insurance required hereunder and all other charges of any and every nature whatsoever which at any time are assessed or levied against or upon or which, in Mortgagee's opinion, are reasonably necessary or desirable to preserve or protect the Mortgaged Premises or the Collateral [the "Charge(s)"]. Mortgagee may pay all, or any, portion of any such Charges together with any interest or penalties thereon, but in no event shall be obligated to do so. In the event that Mortgagee shall pay all, or any portion of any such Charges, the amount so paid by Mortgagee shall be secured hereby, payable on demand and, until so paid by Mortgagor, shall bear interest at the rate then provided for in the Note. Mortgagor may in good faith contest any Charges provided that no lien shall result on the Mortgaged Premises superior to the lien on the Mortgage as a result of such contest.

3.05 Upon request, Mortgagor will pay to Mortgagee in monthly installments, as nearly equal as practicable, on the due date of any monthly installment payment required under the terms and conditions of the Note or on such other date as may be specified by Mortgagee at any time hereafter, sufficient funds, as determined and redetermined by Mortgagee, from time to time hereafter, to pay when due the next maturing Charges, or installment payments due thereon, which funds shall be held in a special, escrow account bearing interest at such rate as may be affirmatively required from time to time hereafter by law, if any, (the "Escrow Fund"), and over which only Mortgagee has the powers of application and withdrawal. Mortgagee shall apply the

Escrow Fund to the payment of such Charges or installment payments due thereon. If the amount of the Escrow Fund shall at any time exceed the amounts due or to become due for such Charges, Mortgagee may, in Mortgagee's reasonable discretion: (i) return any excess to Mortgagor; (ii) credit such excess against the indebtedness of Mortgagor to Mortgagee secured hereby; or (iii) credit such excess against future payments to be made to the Escrow Fund. Mortgagee may deal with the person shown on Mortgagee's records as being the owner of the Mortgaged Premises in disbursing any such excess. If the Escrow Fund is not sufficient to pay any such Charges when due, Mortgagor will pay to Mortgagee upon demand such amount as may be necessary to make up such deficiency. Until expended or applied as provided for above, funds deposited in the Escrow Fund by Mortgagor shall be assigned to, and constitute additional collateral for the full complete and timely payment and performance of the financial liabilities and other obligations of Mortgagor to Mortgagee secured by this Mortgage.

3.06 Mortgagor shall (or shall cause the Condominium Association to do so) procure, pay the premiums on and maintain in full force and effect at all times a policy of:

(a) Casualty (or when applicable, "builder's risk") insurance having a so-called Extended Coverage Endorsement or an insurance policy affording equivalent coverages acceptable to Mortgagee insuring the insurable portions of the improvements now or hereafter constituting the Mortgaged Premises including, without limitation, any and all fixtures (the "Improvements") against fire, such other risks of loss as are customarily insured under a policy of Casualty Insurance with an Extended Coverage Endorsement and such other risks and loss as may be specified by Mortgagee from time to time hereafter in such amounts as Mortgagee in Mortgagee's discretion may require, but in no event less than the full insurable value of such Improvements at replacement cost. Such policy shall also insure the Collateral against loss or damage by fire, theft, burglary, pilferage, loss in transit and such other hazards as Mortgagee may specify in amounts acceptable to Mortgagee. Such policy of insurance shall contain, inter alia (i) a standard New Hampshire Mortgagee clause or equivalent provision satisfactory to Mortgagee naming Mortgagee as loss payee and making the proceeds thereof payable to Mortgagee in the event of an insured loss, and (ii) a clause requiring the insurer to give the Mortgagee at least ten (10) days' written notice of termination or cancellation thereof or any reduction in the limits of coverage provided thereby.

(b) Comprehensive Public Liability Insurance naming Mortgagor as insured and Mortgagee as an additional named insured providing coverage in amounts reasonably acceptable to Mortgagee.

(c) If at any time the Mortgaged Premises is located within the boundaries of a federally designated flood hazard area, Flood Insurance insuring the insurable portions of the buildings and other improvements now or hereafter constituting the Mortgaged Premises including, without limitation, any and all fixtures, against loss, destruction or damage by flood in such amount as Mortgagee in Mortgagee's discretion may require from time to time hereafter.

(d) Such other insurance providing coverage against such other risks in such amounts as Mortgagee in Mortgagee's discretion may reasonably require or specify from time to time hereafter.

All insurance now or hereafter required to be procured, paid for and maintained by Mortgagor under this Mortgage shall be effected by valid and enforceable policies of insurance issued by insurers authorized to transact business within the State of New Hampshire which are reasonably acceptable to Mortgagee, each of which shall be in such form and provide coverage in such amounts and for such periods of time as Mortgagee in Mortgagee's sole and absolute discretion may require from time to time and shall be satisfactory in all other respects to Mortgagee. Mortgagor will deliver to Mortgagee, at Mortgagee's option, the original of each policy of insurance required hereunder, a true and complete duplicate thereof or a Certificate of Insurance establishing the issuance and existence thereof. Not later than thirty (30) days prior to the expiration date of any such policy of insurance, Mortgagor will deliver to Mortgagee, at Mortgagee's option, an original renewal or replacement policy thereof or a true and complete duplicate thereof or a Certificate of Insurance establishing the issuance and existence thereof.

3.07 The proceeds of any policy of insurance required by Section 3.06 shall be paid to Mortgagee and Mortgagee at Mortgagee's option, may (i) retain such insurance proceeds and apply the same in satisfaction or reduction of the indebtedness secured hereby in such priority and proportions as Mortgagee in Mortgagee's sole and absolute discretion deems proper or (ii) disburse or release all, or any portion of such insurance proceeds to Mortgagor for the purpose of rebuilding, renovating or repairing the Mortgaged Premises or the Collateral on such terms, conditions and covenants as Mortgagee in Mortgagee's sole and absolute discretion may prescribe.

3.08 Mortgagor will maintain full and correct books of account in accordance with generally accepted accounting principles applied on a consistent basis showing in detail the earnings and expenses of the Mortgaged Premises and Mortgagor's financial condition and from time to time upon request by Mortgagee, permit Mortgagee to inspect and make extracts from such books of account at the Mortgaged Premise or such other place as such books of account and other records are customarily kept by Mortgagor.

3.09 Mortgagee, acting by and through officers, employees and agents, may come upon, and enter the Mortgaged Premises at reasonable times for the purpose of inspecting the same.

3.10 If any action or proceeding be commenced, except an action to foreclose this Mortgage or to collect the indebtedness hereby secured, to which Mortgagee is made a party by reason of the execution of this Mortgage or the Note or the Loan Documents or in which it becomes necessary to defend or uphold the validity, enforceability or priority of this Mortgage or the Loan Documents, all costs, expenses, judgments, decrees, orders and damages incurred by, or rendered or awarded against Mortgagee including, without limitation, reasonable attorneys' fees in, or as a result of any such litigation will be paid by Mortgagor together with interest thereon from date of payment at the rate then specified in the Note, and any such sum and the interest thereon shall be payable on demand, secured hereby and have the benefit of the lien hereby created and its priority.

3.11 Within ten (10) days after being requested to do so, Mortgagor will furnish a duly acknowledged, written statement setting forth the amount of the debt secured by this Mortgage,

and stating either that no offsets, counterclaims, recoupments or defenses exist to, or against such debt or, if such offsets, counterclaims, recoupments or defenses are alleged to exist, the nature and amount thereof.

3.12 Neither the sale of all or any portion of the Mortgaged Premises nor any extension of the time for the payment of the indebtedness hereby secured or any other indulgence with respect thereto or any other obligation secured hereby given to Mortgagor or any Obligor by Mortgagee shall operate to release, discharge, modify, change or effect in any manner whatsoever the liability of Mortgagor to Mortgagee under this Mortgage or the Note or the Loan Documents in whole or in part.

3.13 The receipt and disposition of income from the Mortgaged Premises, eminent domain awards, insurance proceeds, or any other sums under the provisions of this Mortgage by Mortgagee shall not be a waiver or release of any rights, privileges or remedies of Mortgagee under this Mortgage or the Note or any Loan Document including, but not limited to, the right of foreclosure or acceleration of the indebtedness evidenced by the Note, whether such receipt or disposition shall be before or after the exercise of any such rights, privileges or remedies.

3.14 Mortgagor, at Mortgagor's sole cost and expense, will do, execute, have attested and acknowledge if necessary, and deliver any and all such further acts, mortgages, mortgage deeds, collateral assignments, notices of assignments and assurances as Mortgagee may hereafter require to effectuate further the purposes of this Mortgage, or for carrying out the intention or facilitating the performance of the terms, conditions and covenants of this Mortgage or for filing or recording this Mortgage, and hereby nominates, constitutes and appoints Mortgagee to execute, have attested and acknowledge if necessary, and deliver in the name of Mortgagor, to the extent Mortgagee may lawfully do so, one or more financing statements, security agreements or comparable security instruments as Mortgagee may deem necessary or desirable to evidence more effectively or perfect the lien hereof upon all, or any portion of the Mortgaged Premises or the security interest and other rights, title and interest in and to the Collateral granted by Mortgagor to Mortgagee hereby with the same effect as if done by Mortgagor personally. This power of attorney which is coupled with an interest in the subject matter of such power shall be irrevocable during the term of this Mortgage.

3.15 No delay, failure, omission or refusal on the part of Mortgagee in exercising any privilege, remedy or right against Mortgagor or any other party or which are available to Mortgagee under the terms of the Note, this Mortgage or any Loan Document or any statute, equitable doctrine or rule of law shall operate as, or be deemed to be a waiver thereof. No waiver of any such privilege, remedy or right against Mortgagor or any other party shall be effective unless made in a written instrument which has been signed by a duly authorized officer of Mortgagee. An effective, written waiver by Mortgagee of any privilege, remedy or right against Mortgagor or any other party on one occasion shall not bar, or be deemed to preclude the exercise of such privilege, remedy or right by Mortgagee in the future should the occasion therefor occur.

3.16 Environmental Hazards. Borrower shall not:

(a) cause or permit the presence, use, generation, manufacture, production, processing, installation, release, discharge, storage (including aboveground and underground storage tanks for petroleum or petroleum products), treatment, handling, or disposal of any Hazardous Materials (as defined below) (excluding the safe and lawful use and storage of quantities of Hazardous Materials customarily used in the operation and maintenance of comparable properties or for normal household purposes) on or under the Mortgaged Premises, or in any way affecting the Mortgaged Premises or its value, or which may form the basis for any present or future demand, claim or liability relating to contamination, exposure, cleanup or other remediation of the Mortgaged Premises; or

(b) cause or permit the transportation to, from or across the Mortgaged Premises of any Hazardous Material (excluding the safe and lawful use and storage of quantities of Hazardous Materials customarily used in the operation and maintenance of comparable properties or for normal household purposes); or

(c) cause or exacerbate any occurrence or condition on the Mortgaged Premises that is or may be in violation of Hazardous Materials Law (as defined below).

(The matters described in (a), (b) and (c) above referred to collectively below as "Prohibited Activities or Conditions.")

Except with respect to any matters which have been disclosed in writing by Borrower to Lender prior to the date of this Mortgage, or matters which have been disclosed in an environmental hazard assessment report of the Mortgaged Premises received by Lender prior to the date of this Mortgage, Borrower represents and warrants that it has not at any time caused or permitted any Prohibited Activities or Conditions and to the best of its knowledge, no Prohibited Activities or Conditions exist or have existed on or under the Mortgaged Premises. Borrower shall take all appropriate steps (including but not limited to appropriate lease provisions) to prevent its employees, agents, and contractors, and all tenants and other occupants on the Mortgaged Premises, from causing, permitting or exacerbating any Prohibited Activities or Conditions.

If Borrower has disclosed that Prohibited Activities or Conditions exist on the Mortgaged Premises, Borrower shall comply in a timely manner with, and cause all employees, agents, and contractors of Borrower and any other persons present on the Mortgaged Premises to so comply with, (1) any program of operations and maintenance ("O&M Program") relating to the Mortgaged Premises that is acceptable to Lender with respect to one or more Hazardous Materials (which O&M program may be set forth in an agreement of Borrower (an "O&M Agreement")) and all other obligations set forth in any O&M Agreement, and (2) all Hazardous Materials Laws. Any O&M Program shall be performed by qualified personnel. All costs and expenses of the O&M Program shall be paid by Borrower, including without limitation Lender's fees and- costs- incurred in connection with the monitoring and review of the O&M Program and Borrower's performance thereunder. If Borrower fails to timely commence or diligently continue and complete the O&M Program and comply with any O&M Agreement, then Lender may, at Lender's option, declare all of the sums secured by this Mortgage to be immediately due and payable, and Lender may invoke any remedies permitted by Section 5 of this Mortgage.

Borrower represents that Borrower has not received and has no knowledge of the issuance of any claim, citation or notice of any pending or threatened suits, proceedings, orders, or governmental inquiries or opinions involving the Mortgaged Premises that allege the violation of any Hazardous Materials Law ("Governmental Actions").

Borrower shall promptly notify Lender in writing of: (i) the occurrence of any Prohibited Activity or Condition on the Mortgaged Premises; (ii) Borrower's actual knowledge of the presence on or under any adjoining Mortgaged Premises of any Hazardous Materials which can reasonably be expected to have a material adverse impact on the Mortgaged Premises or the value of the Mortgaged Premises; (iii) the discovery of any occurrence or condition on the Mortgaged Premises or any adjoining real Mortgaged Premises that could cause any restrictions on the ownership, occupancy, transferability or use of the Mortgaged Premises under Hazardous Materials Law; (iv) any Governmental Action; and (v) any claim made or threatened by any third party against Borrower, Lender, or the Mortgaged Premises relating to loss or injury resulting from any Hazardous Materials. Any such notice by Borrower shall not relieve Borrower of, or result in a waiver of any obligation of Borrower under this Section 3.15. Borrower shall cooperate with any governmental inquiry, and shall comply with any governmental or judicial order which arises from any alleged Prohibited Activities or conditions.

Borrower shall pay promptly the costs of any environmental audits, studies or investigations (including but not limited to advice of legal counsel) and the removal of any Hazardous Material from the Mortgaged Premises required by Lender as a condition of its consent to any sale or transfer under Section 3.02 of this Mortgage of all or any part of the Mortgaged Premises or any transfer occurring upon a foreclosure or a deed in lieu of foreclosure or any interest therein, or required by Lender following a reasonable determination by Lender that there may be Prohibited Activities or Conditions on or under the Mortgaged Premises. Borrower hereby authorizes Lender and its employees, agents and contractors to enter onto the Mortgaged Premises for the purposes of conducting such environmental audits, studies and investigations. Any such costs and expenses incurred by Lender (including but not limited to fees and expenses of attorneys and consultants, whether incurred in connection with any judicial or administrative process or otherwise) which Borrower fails to pay promptly shall become immediately due and payable and shall become additional indebtedness secured by this Mortgage and shall bear interest as provided in the Note.

Borrower shall hold harmless, defend and indemnify Lender and its officers, directors, trustees, employees, and agents from and against all proceedings (including but not limited to Government Action), claims, damages, penalties, costs and expenses (including without limitation reasonable fees and expenses of attorneys and expert witnesses, investigatory fees, and cleanup and remediation expenses, whether or not incurred within the context of the judicial process), arising directly or indirectly from (i) any breach of any representation, warranty, or obligation of Borrower contained in this Section 3.16, or (ii) the presence or alleged presence of Hazardous Materials on or under the Mortgaged Premises. Lender hereby agrees that the liability created under this Section shall be limited to the assets of Borrower and Lender shall not seek to recover any deficiency from any manager or member of Borrower.

The term "Hazardous Materials," for purposes of this Section 3.16, includes petroleum and petroleum products, flammable explosives, radioactive materials (excluding radioactive materials in smoke detectors), polychlorinated biphenyls, lead, asbestos in any form that is or could become friable, hazardous waste, toxic or hazardous substances or other related materials whether in the form of a chemical, element, compound, solution, mixture or otherwise including, but not limited to, those materials defined as "hazardous substances", "extremely hazardous substances", "hazardous chemicals", "hazardous materials", "toxic substances", "solid waste", "toxic chemicals", "air pollutants", "toxic pollutants", "hazardous wastes", "extremely hazardous waste" or "restricted hazardous waste" by Hazardous Materials Law or regulated by Hazardous Materials Law in any manner whatsoever.

The term "Hazardous Materials Law", for the purposes of this Section 3.16, means all federal, state, and local laws, ordinances and regulations and standards, rules, policies and other binding governmental requirements and any court judgments applicable to Borrower or to the Mortgaged Premises relating to industrial hygiene or to environmental or unsafe conditions or to human health including, but not limited to, those relating to the generation, manufacture, storage, handling, transportation, disposal, release, emission or discharge of Hazardous Materials, those in connection with the construction, fuel supply, power generation and transmission, waste disposal or any other operations or processes relating to the Mortgaged Premises, and those relating to the atmosphere, soil, surface and ground water, wetlands, stream sediments and vegetation on, under, in or about the Mortgaged Premises.

The representations, warranties, covenants, agreements, indemnities and undertakings of Borrower contained in this Section 3.16 shall be in addition to any and all other obligations and liabilities that Borrower may have to Lender under applicable law.

SECTION 4
Events of Default

The Mortgagor further covenants and agrees that the occurrence of any one or more of the following events shall constitute an Event of Default hereunder:

4.01 Any default by Mortgagor in paying any installment or other sum due Mortgagee under the terms, conditions and covenants of the Note as, when and in the manner required thereby or in performing or satisfying any of Mortgagor's other obligations thereunder which is not cured within such grace period as may be afforded with respect to such default under the terms of the Note, if any.

4.02 Any default by any Guarantor in the payment or performance of any obligation under any Guaranty.

4.03 Any breach of, or default under any one or more of the warranties, terms, conditions or covenants contained or set forth in any Loan Document which is not cured within such grace period as may be afforded with respect to such breach or default.

4.04 The attachment (whether by Writ of Attachment, Trustee Process or otherwise), or the filing of any other lien or other involuntary encumbrance of any nature whatsoever against, or the levying of any execution upon all, or any portion of the Mortgaged Premises or Collateral which is not discharged or dissolved or removed within thirty (30) days.

4.05 Any other breach of, or default under any one or more of the statutory conditions or the representations, warranties, terms, conditions or covenants of this Mortgage, which is not cured within fifteen (15) days from the date of written notice of such breach or default; provided, however, if such breach or default is not capable of being cured within fifteen (15) days, such grace period shall be extended for a reasonable period of time [not to exceed sixty (60) days] provided Mortgagor shall commence and diligently take such actions as are necessary to effect such cure.

4.06 Mortgagor or any Guarantor shall: (i) (A) admit in writing its inability to pay its debts generally as they become due; (B) file a petition in bankruptcy or a petition to take advantage of any insolvency act; (C) make an assignment for the benefit of creditors; (D) consent to or acquiesce in the appointment of a receiver, liquidator or trustee of itself of the whole or any substantial part of its properties or assets; (E) file a petition or answer seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under the federal bankruptcy laws or any other applicable law; or (ii) (A) a court of competent jurisdiction shall enter an order, judgment, or decree appointing a receiver, liquidator, or trustee of the Mortgagor, or of the whole or any substantial part of the property or assets of the Mortgagor and such order, judgment, or decree shall remain unvacated, or not set aside, or unstayed for sixty (60) days, or (B) petition shall be filed against the Mortgagor seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under the federal bankruptcy laws or any other applicable law and such petition shall remain undismissed for sixty (60) days, or (C) under the provisions of any other law for the relief or aid of debtors, any court of competent jurisdiction shall assume custody or control of the Mortgagor of the whole or any substantial part of its property or assets and such custody or consent shall remain unterminated or unstayed for sixty (60) days, or (iii) an attachment or execution is levied against any substantial portion of the property of the Mortgagor or against any portion of the Property and is not discharged or bonded within sixty (60) days.

SECTION 5
Effect of Default

Upon the occurrence of any Event of Default hereunder and at all times thereafter until Mortgagee shall have executed a written waiver of such default, Mortgagor shall be in default hereunder and Mortgagee, at Mortgagee's option, may:

5.01 Declare the entire unpaid balance of the Note including, without limitation, principal, accrued interest and other sums due or recoverable thereunder, immediately due and payable in full without notice or demand of any nature whatsoever.

5.02 Make such alterations, additions, improvements, renovations and repairs to the Mortgaged Premises as may in Mortgagee's opinion be reasonably necessary to (i) complete the construction of the improvements on the Mortgaged Premises; (ii) keep the same usable for the purposes for which such Mortgaged Premises were used by Mortgagor or (iii) keep the Mortgaged Premises in a safe condition.

5.03 Collect the rents, issues and profits (the "Rents") arising from any part of the Mortgaged Premises, past due and thereafter becoming due, and apply the same in such order of priority as Mortgagee deems appropriate to the payment of the costs and expenses incurred by Mortgagee in collecting such Rents and managing the Mortgaged Premises, the indebtedness evidenced by the Note and any other indebtedness secured hereby. All monies advanced or expended by Mortgagee to collect such Rents or manage the Mortgaged Premises shall be secured hereby, payable on demand and, until so paid by Mortgagor bear interest at the rate then provided for in the Note. The taking of possession of the Mortgaged Premises and collection of Rents by Mortgagee pursuant hereto shall not be construed as an affirmation of any lease of the Mortgaged Premises except such leases as Mortgagee has affirmed in writing, and Mortgagee or any other purchaser of the Mortgaged Premises at foreclosure sale may (if otherwise entitled to do so) exercise the right to terminate any such lease as though the taking of possession and collection of Rents had not occurred pursuant hereto.

5.04 Exercise the statutory power of sale hereinafter granted to Mortgagee or any other right, privilege or remedy available to the Mortgagee hereunder or under the Note or the Loan Documents or any statute or rule of law or equity; all of which are cumulative and may be exercised by their Mortgagee singly, concurrently or successively at the Mortgagee's option, and as often as the occasion therefor shall occur in Mortgagee's opinion.

SECTION 6
Statutory Conditions and Power of Sale

This Mortgage is upon the statutory condition, as well as the terms, conditions and covenants contained herein, and in the Note and Loan Documents for any breach of which, or default under, Mortgagee shall, in addition to all other rights and powers granted or given hereunder, have the statutory power of sale.

SECTION 7
Conduct of Foreclosure Sale, Marshaling and Waiver

And it is agreed that if Mortgagee elects to exercise the statutory power of sale herein granted to Mortgagee by Mortgagor, Mortgagee may (subject only to the provisions of Chapter

479 of the New Hampshire Revised Statutes Annotated or any successor statute of similar import then in effect which governs the foreclosure of New Hampshire mortgages):

7.01 Hold any foreclosure sale of the Mortgaged Premises and any other Collateral securing the payment and performance of all, or any portion of the indebtedness secured hereby at a public auction or auctions held on, near or in the vicinity of any of the Mortgaged Premises.

7.02 Apply the proceeds of any foreclosure sale of all, or any portion of the Mortgaged Premises and any other Collateral to the payment of (i) all costs and expenses thereof, including, but not limited to, reasonable attorney's, appraiser's and auctioneer's fees and advertising costs, (ii) the indebtedness of Mortgagor to Mortgagee secured by this Mortgage including, without limitation, the indebtedness evidenced by, or arising under the Note, in such order of preference and priority as Mortgagee deems appropriate, (iii) any other financial liabilities of Mortgagor subject only to the senior and superior rights of third persons, if any and (iv) pay over any remaining balance of such proceeds to Mortgagor or for Mortgagor's account.

7.03 Offer for sale and sell all, or any combination of the Mortgaged Premises and any other Collateral pursuant to New Hampshire Law, as the same may be amended from time to time, as an entirety for one bid or in such lots or item by item for combined bids or separate bids, as appropriate, or any combination of the foregoing which Mortgagee deems to be appropriate and the proceeds of any such entirety or lot sales may be accounted for in one account without making any distinction between the items of security and without assigning to them any proportion of the proceeds thereof, and Mortgagor hereby waives the application of the equitable doctrine of marshaling or any rule of law or other equitable doctrine of similar import and relinquishes and releases all of Mortgagor's rights thereunder and the benefits conferred upon Mortgagor thereby whether now existing or arising hereafter. In the event that Mortgagee elects to exercise the statutory power of sale hereinbefore granted to Mortgagee by selling the Mortgaged Premises, fixtures and any such other Collateral in parcels, parts or lots, such foreclosure sale or sales may be held from time to time, and this Mortgage shall remain in full force and effect and such statutory power of sale shall not be fully executed until all of the Mortgaged Premises, fixtures and such other collateral shall have been sold pursuant thereto.

SECTION 8
Definitions and Rules of Construction

In the interpretation of this Mortgage, the following definitions and rules of construction shall apply unless the context of a provision otherwise specifies:

8.01 The terms "Mortgage Covenants", "statutory conditions" and "statutory power of sale" shall have the same meaning as attributed to such terms by New Hampshire Revised Statutes Annotated.

8.02 The term "Loan Documents" means and includes:

(a) A Loan Agreement of even date herewith by and between Mortgagor and Mortgagee;

(b) The Note;

(c) This Mortgage;

(d) A Collateral Assignment of Leases and Rents;

(e) An Assignment of Permits, Approvals, Contracts and Plans of even date herewith given by Mortgagor to Mortgagee;

(f) A Collateral Assignment of Declarant's Rights of even date herewith by and between Mortgagor and Mortgagee; and

(g) Any and all other agreements, documents, instruments, Notes or contracts, now or hereafter made or entered into, by and between Mortgagor and Mortgagee.

8.03 All capitalized words, terms and phrases not defined in this Section shall have the meaning attributed to such word, term or phrase in the paragraph hereof in which such word, term or phrase is defined, whether by being capitalized and placed in parentheses or otherwise.

8.04 All of the words, terms and phrases in this Mortgage, regardless of the number and gender in which used, shall be construed to include any other number (singular or plural) and any other gender (masculine, feminine or neuter) as the context of any provision hereof may require the same as had any such word, term or phrase been fully and properly written in number and gender.

8.05 Whenever the Mortgagee's consent or approval is required hereunder such consent or approval shall not be unreasonably withheld or delayed.

8.06 The provisions of this Mortgage are severable, such that if any provision, condition or covenant hereof shall be declared invalid, void or unenforceable by any court of competent jurisdiction, the remainder hereof shall be unaffected thereby.

8.07 All representations, warranties, covenants, agreements and obligations of the Mortgagor as set forth herein shall be and are the joint and several representations, warranties, covenants, agreements and obligations of the Developer and the Land Owner.

8.08 The Borrower and the Mortgagee mutually hereby knowingly, voluntarily and intentionally waive the right to a trial by jury in respect of any claim based hereon arising out of, under or in connection with this Mortgage or any other documents contemplated to be executed in connection herewith or any course of conduct, course of dealing, statements (whether verbal or written) or actions of any party. This waiver constitutes a material inducement for the Mortgagee to accept this Mortgage and made the Loan.

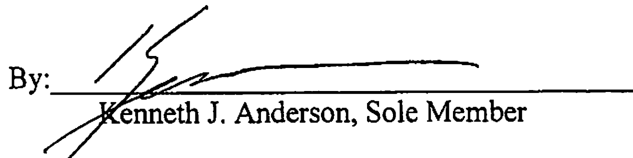
8.9 This Mortgage and all agreements and instruments executed by Mortgagor in connection herewith shall be governed by and construed in accordance with the internal laws of the State of New Hampshire.

8.10 The maximum amount secured by this Mortgage is $6,000,000.00.

This Mortgage shall be binding upon Mortgagor and Mortgagor's heirs, administrators, executors, successors, legal representatives and assigns and inure to the benefit of Mortgagee and its successors, legal representatives and assigns.

IN WITNESS WHEREOF, ***Monument Garden, LLC*** has caused this Mortgage to be executed by Powder Mill Road Property Management, LLC, its Managing Member, hereunto duly authorized on this, the 30th day of September, 2014.

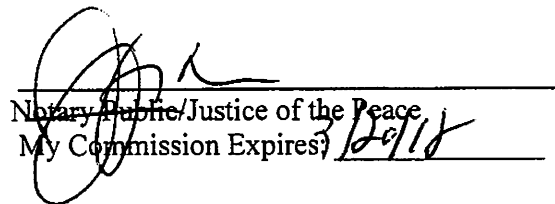
Monument Garden, LLC
By Powder Mill Road Property Management, LLC,
its Managing Member



By:______________________
Kenneth J. Anderson, Sole Member

STATE OF NEW HAMPSHIRE
COUNTY OF HILLSBOROUGH

The foregoing instrument was acknowledged before me this the 30th day of September, 2014, by Kenneth J. Anderson, Sole Member of Powder Mill Road Property Management, LLC, a New Hampshire limited liability company, as Managing Member of Monument Garden, LLC, a Maine limited liability company, on behalf of said company.



Notary Public/Justice of the Peace
My Commission Expires: 3/20/18

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EXHIBIT A

A. A certain tract or parcel of land situated on Lilac Lane in the City of Dover County of Strafford and State of New Hampshire, the same being more particularly delineated as Condominiums at Lilac Lane on plan entitled "Revision IV to the Condominium Site Plan, Tax Map H Lot 35A, The New Meadows, Inc." prepared by MSC Civil Engineers & Land Surveyors, Inc., dated February 23, 2009 and recorded in the Strafford County Registry of Deeds (the "Registry") as Plans #98-094 through 98-098 (the "Site Plan"), more particularly bounded and described as follows:

BEGINNING AT A POINT IN THE SIDELINE OF LILAC LANE N85°58'17" E A DISTANCE OF 106.40 FEET FROM AN ANGLE POINT OF THE MEADOWS AT DOVER, A CONDOMINIUM; THENCE PROCEEDING ALONG SAID MEADOWS AT DOVER, A CONDOMINIUM; THE FOLLOWING COURSES: N 82° 23' 50" E A DISTANCE OF 159.57 FEET; ALONG A CURVE TO THE LEFT HAVING A RADIUS OF 200.00 FEET, AN ARC LENGTH OF 111.91 FEET; N 50° 20' 18" E A DISTANCE OF 257.81 FEET; S 01° 51' 11" W A DISTANCE OF 77.45 FEET; S 35° 45' 41" W A DISTANCE OF 116.21 FEET; S 21° 41' 21 E A DISTANCE OF 91.13 FEET; S 54° 57' 20" E A DISTANCE OF 124.71 FEET; S 17° 56' 22" E A DISTANCE OF 130.70 FEET; S 53° 06' 12" E A DISTANCE OF 63.68 FEET; S 18° 30' 11" W A DISTANCE OF 241.19 FEET; S 09° 54' 53" W A DISTANCE OF 295.72 FEET; S 56° 30' 37" W A DISTANCE OF 82.94 FEET; S 78° 01' 45" W A DISTANCE OF 46.50 FEET; N 24° 00' 00" W A DISTANCE OF 915.20 FEET TO THE POINT OF BEGINNING.

Excepting therefrom twenty-four (24) Units in Building 12 of the Condominium shown on the Site Plan, as Units 1211 through 1218, 1221 through 1228 and 1231 through 1238, inclusive, and the undivided interest of said Units in the common area of the Condominium.

B. Units 1311 through 1318, 1321 through 1328 and 1331 through 1338 in Building 13;

C. Units 1411 through 1418, 1421 through 1428 and 1431 through 1438 in Building 14;

D. Forty-eight (48) Units to be constructed in Buildings 15 and 16 of the Condominium consisting of:

(i) Units 1511 through 1518, 1521 through 1528 and 1531 through 1538 in Building 15; and

(ii) Units 1611 through 1618, 1621 through 1628 and 1631 through 1638 in Building 16;

as the above listed Units are described, defined and identified in the Declaration of

Condominiums at Lilac Lane dated February 16, 2012, recorded in the Registry at Book 3816, Page 458 (as amended, the "Declaration") and the Bylaws of Condominiums at Lilac Lane recorded in the Registry at Book 3816, Page 474 (as amended, the "Bylaws") and the Site Plan and floor plans for the Condominium recorded in the Registry as Plans #99-071 through 99-073 (the "Plans"); together with the undivided interest of each such Unit in the common area of the Condominium as defined in the Declaration, Bylaws and Plans.

E. All improvements constructed in or on the Condominium except Building 12 previously constructed and sold, utilities, base coat paving of parking areas and access ways, curbing, lighting and any other site improvements (collectively the "Improvements").

F. All development rights of the grantor as declarant of the Condominium as set out and defined in N.H. RSA 356-B, the Declaration, Bylaws and Plans (collectively the "Development Rights").

G. Any and all federal, state and local approvals and permits issued to grantor for development of the Condominium (collectively the "Permits"), to the extent the Permits can be assigned or transferred.

This conveyance is made together with and subject to the rights and easements set forth in the Declaration, Bylaws and Plans, as may be amended, and is further subject to: (i) the provisions of N.H. RSA 356-B, as may be amended; (ii) all other terms, conditions, rights, restrictions and matters set forth in the Declaration, Bylaws, Plans and all rules, regulations and agreements lawfully made and/or entered into from time to time pursuant to the provisions of N.H. RSA 356-B, the Declaration and Bylaws; and (iii) all other agreements, easements, rights, covenants, conditions and restrictions of record affecting the Condominium.

EXHIBIT 9

Doc # 0012189 Sep 30, 2014 11:57 AM
Book 4246 Page 0166 Page 1 of 2
Register of Deeds, Strafford County

Return to:
William C. Tucker, Esquire
Wadleigh, Starr & Peters, P.L.L.C.
95 Market Street
Manchester, New Hampshire 03101

**COLLATERAL ASSIGNMENT OF
DECLARANT'S RIGHTS**

THIS ASSIGNMENT made this the 30th day of September, 2014, ***Monument Garden, LLC***, a Maine limited liability company, having a principal place of business at 21 Continental Boulevard, Merrimack, New Hampshire 03054 (the "Assignor"), ***Centrix Bank & Trust,*** a New Hampshire banking corporation, having a principal place of business at 1 Atwood Lane, Bedford, New Hampshire 03110 (the "Assignee").

WITNESSETH

WHEREAS, the Assignor as Owner of the premises situated in Dover, New Hampshire and described in that certain Mortgage and Security Agreement, executed by the Assignor to be recorded in the Strafford County Registry of Deeds of even date herewith (said Mortgage and Security Agreement being hereinafter referred to as the "Mortgage"), which Mortgage secures a Promissory Note in the principal amount of $4,864,943.75 (collectively the "Note"); and

WHEREAS, the said premises described in said Mortgage is being developed as a portion of the condominium project known as Condominiums at Lilac Lane, and the Assignor having constructed and declared the Units in Buildings 13 and 14 and having the rights to construct and declare the Units in Buildings 15 and 16 in Condominiums at Lilac Lane, Dover, New Hampshire.

NOW, THEREFORE, in order to induce the Assignee to make said loan and as additional security for the payment of the principal and interest due on the Note, and for the performance and observance of all the terms of the Note and Mortgage, the aforesaid Assignor does hereby assign and transfer to the Assignee all its rights in and to the said Condominium including the rights to construct and declare such units.

And the Assignor hereby covenants and agrees as follows:

Not to amend or change in any respect the terms and conditions of the Declaration or any of the exhibits thereto without the prior written consent of the Assignee.

That unless and until there is default in the performance or observance of any of the terms of the Note or Mortgage which said default continues beyond the grace periods, if any, provided in the Note or Mortgage, the Assignor shall be entitled to exercise all the rights of the Assignor contained in or relating to the said Declaration of Condominium.

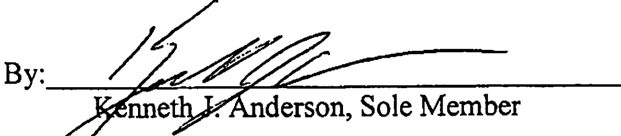
That upon default under the terms of the Note or Mortgage or of this Assignment, or at any time after such default, the Assignee, its successors or assigns, at its or their option and without further consent thereto by the Assignor or any subsequent owner of the premises, may exercise all the rights of the Assignor as contained in or relating to the Declaration of Condominium and may enter into or upon the said mortgaged premises and take possession thereof and may do every act and thing that the Assignor or any subsequent owner of the premises might or could do.

That upon payment of the Note in accordance with its terms and compliance with all of the terms of the Mortgage, this Assignment shall be rendered null and void and the Assignor shall be re-vested with all rights as contained in or relating to the said Declaration of Condominium.

That the Assignee shall not be responsible for the control, care or management of the mortgaged premises or for any waste committed or permitted thereon by any person including unit owners and the Assignee shall not be liable by reason of any dangerous or defective condition of the mortgaged premises resulting in loss or injury to any tenant or other person except such as is caused by the deliberate or intentional act of the Assignee while the Assignee is in actual control, care or management of the said premises.

IN WITNESS WHEREOF, Monument Garden, LLC has caused this Assignment to be executed by Powder Mill Road Property Management, LLC, its Managing Member, hereunto duly authorized on this, the 30th day of September, 2014.

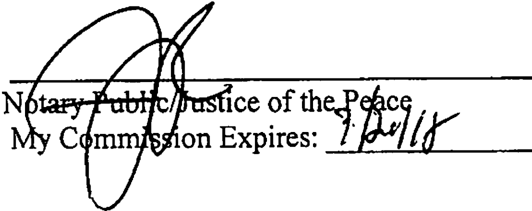
Monument Garden, LLC
By Powder Mill Road Property Management, LLC,
its Managing Member



By: ______________________
Kenneth J. Anderson, Sole Member

STATE OF NEW HAMPSHIRE
COUNTY OF HILLSBOROUGH

The foregoing instrument was acknowledged before me this the 30th day of September, 2014, by Kenneth J. Anderson, Sole Member of Powder Mill Road Property Management, LLC, a New Hampshire limited liability company, as Managing Member of Monument Garden, LLC, a Maine limited liability company, on behalf of said company.



Notary Public/Justice of the Peace
My Commission Expires: ______

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STATE OF NEW HAMPSHIRE

STRAFFORD, ss

No. 219-2015-CV-313

CONDOMINIUMS AT LILAC LANE
UNIT OWNERS' ASSOCIATION,

Plaintiff,

v.

MONUMENT GARDEN LLC, and
CENTRIX BANK AND TRUST,

Defendants.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT WITH INCORPORATED MEMORANDUM OF LAW

NOW COME the above-captioned Defendants, Monument Garden LLC ("Monument Garden") and Centrix Bank and Trust[1] (together, "Defendants"), by and through counsel, and hereby file this Motion for Summary Judgment with an incorporated supporting memorandum of law as to all counts in the Plaintiff Condominiums at Lilac Lane Unit Owners' Association's ("Plaintiff" or "Association") Verified Complaint. In support thereof, Defendants state the following:

INTRODUCTION

This matter concerns a residential condominium known as Condominiums at Lilac Lane ("Condominium") located in Dover. On or around August 21, 2015, Plaintiff filed its Verified Complaint seeking various declaratory judgments, unjust enrichment/disgorgement, a lis pendens, and injunctive relief. Plaintiff argues that the Condominium is subject to certain

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[1] Alongside this Motion, the Defendants file an Assented-to Motion to Substitute Proper Party Defendant to reflect Centrix Bank and Trust's merger into Eastern Bank.

provisions of RSA 356-B applicable to "convertible land," the exceptionally harsh result of which is that most of the Defendants' rights in the Condominium should be stripped and flow back to the Association.

Defendants now move for summary judgment on all counts of the Verified Complaint and assert that there are no genuine issues of material fact in dispute and the Defendants are entitled to summary judgment as a matter of law. In support, Defendants rely upon this motion and incorporated memorandum of law, the Affidavit of Michael A. Klass, Esq. ("Klass Affidavit") filed herewith, along with any arguments and evidence that may be introduced during oral argument on the matter. As explained below, all counts within Plaintiff's Complaint rely upon the flawed premise that the Condominium contains convertible land. In fact, the Condominium's underlying documents, which were previously reviewed and approved by New Hampshire's Attorney General's Office, do not allow for its land to be converted; rather, the Condominium consists of all submitted land with no right to convert or expand. As such, the provisions of RSA 356-B that apply to convertible land are irrelevant in this case, and Plaintiff's arguments should be dismissed.

UNDISPUTED MATERIAL FACTS

Defendants rely upon the following undisputed facts for the purposes of summary judgment only:

The land at issue in this case was once part of a larger condominium development known as the Meadows at Dover, which was created in 1988. See Klass Affidavit, Ex. A. While all of the long history of the Meadows condominium is not relevant to this case, it is notable that such condominium was the subject of an enforcement action by the New Hampshire Attorney General in and around 2007 to halt the sales of unregistered units. Id. Notably, in 2010 the New

Hampshire Attorney General found that the "Meadows at Dover is a condominium consisting of up to 384 residential units. Of these, 264 are [sic] contained in buildings numbered 1 through 11 (the "Original Units") and the remaining 120 residential units are ***contained in or proposed buildings numbered 12 through 16 (the "New Units")***. Id. at 2 (emphasis added).

Following such action, and consistent with the ruling of the Attorney General's Office, the Meadows' declarant terminated the Meadows and divided it into three smaller condominiums pursuant to RSA 356-B:34-a, consisting of (1) the pre-existing Meadows' units, (2) the Condominium, and (3) a nearby commercial condominium. Klass Affidavit, Ex. D; see also Klass Affidavit, Ex. A, p. 5 (finding and ruling "that the proposed condominium instruments submitted with respect to each resulting condominium conform to the provisions of RSA 356-B.") Thus, the Condominium was created in 2010 by the recording of its declaration ("Declaration"), which was recorded with the Strafford County Registry of Deeds ("Registry") on March 3, 2010 at Book 3816, Page 458. The Condominium's governing bylaws were recorded that same day at Book 3816, Page 478, and its site and floor plans were recorded likewise at Plan DR98-094 (Document Number 2843). See Klass Affidavit, Exhibits B, C, D. While the Declaration, site plans, and bylaws all speak for themselves, they are all clear in that there is no reference to convertible land.

As reflected in such recorded documents, the Condominium contains approximately 7.18 acres and consists of five buildings identified as Buildings 12 through 16, each including twenty-four units. Building 12 was constructed before the Condominium was created. Building 13 was constructed in June 2013, and Building 14 was constructed in July 2014.

Plaintiff now attacks Monument Garden's rights in Buildings 13 and 14, its right to construct Buildings 15 and 16, and its right to cast votes on units that it currently owns.

STANDARD OF REVIEW

In order to prevail on a motion for summary judgment, the moving party must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. See RSA 491:8-a, III; Phaneuf Funeral Home v. Little Giant Pump Co., 163 N.H. 727, 730 (2012).

ARGUMENT

Notwithstanding the Plaintiff's tortured interpretation of the Condominium's governing instruments, the issue before this Court is simply stated: is the Condominium convertible? The answer to this question is a resounding no, as evidenced in the record's undisputed facts as they are applied to the plain language of RSA 356-B. The Plaintiff's attempt to trigger RSA 356-B's "convertible" requirements fails as the Condominium contains no convertible land and is, therefore, not subject to RSA 356-B:23, III's five-year window. Plaintiff's arguments otherwise find no support in fact or law. Moreover, the Plaintiff's arguments are contrary to long-standing New Hampshire practice and the resulting implications would vaporize the rights of the Defendants in addition to countless other property owners and lenders who have relied, in good faith, on the plain language of RSA 356-B. As demonstrated below, Plaintiff's Verified Complaint must be dismissed as a matter of law.

A. The Condominium Was Duly Created Pursuant to RSA 356-B

All counts in the Plaintiff's Complaint rely on its erroneous conclusion that the Condominium includes convertible land. See, e.g., Verified Complaint at ¶¶11-22. However, this argument finds no support in the record or the applicable law. Rather, the Condominium's declaration and site plans, as approved by the New Hampshire Attorney General's Office, speak for themselves and establish that the Condominium, including all of its improvements, were duly

submitted and lawfully created under RSA 356-B. As such, the Defendant's ownership and development interests in the Condominium are valid and lawful.

A basic introduction of the law governing the creation of condominiums in New Hampshire, RSA 356-B, is helpful in understanding the fundamental error in the Plaintiff's argument. As a starting point, in order to create a condominium, a declarant (land owner) prepares and records certain documents with the registry of deeds, including a declaration of condominium "which defines the rights as among the condominium owners, the condominium association, and the developer." See Ryan James Realty, LLC v. Villages at Chester Condo. Ass'n, 153 N.H. 194, 196 (2006) (citing RSA 356-B:7, 11). In addition to regulating the contents of a condominium's declaration, specific site and floor plans are also required. RSA 356-B:20, I requires that site plans, in part

> show[] the location and dimensions of the submitted land, the location and dimensions of any convertible lands within the submitted land, the location and dimensions of any existing improvements, the intended location and dimensions of any contemplated improvements which are to be located on any portion of the submitted land other than within the boundaries of any convertible lands, ... The site plans shall label every convertible land as a convertible land, and if there be more than one such land the site plans shall label each such land with one or more letters or numbers or both different from those designating any other convertible land and different also from the identifying number of any unit. . . . In the case of any improvements located or to be located on any portion of the submitted land other than within the boundaries of any convertible lands, the site plans shall indicate which, if any, have not been begun by the use of the phrase "(NOT YET BEGUN)" and which, if any, have been begun but have not been substantially completed by the use of the phrase "(NOT YET COMPLETED)."
> . . . .

Notable is the fact that RSA 356-B specifically allows for the creation of different types of condominiums. Compare RSA 356-B:16, I (identifying the general requirements of a declaration) with RSA 356-B:16, II (regarding specific requirements in the declaration applicable to any convertible land), RSA 356-B:16, III (regarding expandable condominiums). Plaintiff's

argument neglects the fact that a traditional (non-convertible or non-expandable) condominium may be created that includes future improvements that are, in the words of the statute, "not yet begun" at the time the land is submitted.

As this is an issue of statutory construction, courts are tasked with determining the "legislature's intent as expressed in the words of the statute considered as a whole." Zorn v. Demetri, 158 N.H. 437, 438-39 (2009). Courts

> first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning. We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. . . . We construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result. Moreover, we do not consider words and phrases in isolation, but rather within the context of the statute as a whole. This enables us to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme.

Id. (internal citations omitted). Finally, courts "will not add words that the legislature did not see fit to include, nor delete those that it did." State v. Duran, 158 N.H. 146, 155 (2008).

Consistent with the statute's plain language, the necessary requirements in creating a condominium are simply that the declarant must "submit" land which is described in the declaration and as shown on the site plans, in addition to showing all buildings and improvements constructed or to be constructed, and shall clearly label the improvements. See RSA 356-B:16, RSA 356-B:20. The Condominium's declaration and site plans satisfy these requirements and Plaintiff's arguments otherwise must fail.

As an initial matter, Plaintiff neglects to account for the Attorney General's recorded Findings and Rulings from 2010, which authorized the Meadows at Dover condominium to be terminated and divided into three separate and new condominiums, pursuant to RSA 356-B:34 (governing termination or amendment of instruments after conveyance of unit) and RSA 356-

B:34-a (listing certain provisions by which a condominium is deemed to have been terminated). As evident from that document, the Attorney General specifically ruled that the proposed termination and division was lawful and that the proposed instruments (including the Condominium's declaration and site plan) conformed with RSA 356-B. See Klass Affidavit, Ex. 5 at pp. 5-6.

In addition to the fact that the Attorney General reviewed and approved the Condominium's creation in 2010, such compliance with RSA 356-B is self-evident based on a review of the recorded instruments. RSA 356-B:7 states, in part, that: "[n]o condominium instruments shall be recorded unless all units located or to be located on any portion of the submitted land, other than within the boundaries of any convertible lands, are depicted on site plans and floor plans that comply with RSA 356-B:20, I and II." RSA 356-B:20, I states, in part: "In the case of any improvements located or to be located on any portion of the submitted land other than within the boundaries of any convertible lands, the site plans shall indicate which, if any, have not been begun by the use of the phrase "(NOT YET BEGUN)" and which, if any, have been begun but have not been substantially completed by the use of the phrase "(NOT YET COMPLETED).'"

Here, the Condominium's site plan shows that at the time it was recorded, Building 12 was in existence; Building 13 was under construction; and proposed Buildings 14, 15, and 16 were labeled "not yet begun," as required by RSA 356-B:20. Moreover, the Condominium's site plans and declaration clearly submit all 7.18 acres to the provisions of RSA 356-B and do so without qualifying the land or improvements as convertible. Furthermore, RSA 356-B contains no fixed timeframe for construction that would apply to Buildings 14 through 16. Specifically, under RSA 356-B:29, II (titled "Declarant's Obligation to Complete and Restore"), there is no

timeframe identified for completion of a traditionally submitted condominium. In light of the above, and as found previously by the Attorney General, it is clear that the Condominium lawfully exists under RSA 356-B.

B. The Condominium is Not Convertible and, Thus, Not Subject to RSA 356-B:23

Notwithstanding the above, Plaintiff's argument begins and ends with the fact that the Condominium does not contain convertible land. Nowhere in the Condominium's recorded documents is there a reference to convertible land, and Plaintiff has no legal support for its position that "phasing" (or phased development) is interchangeable with the concept of "convertible land."

As noted above, RSA 356-B gives a declarant the right to create a condominium with convertible or expandable land,[2] which provides certain flexibility in that it gives the declarant the right to add units to the condominium after it is established. In order to obtain the flexibility of convertible land, a declarant must prepare the condominium's declaration and site plans accordingly. More specifically, the declaration of a condominium containing convertible land must comply with the explicit requirements of RSA 356-B:16, II. Similarly, the site plans and floor plans for a convertible condominium must show and label all convertible lands as required in RSA 356-B:20. Plaintiff takes great pains to argue that the Condominium's instruments do not comply with the above-referenced statutory requirements. The obvious response is that the

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2 "If the condominium is an 'expandable condominium,' the declaration must contain an explicit reservation of the option to add land to the condominium, a legal description of the 'additional land,' which is the land that may be added to the condominium, and numerous other provisions. RSA 356–B:16, III. 'By declaring an expandable condominium, a developer may submit land to the condominium while reserving the right to expand the condominium by later adding more land.'"

Ryan James Realty, LLC v. Villages at Chester Condo. Ass'n, 153 N.H. 194, 196 (2006) (internal citation omitted).

Condominium was never intended to be convertible; rather, it was always intended to be a traditionally submitted condominium with certain improvements that were "not yet begun," as was clearly shown on the site plan.

Plaintiff attempts to bypass the plain language of the Condominium's instruments by equating its phased construction with convertible land. Plaintiff conflates these terms in an attempt to trigger RSA 356-B:23, III's five-year conversion window.[3] However, RSA 356-B makes no connection between "phasing" and "convertible land." In fact, nowhere in RSA 356-B does the word "phase," or any variant thereof, ever appear. Likewise, Plaintiff cites to no case law that supports such a novel argument, which is a transparent attempt to strip the Defendants of their legitimate rights in the Condominium. This, together with the fact that the Condominium was lawfully created and submitted under RSA 356-B, warrants dismissal of all counts within the Plaintiff's Verified Complaint.

C. *Shepherds Hill* Does Not Apply in this Case

In support of its request for a preliminary injunction, Plaintiff cites to an Order dated March 18, 2014 issued in the matter of Shepherds Hill Homeowners Association, Inc. v. Shepherds Hill Development Co., LLC, Hillsborough County, Southern District, No. 2013-CV-241 (Colburn, J.). Plaintiff claims such case supports the conclusion that Monument Garden has no ownership interest in the Condominium. See Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Preliminary Injunction and for Lis Pendens, pp. 6-7, and Tab 1. When the

[3] The fact that the legislature applied a specific five-year deadline to convertible land, but not to submitted land, is telling. If the legislature wished to subject a specific deadline upon traditional condominiums, it could have but chose not to. See Ettinger v. Town of Madison Planning Bd., 162 N.H. 785, 791 (2011) ("When the legislature uses different language in the same statute, we assume that the legislature intended something different.").

facts are reviewed, however, it is readily apparent that Shepherds Hill is inapplicable to the case at bar.

Ultimately at issue in Shepherds Hill was whether the defendant retained any development rights in light of the expiration of RSA 356-B:23's five-year window. Id. at 3-4. As described by the Trial Court, Shepherds Hill involved condominium land that was indisputably convertible, id. at 1, which is not the case here. Given that the Condominium does not contain any convertible land, Shepherds Hill's rationale and holding do not apply. However, a brief review of Shepherds Hill's recorded instruments is helpful for context and to contrast the differences between a convertible condominium and the Condominium. The differences between the two highlight how the Condominium is not convertible and, thus, should not be treated as one.

For one, the Shepherds Hill site plan specifically identifies submitted land, convertible land, and convertible/withdrawable land. See Klass Affidavit, Ex. F. Contrastingly, the Condominium's site plan only identifies submitted land. Furthermore, the declaration at issue in Shepherds Hill contains various references to convertible land. See Klass Affidavit, Ex. E, p. 3 (§ H); p. 4 (§ J); and Exhibit A-3 (legal description for convertible land). The Condominium, on the other hand, contains no references to convertible land. The above is further evidence that the Condominium never intended to contain convertible land and is not subject to RSA 356-B's convertible land requirements.

CONCLUSION

The record is clear that the Condominium is a lawfully created condominium with no convertible land. Plaintiff's arguments otherwise find no support in the record or in RSA 356-B.

As such, Defendants respectfully request that this Court enter Judgment in their favor on all counts of the Association's Verified Complaint.

WHEREFORE, Defendants pray that this Honorable Court:

1. Schedule a hearing on this Motion at the Court's earliest convenience;
2. Enter final judgment in favor of the Defendants on all counts of the Verified Complaint;
3. Award Defendants their reasonable costs and fees, to be determined by this Court; and
4. Grant such other relief as the Court deems just and proper.

Respectfully submitted,
Defendants, Monument Garden LLC and
Centrix Bank and Trust,

By their attorneys,
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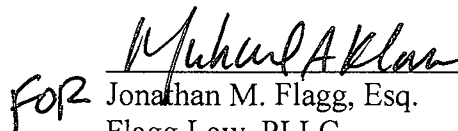
October 22, 2015

Defendants, Monument Garden LLC,
By its attorney,
Flagg Law, PLLC



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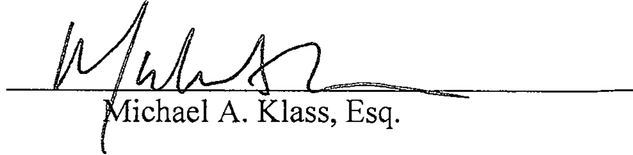
October 22, 2015

CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2015, a copy of the foregoing DEFENDANTS' MOTION FOR SUMMARY JUDGMENT WITH INCORPORATED MEMORANDUM OF LAW and the AFFIDAVIT OF MICHAEL A. KLASS was forwarded to Thomas W. Aylesworth, Esq., and Jonathan M. Flagg, Esq., via regular mail.



Michael A. Klass, Esq.

STATE OF NEW HAMPSHIRE

STRAFFORD, ss

SUPERIOR COURT
DOCKET NO. 219-2015-CV-313

CONDOMINIUMS AT LILAC LANE UNIT OWNERS' ASSOCIATION,

Plaintiff,

v.

MONUMENT GARDEN LLC and EASTERN BANK,

Defendants.

PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

NOW COMES the Plaintiff, Condominiums at Lilac Lane Unit Owners' Association ("Association"), by and through its attorneys, and pursuant to RSA 491-8(a), hereby moves for summary judgment in its favor against Defendants Monument Garden LLC ("Monument Garden") and Eastern Bank on the Verified Complaint Counts I, II, III, and V (each for declaratory judgment) and Counts VII, VIII, IX, and X I (each for injunctive relief). The Association's motion is for partial summary judgment because the Association does not seek relief at this time on Count IV (unjust enrichment).

As grounds for this motion, the Association states as follows:

1. This is an action in equity and for declaratory relief brought by the unit owner's association of a residential condominium against the developer/declarant of the condominium, and against the holder of a certain mortgage purportedly encumbering land, buildings, and units

that are part of the common areas of the condominium. The claims implicate the common areas of the Condominium, which are under control of the Association. RSA 356-B:41, I, B:42.

2. The claims arise out of a dispute regarding the rights of Monument Garden, the successor in interest to the developer/declarant of the Condominium, under the declaration of condominium (the "Declaration") that created The Condominiums at Lilac Lane (the "Condominium").

3. Among other relief, the Association seeks a declaration that Monument Garden had no development rights to construct additional buildings and units on Condominium land after the Condominium was created on March 3, 2010. Alternatively, the Association seeks a declaration that any development rights held by Monument Garden concerning the Condominium expired on March 3, 2015, pursuant to the statutory five-year limitation period.

4, The Association seeks further declaration that the common areas of the Condominium are free of any right, title or interest of Monument Garden and of mortgage lien interests granted by Monument Garden to its co-defendant lender.

5. The material facts are not in dispute, and the issues of law raised in and by this motion include: (a) whether Monument Garden had any rights to construct additional buildings, known as Buildings 13 and 14, and the units therein, under the relevant provisions of the Declaration and the New Hampshire Condominium Act (the "Act"); (b) whether, if Monument Garden did have any such development rights, they expired on March 3, 2015, pursuant to the Act's five-year development limitation period; (c) whether the common areas of the Condominium are free of any right or claim of these Defendants under the relevant provisions of the Declaration and the Act; and (d) whether Eastern Bank has any enforceable mortgage lien

interests or other interests in the Condominium land, buildings, facilities, and other common areas.

6. In support of this motion, the Association submits a memorandum setting forth the undisputed facts and legal authority entitling the Association to summary judgment on the counts addressed herein, and an affidavit of counsel with supporting documents.

WHEREFORE, the Association respectfully requests that this Court enter summary judgment in favor of the Association under Verified Complaint Counts I, II, III, V, VII, VIII, IX, and X, by:

A. Declaring that Monument Garden had no right to construct Buildings 13 and 14 or the units therein and has no right to any further development on the Condominium land;

B. Declaring that Condominium Buildings 13 and 14, and the units and appurtenant facilities therein, are all common area owned in common by the Building 12 unit owners and controlled by the Association;

C. Alternatively, if Monument Garden had the right to construct Buildings 13 and 14, declaring that any further development rights under the Declaration expired on March 3, 2015, without any of the land identified as Buildings 15 and 16 having been converted to units or limited common areas of the Condominium;

D. Declaring that the common areas of the Condominium are free of any right, title or interest of Monument Garden and of any mortgage lien or any other interests of Eastern Bank.

E. Declaring that Monument Garden has no right of access to the common areas of the Condominium, except for such use as Monument Garden is allowed as the owner of units in Building 12;

F. Permanently enjoining Monument Garden, its successors and assigns, and anyone acting or purporting to act on its behalf or in its stead, from exercising, or attempting to exercise, any alleged right of access to the common areas of the Condominium except such use as is allowed to unit owners so long as Monument Garden remains an owner of Condominium units; and

G. Permanently enjoining Monument Garden from exercising, transferring, conveying, or otherwise dealing with any rights to develop the Condominium.

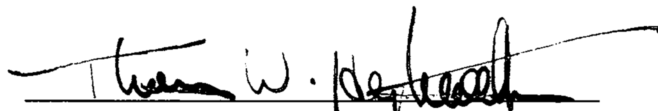
H. Permanently enjoining Eastern Bank from exercising, transferring, conveying, or otherwise dealing with any mortgage or other rights to the Condominium common areas.

Respectfully submitted,

CONDOMINIUMS AT LILAC LANE
UNIT OWNERS' ASSOCIATION

By its attorneys,

MARCUS, ERRICO, EMMER
& BROOKS, P.C.



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Dated: November 19, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November, 2015, I served a copy of the foregoing by electronic mail and first-class and U.S. Mail, postage prepaid, to the following counsel of record:

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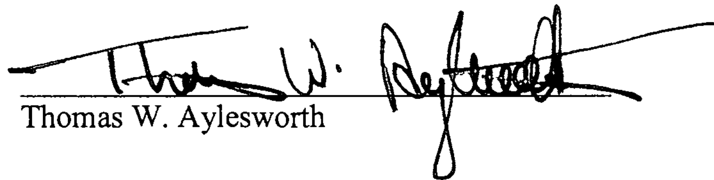

Thomas W. Aylesworth

STATE OF NEW HAMPSHIRE

STRAFFORD, ss

SUPERIOR COURT
DOCKET NO. 219-2015-CV-313

CONDOMINIUMS AT LILAC LANE UNIT OWNERS' ASSOCIATION,

Plaintiff,

v.

MONUMENT GARDEN LLC and EASTERN BANK,

Defendants.

PLAINTIFF'S OBJECTION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

NOW COMES the Plaintiff, Condominiums at Lilac Lane Unit Owners' Association ("Association"), by and through its attorneys, and submits the following Objection to Defendants' Motion for Summary Judgment And Memorandum of Law in Support of Plaintiff's Cross-Motion for Partial Summary Judgment.

PRELIMINARY STATEMENT

The primary issue in this dispute is whether Defendant Monument Garden LLC ("Monument Garden"), as declarant of the Condominiums at Lilac Lanes ("Lilac Lane Condominium" or "Condominium"), retained any rights to develop additional buildings and units on existing submitted Condominium land after the Condominium was created on March 3, 2010 (the "Creation Date"). The parties are in agreement on two points—first, this action can be determined on summary judgment, and second, the Condominium Declaration contains no

reference to "convertible land" or convertible land rights within the meaning of the New Hampshire Condominium Act, RSA 356-B. But the agreement ends there, because as a matter of law, the Association is entitled to a judgment declaring that Monument Garden has no lawful interest in the two Lilac Lane Condominium buildings (Buildings 13 and 14) that were completed after the Creation Date, that Buildings 13 and 14 and the units located in those buildings are Condominium common areas, and that Monument Garden has no right to any future development on Condominium land. Even if, arguendo, the Court determines that the Declaration contains sufficient information to establish future development rights on convertible land, such rights expired on March 3, 2015, due to the five-year limitation period under RSA 356-B:54, V.

The second issue is whether Monument Garden's lender, Eastern Bank, has any mortgage interests in the Lilac Lane Condominium land, buildings, facilities, and other common areas. The undisputed material facts demonstrate that all of the Condominium land was submitted to the Condominium on the Creation Date, and that the Condominium buildings, facilities, and land are all common areas owned in common by the Condominium unit owners and controlled by the Association. Thus, the Association is entitled to a judgment as a matter of law declaring that Eastern Bank has no mortgage interest in the Lilac Lane Condominium common areas and that any such interests are limited to the Building 12 units owned by Monument Garden.

The Association's cross-motion is for partial summary judgment. If the Association prevails on its cross-motion, further proceedings will be necessary to determine the amount of damages awarded to the Association on its unjust enrichment claim in which it seeks to disgorge rental income received by Monument Garden from tenants who lease the units in Lilac Lane Condominium Buildings 13 and 14.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. The Association is the organization of unit owners of the Lilac Lane Condominium, a residential condominium located in Dover, New Hampshire. (Verified Complaint ("V. Compl.") ¶ 1).

2. Lilac Lane Condominium was created by the Declaration of Condominiums at Lilac Lane ("Declaration"), recorded with the Strafford County Registry of Deeds ("Registry of Deeds") on March 3, 2010, at Book 3816, Page 458. (Id.). (Affidavit of Thomas W. Aylesworth ("Aylesworth Aff.") Ex. A).

3. The Association governs Lilac Lane Condominium pursuant to the Condominium's Bylaws ("Bylaws") recorded at the Registry of Deeds on March 3, 2010, at Book 3816, Page 474. (Aylesworth Aff. Ex. B).

4. The original declarant of Lilac Lane Condominum is New Meadows, Inc. ("New Meadows"). (V. Compl. ¶ 4; Aylesworth Aff. Ex. A).

5. Monument Garden succeeded to the interests of New Meadows by Deed recorded with the Registry of Deeds on October 4, 2012, at Book 4059, Page 452 (the "Deed"). (Aylesworth Aff. Ex. C).[1]

6. The Declaration, as recorded by New Meadows, provides that the land consisting of 7.18 acres, as described in Exhibit "A" to the Declaration, with all buildings and improvements, was submitted to condominium status pursuant to the New Hampshire Condominium Act, RSA 356-B, et seq. (the "Act"). (Aylesworth Aff. Ex. A).

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[1] Under the Act, the declarant is the person, and his/her successors, that creates a condominium by executing and recording the condominium declaration. RSA 358-B:3, XIII. It is generally understood that the declarant is the developer of the condominium.

7. The Declaration states that Lilac Lane Condominium shall consist of a maximum of 120 units located in five buildings designated on a Condominium Plan as Buildings 12, 13, 14, 15 and 16, with each building containing 24 units. (V. Compl. ¶ 6; Aylesworth Aff. Ex. A).

8. At the time the Declaration was recorded on March 3, 2010, only Building 12 was completed. (V. Compl. ¶ 7).

9. At the present time, Monument Garden owns four units in Building 12. (V. Compl. ¶ 7).[2] The remaining units in Building 12 are owned by third parties. (Id.).

10. Building 13 was completed in June 2013, and building 14 was completed in July 2014, both after the Declaration was recorded. (V. Compl. ¶ 8).

11. Monument Garden rents all 48 units in Buildings 13 and 14 to third party tenants. (Id.).

ARGUMENT

I. STANDARD FOR SUMMARY JUDGMENT.

Under RSA 491:8–a, III, the moving party on a motion for summary judgment has the burden to demonstrate that there is no genuine issue as to any material fact, and that it is entitled to judgment as a matter of law. Sabinson v. Trustees of Dartmouth Coll., 160 N.H. 452, 460 (2010). The trial court must construe the pleadings, discovery and affidavits in the light most favorable to the non-moving party to determine whether the proponent has established the absence of a dispute over any material fact and the right to judgment as a matter of law. Porter v. Coco, 154 N.H. 353, 356 (2006).

This case concerns the legal question of whether the recording of the Lilac Lane Condominium's Declaration established rights of the declarant to build future Condominium

[2] The Verified Complaint states that Monument Garden owns three units in Building 12. The Association believes that Monument Garden has purchased one additional unit, for a total of four units in Building 12.

buildings and units on existing Condominium land in the absence of any reference to convertible land or convertible land rights contained in the Declaration pursuant to RSA 356-B:16, II. The Association contends that it does not. The relevant provisions of the Act, as applied to the undisputed facts in this case, compels the conclusion that Monument Garden had no right to construct Buildings 13 and 14, and therefore has no interest in those buildings or the units therein, and has no right to further develop Condominium land. The law as applied to the facts also compels the conclusion that Monument Garden's mortgage company, Eastern Bank, has no mortgage or other interests in Lilac Lane Condominium land, buildings, or units, except perhaps the few units owned by Monument Garden in Building 12.

II. THE ASSOCIATION IS ENTITLED TO SUMMARY JUDGMENT BECAUSE THE NEW HAMPSHIRE CONDOMINUM ACT DOES NOT RECOGNIZE MONUMENT GARDEN'S "TRADITIONAL CONDOMINIUM" THEORY.

A. The Purpose of the Act Is to Protect the Reasonable Expectations of Condominium Unit Purchasers.

The fundamental purpose of the Act is to protect unit owners and "'the reasonable expectations of the parties, who are charged with knowing what is in the public records for them to know before they buy.'" Shepherds Hill Homeowners Assoc., Inc. v. Shepherds Hill Dev. Co., LLC, Hillsborough Sup. Ct. Southern Dist., Docket No. 2013-CV-00241 (N.H. Super. March 18, 2014) (quoting Sunshine Meadows Condo. Assoc. v. Bank One, Dayton, N.A., 599 So.2d 1004, 1009 (Fla. Dist. Ct. App. 1992); and citing Alessi v. Bowen Court Condo, 44 A.3d 736, 742 (R.I. 2012) (noting that "Rhode Island's Condominium Act is a consumer protection vehicle"). (The Shepherd's Hill decision is provided at Aylesworth Aff. Ex. D). See New Hampshire Supreme Court Order dated April 2, 2015, affirming the trial court decision in Shepherds Hill and reiterating that the purpose of the Act is to protect unit owners. (The Order is provided at Aylesworth Aff. Ex. E).

In matters of statutory interpretation, the Court's goal "is to apply statutes in light of the policy sought to be advanced by the entire statutory scheme. . . . Accordingly, [the Court will] interpret a statute in the context of the overall statutory scheme and not in isolation." State of New Hampshire v. Addison, 165 N.H. 381, 418 (2013) (citations omitted). Ultimately, "'all rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used.'" Id. (quoting 2A N.J. Singer & J.D. S. Singer, Statutes and Statutory Construction § 45.5, at 36 (7th ed. 2007).

B. The Act Allows for Three Types of Condominiums, None of Which Is a So-Called "Traditional Condominium."

A determination of the parties' rights will be a product of the Court's interpretation of the Act, as it "governs all condominiums and condominium projects." Ryan James Realty, LLC v. Villages at Chester Condo. Assoc., 153 N.H. 194, 196 (2006) (citing RSA 356-B:2; Neumann v. Village of Winnipesaukee Timeshare Owners' Assoc., 147 N.H. 111, 113 (2001)). The Act "provides for very limited and specific ways of creating units in a condominium, and the statute does not indicate that this process may be change by agreement." America Condo. Ass'n, Inc. v. IDC, Inc., 870 A.2d 434 (R.I. 2005) (referring to the Rhode Island Condominium Act, G.L. 1956 § 34-36.1-1.01). Under the Act, a condominium unit owner is entitled to exclusive ownership and possession of his unit and to an undivided interest together with other unit owners as tenants in common in the common areas. RSA 356-B:3, VII and RSA 356-B:17; LSP Assoc. v. Town of Gilford, 142 N.H. 369 (1997) (distinguishing condominium form of ownership from mobile home park); Noble v. Murphy, 34 Mass. App. Ct. 452, 455-56 (1993); McEneaney v. Chestnut Hill Realty Corp., 38 Mass. App. Ct. 573 (1995). The Condominium Act requires the formation of an organization of unit owners in whom management and control of the condominium common areas is vested. See RSA 356-B:35, 42, 43, 45, 46.

As the New Hampshire Supreme Court opined in Ryan James Realty, LLC, "When a developer . . . submits . . . land to the condominium, the developer transfers ownership of those portions of land to the condominium." 153 N.H. at 196. In so holding, the New Hampshire Supreme Court recognized the distinction of the condominium form of ownership and the fact that submission of the land divests the developer of title to the land and coveys it to the (existing and future) unit owners in common.

With these principles in mind, the Act allows for the creation of three different types of condominiums, as follows:[3]

1. The Basic Condominium.

To create a basic condominium, the declarant must complete construction of all the condominium buildings and units, then record the condominium declaration with the registry of deeds, thereby submitting the buildings, units, and land to condominium status.[4] RSA 356-B:7, B16; Ryan James Realty, 153 N.H. at 196. Along with the declaration, the declarant must record site plans and floor plans. RSA 356-B:7. The site plans must be certified by a registered land surveyor, who "shall also certify that all units or portions thereof depicted on any portion of the submitted land other than within the boundaries of any convertible lands have been substantially completed." RSA 356-B:20, I (emphasis added). "Pursuant to general rules of statutory construction, the word 'shall' is a command, which requires mandatory enforcement. . . . Substantial compliance with this statute does not suffice." General Insulation Co. v. Eckman Construction, 159 N.H. 601, 608 (2010) (quotation marks and citation omitted).

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[3] The Act allows for other types of condominiums that are not relevant to the issues in this case. A contractable condominium allows designated portions of the submitted land to be withdrawn from the condominium. RSA 356-B:3, VIII. A conversion condominium allows the conversion of occupied buildings to condominium status. RSA 356-B:3, IX.

[4] For convenience, this type of condominium is referred to herein as the "basic condominium," because it is created by satisfying the Act's basic requirements and does not allow for any future addition of new buildings and units.

The consequence of the substantial completion requirement is that the declarant has no right to construct additional units outside the boundaries of convertible land after the declaration is recorded. If, as in this case, a declarant does in fact construct new units outside convertible land after recording the declaration, the declarant has no right to those units because they are condominium common areas owned in common by the owners of the units that were lawfully created—in this case, the owners of units in Building 12.

The Rhode Island Condominium Act has a requirement like the New Hampshire Act for substantial completion of buildings and units at the time the condominium declaration is recorded. See R.I. Gen. Laws § 34-36.1-2.09(a). In America Condo. Ass'n, the declarant of a Rhode Island condominium attempted to work around the substantial completion requirement by identifying un-built buildings and units in the declaration and on site plans that the declarant intended to construct in the future. 870 A.2d at 439-440. The Rhode Island Supreme Court rejected the declarant's argument that it had satisfied the statutory requirements for those buildings and units: "[N]o structural components were located on either of the two parcels in 1988 that met the requirements for 'substantial completion' that the Act cites as a prerequisite for recording a declaration of condominium. . . . Therefore, because the [un-built] Units never were validly created units within the meaning of the Act, they were, and remain, common elements." Id. The Court concluded that if a declarant were allowed to construct future buildings and units after the condominium was created, even if they are identified in the declaration and shown on site plans, "the requirement that all structural components and mechanical systems be substantially completed indeed would be irrelevant." Id. at 440-41.

The same analysis applies in this case. Monument Garden cannot maneuver around the Act's requirement for substantial completion of units outside the boundaries of convertible land

by merely describing future buildings and units in the declaration and site plans and by making up a term, "Traditional Condominium," that does not appear in the Act.[5] Consequently, Monument Garden had no right to construct Buildings 13 and 14 or the units in those buildings and has no right to any further development on Condominium land. Buildings 13 and 14, the units in those buildings, and the entirety of the Condominium land are common areas owned in common by the Building 12 unit owners. To rule otherwise would render the Act's substantial completion requirement irrelevant.

Monument Garden tries to work around the Act's substantial completion requirement by misconstruing a different portion of § 20, I, which reads as follows:

> In the case of any <u>improvements</u> located on any portion of the submitted land other than within the boundaries of any convertible land, the site plans shall indicate which, if any, have not been begun by the use of the phrase "(NOT YET BEGUN)" and which, if any, have been begun but have not been substantially completed by the use of the phrase "(NOT YET COMPLETED).

RSA 356-B:20, I (emphasis added). Monument Garden alleges that the original declarant complied with this provision because the Condominium site plans label Building 13 as "UNDER CONSTRUCTION" (which is not recognized by the Act under any circumstance) and Buildings 14, 15, and 16 as "NOT YET BEGUN."

Monument Garden's argument fails, because in the context of the Act, "improvement" does not mean a structure containing condominium units. The term "improvement" is not defined by the Act, and therefore the Court is to 'construe the meaning of statutory language 'not in isolation, but together with all associated sections,' and consequently [the Court's] interpretation of [a term] is informed by its use elsewhere in the statute." <u>K.L.N. Construction Co., Inc. v. Town of Pelham</u>, 167 N.H. 180, 185 (2014) (quoting <u>Appeal of Thermo-Fisher</u>

[5] Monument Garden's allegation that the so-called "traditional condominium" is consistent with "long-standing New Hampshire practice" is mere rhetoric unsupported by any facts and is expressly contradicted by the Act's definition of convertible land, but nonetheless such allegations have no bearing on how the Act is to be construed.

Scientific, 160 N.H. 670, 672-73 (2010)). As stated above, in the very provision upon which Monument Garden relies, the Act expressly provides that each "unit" located outside the boundaries of convertible land "shall" be certified as "substantially completed." RSA 356:B-20, I. To state the obvious, a unit cannot be substantially completed if it is "NOT YET BEGUN" or "NOT YET COMPLETED." Other sections of the Act also use "improvement" as a catch-all term for additions to a condominium other than structures with units. See, e.g., RSA 356-B:16, II and III; 356-B:16,V(b); 356-B:22; 356-B:23,III; 356-B:27; 356-B:29,II; 356-B:30,I; 356-B:42,I; 356-B:43,I(c); 356-B:51,I(n); and 356-B:55. Thus, Monument Garden cannot evade the Act's strict requirement for substantial completion of units outside the boundaries of convertible land by mischaracterizing condominium units as "improvements." Again, Monument Garden's theory would render the Act's substantial completion requirement irrelevant.

2. The Convertible Land Condominium.

A declarant intending to add future buildings and units on existing condominium land must create convertible land. "Convertible land" is a term defined in the Act as **"a building site which is a portion of the common area within which additional units and/or a limited common area may be created in accordance with this chapter."** [6] RSA 356-B:3, X (bold added). To create convertible land, the declarant must include detailed disclosures in the condominium declaration, in furtherance of the Act's purpose to provide notice and protect the reasonable expectations of unit purchasers. The detailed disclosures for convertible land are enumerated under the Act at §16, II(a) through (g). See Shepherds Hill Homeowners Ass'n, Inc., No. 2013-CV-00241, *5 (citing RSA 356-B:16, II as providing the means by which "[a]

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[6] The Act defines common area as "all portions of the condominium other than the units." RSA 356-B:3, II. The Act defines limited common area as "a portion of the common area reserved for the exclusive use of those entitled to the use of one or more, but less than all, of the units." RSA 356-B:3, XX.

developer may include land in the condominium while reserving the right to expand the condominium by later adding units on that land—an option the Act . . . refer[s] to as 'convertible land.'"). Alternatively, a declarant may elect to add future units in existing condominium buildings—but cannot add new buildings—by creating "convertible space." RSA 356-B:3, XI. The convertible land is deemed to be converted when the declarant amends the declaration and records site plans and floor plans depicting the additional buildings and units within the boundary of the convertible land. RSA 356-B:20, III.[7]

The declarant's right to add buildings and units on convertible land is limited to a period of no more than five years, at which point the rights expire.[8] RSA 356-B:54, V. The five-year limitation period is strictly enforced, and a declarant is not permitted to maneuver around it with clever tactics. See Shepherds Hill Homeowners Ass'n, Inc., No. 2013-CV-00241, *6 (rejecting declarant's attempt to "skirt" the five-year limit for developing convertible land).

Under the well-established rule of statutory construction, "the expression of one thing in a statute implies the exclusion of another." Matter of Gamble, 118 N.H. 771, 777 (1978) (citing Vaillancourt v. Gen. Mut. Ins. Co., 117 N.H. 48 (1977), and 2A J. Sutherland, Statutes and Statutory Construction § 47.23-24 (4th ed. C. Sands 1973)). Monument Garden's theory defies this rule by interpreting the Act to mean that submitted condominium land that is not convertible can also be **"a building site which is a portion of the common area within which additional units and/or a limited common area may be created in accordance with this chapter."** Monument Garden's theory would render nugatory the definition of convertible land as existing

[7] Notably, when Monument Garden purported to create Buildings 13 and 14, it did not record an amendment to the Declaration.

[8] The five-year limitation period can be extended by up to an additional five years by an appropriate amendment to the condominium declaration. RSA 356-B:54, V. No convertible land or any such amendment exists in the Condominium's Declaration.

common area on which the declarant reserves the right to construct additional buildings and units, and therefore the theory must be rejected. See Petition of Eskeland, 166 N.H. 544, 560-61 (2014) (statutory definition of a term is controlling when construing the statute as a whole).

In this case, the Condominium Declaration disclosures and site plans submitted by the original declarant look very much like convertible land. They identify additional buildings and numbers of units to be constructed in the future and show where they are located. The problem is that the Declaration did not expressly create convertible land and was not amended to convert the convertible land when Buildings 13 and 14 were completed. Monument Garden's expressed intention is an exact fit for the purpose of convertible land, but Monument Garden claims there is no convertible land essentially because Monument Garden does not call it convertible land. Monument Garden cannot avoid the Act—and in particular its five-year limit on constructing units on convertible land—by failing to use the terms and language contained in the Act.

Even if, arguendo, the Court were to conclude that the Declaration contains sufficient information to satisfy the convertible land requirements, the Court nonetheless must rule that any future development by Monument Garden on the Condominium land is time-barred by the five-year limitation period under RSA 356-:54, V, because the Condominium was created more than five years ago.

3. The Expandable Condominium.

A declarant may add land to an existing condominium, and construct new buildings and units on that land, by creating an expandable condominium. "Expandable condominium" is a term defined by the Act as "a condominium to which additional land may be added in accordance with the provisions of the declaration and of this chapter." RSA 356-B:3, XV. To create an expandable condominium, the declarant must include detailed disclosures in the

condominium declaration, similar to the disclosures for convertible land, as enumerated under the Act at §16, III. In furtherance of the Act's purpose, a declarant's right to develop expandable land expires after seven years. RSA 356-B:16, III(c).

The land at issue in this matter has all been submitted to the Condominium, and there is no suggestion by Monument Garden that it intends to expand the Condominium with additional land. Accordingly, the expandable condominium scheme is not applicable to this case.

C. **The Act's Mention of Units "to Be Located" Refers to Convertible Space.**

Monument Garden tries to support its theory with language from the Act's § 7, which reads in relevant part: "No condominium instruments shall be recorded unless all units located or to be located on any portion of the submitted land, other than within the boundaries of any convertible lands, are depicted on site plans and floor plans that comply with RSA 356-B:20, I and II." RSA 356-B:7 (underscore added). Although § 7 only refers to units, Monument Garden argues that this provision means it can add units and buildings without creating convertible land and without being subject to any time limit for future development. Again, Monument Garden's theory cannot be reconciled with the Act's requirement that all units outside the boundaries of convertible land shall be substantially completed when the condominium is created, nor can it be reconciled with the Act's requirement for convertible land as the sole means for developing future buildings and units on existing condominium land.

Section 7 can, however, be reconciled with the Association's reading of the Act. The Act allows one option, called "convertible space," for adding future units in an existing condominium building. Convertible space is defined by the Act as "a portion of a structure within the condominium which portion may be converted into one or more units and/or common area, including but not limited to limited common area, in accordance with this chapter." RSA

356-B:3, XI.[9] The Act is quite clear that prior to the construction of units in a convertible space, the convertible space itself is to be treated as a single unit under the Act:

> Any convertible space not converted in accordance with the provisions of this section, or any portion or portions thereof not so converted, shall be treated for all purposes as a single unit until and unless it is so converted, and the provisions of this chapter shall be deemed applicable to any such space, or portion or portions thereof, as though the same were a unit.

RSA 356-B:24, IV. See RSA 356-B:3, XXIX ("For the purposes of this chapter, a convertible space shall be treated as a unit in accordance with RSA 356-B:24, IV."). Thus, if a declarant creates convertible space, but no convertible land, the declarant complies with § 7 by depicting the location of completed buildings and units on the recorded plans, along with the "unit" (aka convertible space) to be located on the submitted land.[10]

The reference in § 7 to units "to be located" cannot be read in isolation and must be reconciled, if possible, and interpreted in the context of the Act as a whole. The purpose of the Act would be thwarted, and there would be no purpose to convertible land, expandable land, or convertible space, if a declarant could reserve future development rights without any time limitation merely by depicting future buildings and units on site plans recorded with the declaration.

D. The Attorney General Decision Is Not Relevant.

Monument Garden places great importance on the 2010 decision by the New Hampshire Attorney General's office. But that decision approved the declarant's request to subdivide one large condominium into three separate developments. Nothing about the decision determined

[9] Just like convertible land, the Act has strict requirements for the creation of convertible space, none of which were satisfied by the Condominium Declaration in this matter. See RSA 356-B:20, II.

[10] By definition, the convertible space "unit" is not yet constructed, and therefore it does not run afoul of the requirement that units be substantially completed when the condominium is created. Nonetheless, to the extent that the convertible space provision may be deemed in conflict with the Act's substantial completion requirement, the conflict is inherent in the Act and would also exist under Monument Garden's theory.

whether the declarant's development rights extend past the Creation Date, or whether the declarant's purported unlimited-in-time phased development is compliant with the Act. The focus for condominium compliance is the Act, not an Attorney General decision that did not even address the issues presented in this case. Therefore, the Attorney General decision is irrelevant to this action.

III. THE ASSOCIATION IS ENTITLED TO A SUMMARY JUDGMENT DECLARING THAT EASTERN BANK HAS NO INTERESTS IN THE CONDOMINIUM COMMON AREAS.

Eastern Bank is Monument Garden's mortgage lender. Monument Garden entered into a Mortgage And Security Agreement with Eastern Bank's predecessor, Centrix, recorded with the Registry of Deeds on September 30, 2014, at Book 4246, Page 140, on the entirety of the Condominium land and improvements except the 24 units in building 12 (the "Mortgage"). (A copy of the Mortgage is attached as Aylesworth Aff. Ex. F). Under a Collateral Assignment agreement ("Collateral Assignment"), the Mortgage collateral includes all of Monument Garden's alleged interests in the Condominium, including but not limited to the land, development rights, units, unit purchase and sale agreements, unit lease agreements. (A copy of the Collateral Assignment is attached as Aylesworth Aff. Ex. G)

Eastern Bank has no rights to the Lilac Lane Condominium land, buildings, units, facilities, units in Buildings 13 or 14, or any other Condominium common areas, and no development rights. As stated above, at the time the Mortgage and Collateral Assignment were entered into and recorded, the Condominium land had been submitted to condominium status.[11] Pursuant to the Act and the Declaration, all Lilac Lane Condominium land, buildings, facilities,

[11] The 2012 Deed from New Meadows purports to convey ownership rights in the entirety of the 7.18 acres of Condominium land to Monument Garden. But no such conveyance actually occurred, because at the time of the Deed, the Declaration was already recorded, and all 7.18 acres were submitted to condominium status and belonged to the Condominium unit owners in common.

and other elements except for units in Building 12 are all common areas owned in common by the Condominium unit owners. (RSA B-356:17, I; 356-B:42). In addition, also for the reasons stated above, at the time of the Mortgage and Collateral Assignment, Monument Garden owned no lawful interest in the units of Buildings 13 and 14 and had no right to further develop the Condominium. Therefore, Monument Garden could not pledge Condominium land, buildings, facilities, units in Buildings 13 and 14, or other Condominium common areas as security on the Mortgage because it did not own them.

For the foregoing reasons, the Association is entitled to judgment as a matter of law declaring that Eastern Bank has no interests in the Lilac Lane Condominium land, buildings, facilities, or other common areas, and that its interests, if any, are limited to the four units in Building 12 that are owned by Monument Garden.

CONCLUSION

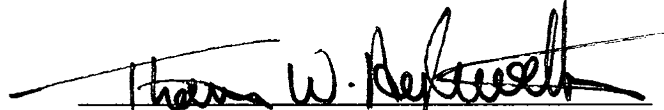
Based upon the foregoing, the Association requests that this Honorable Court deny Monument Garden's motion for summary judgment and grant the Association's cross-motion for partial summary preliminary, and enter judgment in the form proposed in the Association's motion for partial summary judgment, filed herewith.

Respectfully submitted,

CONDOMINIUMS AT LILAC LANE
UNIT OWNERS' ASSOCIATION

By its attorneys,

MARCUS, ERRICO, EMMER
& BROOKS, P.C.



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Dated: November 19, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November, 2015, I served a copy of the foregoing by electronic mail and first-class and U.S. Mail, postage prepaid, to the following counsel of record:

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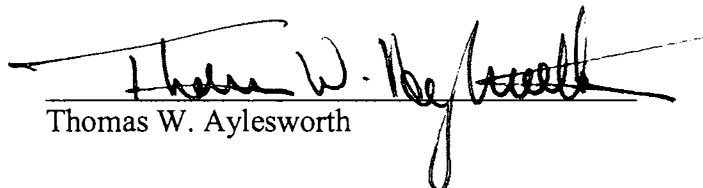

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NOTICE OF DECISION

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Case Name: **Condominiums at Lilac Lane Unit Owners' Association v Monument Garden LLC, et al**
Case Number: **219-2015-CV-00313**

Enclosed please find a copy of the court's order of June 08, 2016 relative to:

Order on Pending Motions (re: court index #15, 21-22, 31)

June 15, 2016

Kimberly T. Myers
Clerk of Court

(277)

C: Thomas W. Aylesworth, ESQ; Jonathan M. Flagg, ESQ; Michael A. Klass, ESQ; Roy W. Tilsley, ESQ

NHJB-2503-S (07/01/2011)

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NHJB-2503-S (07/01/2011)

STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY SUPERIOR COURT

Condominiums at Lilac Lane Unit Owners' Association

v.

Monument Garden, LLC, and Eastern Bank

Docket No. 219-2015-CV-313

ORDER ON PENDING MOTIONS

The plaintiff, Condominiums at Lilac Lane Unit Owners' Association ("Lilac"), brings this action against the defendants, Monument Garden, LLC ("Monument Garden"), and Eastern Bank (collectively, the "defendants"), asserting claims for, among other things, declaratory judgment, injunctive relief, and unjust enrichment. Now before the court are the parties' cross-motions for summary judgment and objections thereto. (Court index #15, 21–22, 31.) After a hearing on the cross-motions, and considering the parties' arguments, the factual circumstances of the case, and the applicable law, the court finds and rules as follows.

FACTS

The following facts are undisputed, unless otherwise indicated. Lilac is an association comprised of the owners of condominium units located within a residential development in Dover known as the Condominiums at Lilac Lane (the "condominium"). (See Klass Aff., Ex. C at 1–2, Oct. 22, 2015.) An entity known as New Meadows, Inc. ("New Meadows") was the original declarant of the condominium. (Id., Ex. B at 1.[1]) The condominium land was initially part of a preexisting condominium development known as the Meadows at Dover. (Id., Ex. A at 1–2.) New Meadows sought to construct new buildings on Meadows at Dover land, but sought to separate the new development—the condominium at issue here—from the existing development. (Id., Ex. A at 1–2.) The proposed division received approval of the Attorney General in February 2010. (Id., Ex. A at 6.)

[1] Exhibit B to the affidavit of Michael Klass is paginated, with the exception of the first page—a table of contents. For ease of reference, when citing to Ex. B, the court will reference the page numbers as set out therein, and will refer to the table of contents as "TOC."

New Meadows subsequently established the condominium in 2010 by executing and recording a Declaration of Condominium (the "declaration") with the Strafford County Registry of Deeds, as required by New Hampshire's Condominium Act, see RSA chapter 356-B (2009 & Supp. 2015). (Id., Ex. B at 1–13.) The declaration describes the land submitted to the condominium as:

> A certain tract or parcel of land together with the buildings thereon situate on Lilac Lane in the City of Dover County of Strafford and State of New Hampshire, the same being more particularly delineated as The Condominium at Lilac Lane on plan entitled "Revision IV to the Condominium Site Plan, Tax Map H Lot 35A, The New Meadows, Inc." prepared by MSC Civil Engineers & Land Surveyors, Inc. [(the "[site] [p]lan")] and to be recorded in the Strafford County Registry of Deeds . . . .

(Id., App A. to Ex. B.[2]) It also explains that the condominium was to "consist of a maximum of one hundred twenty (120) units in five buildings designated on the [above-referenced site plan] as Buildings 12, 13, 14, 15[,] and 16." (Id., Ex. B at 3.) It further contains a list of the 120 units, complete with designation numbers. (Id., App B. to Ex. B.)

Consistent with the declaration, the site plan depicts two existing buildings on the approximate 7.18 acres of submitted land; these buildings are labeled Building 12 and Building 13 respectively. (Id., Ex. D at 1.) According to the accompanying floor plans, Building 12 was substantially complete and Building 13 was under construction. (Verified Compl., Ex. 4 at 6.[3]) The site plan also depicts three proposed buildings, which are labeled Building 14, Building 15, and Building 16 respectively. (Klass Aff., Ex. D at 1.) According to the floor plans, construction on these buildings had not yet begun. (Verified Compl., Ex. 4 at 6.) Additionally, the floor plans depict the twenty-four units existing, or proposed to be built, within each building—a total of 120 units. (Id., Ex. 4 at 6–7.)

On April 10, 2012, New Meadows executed a document entitled "Memorandum of Understanding (Phasing Plan)" (the "phasing plan"), which it subsequently recorded in the

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[2] The declaration contains exhibits; the court refers to these as appendices to Exhibit B to the Klass Affidavit.

[3] Although the accompanying floor plans were not submitted on summary judgment, they were submitted as an exhibit to the verified complaint. (Verified Compl., Ex. 4 at 6–8.) The verified complaint attests that the exhibit is a true and accurate copy of the floor plans. (Id. ¶ 14.) Under these circumstances, the court may consider the exhibit for summary judgment purposes. See Sheinkopf v. Stone, 927 F.2d 1259, 1262 (1st Cir. 1991); 73 Am. Jur. 2d Summary Judgment § 30 (WEST 2016) ("[A] verified complaint may be treated as the functional equivalent of an affidavit for the purposes of opposing a summary judgment motion to the extent that it satisfies the standards explicated in the summary judgment rule.")

Strafford County Registry of Deeds. (Id., Ex. 6 at 1.[4]) The phasing plan explained that New Meadows intended to construct the buildings within the condominium in phases, and sell the units as it completed construction on each building. (Id., Ex. 6 at 1.) At the time of the phasing plan, most of the units in Building 12 had been sold. (Id., Ex. 6 at 1.)

On October 3, 2012, New Meadows transferred its interests in the condominium to Monument Garden by deed. (Aylesworth Aff., Ex. C, Nov. 19, 2015.) Monument Garden executed a mortgage in favor of Eastern Bank's predecessor—Centrix Bank and Trust ("Centrix")—in exchange for a loan to complete the purchase. (Id., Ex. F at 1; see Klass Aff., Exs. G–H.) As further security, Monument Garden executed a document entitled "Collateral Assignment of Declarant's Rights"; this assignment provided that Centrix would be entitled to exercise Monument Garden's development rights in the event of default. (Aylesworth Aff., Ex. G at 1–2 (bolding and capitalization omitted).)

After purchasing New Meadows' interest in the condominium, Monument Garden continued construction on Building 13, which it completed in or around June 2013. (Compl. ¶ 8; Answer ¶ 8.) It subsequently began construction on Building 14, which it completed in or around July 2014. (Compl. ¶ 8; Answer ¶ 8.) Contrary to New Meadows' phasing plan, Monument Garden did not sell any of the units in Buildings 13 and 14, but instead retained ownership of the units contained therein. (See Compl. ¶ 8; Answer ¶ 8.) Monument Garden also planned to construct buildings 15 and 16. (See Compl. ¶ 9; Answer ¶ 9.)

Lilac, as the unit owner's association, is subject to the condominium's bylaws. (Klass Aff., Ex. C at 2.) According to the bylaws' description of Lilac's voting rights, "[e]ach completed unit [is] entitled to one (1) vote." (Id., Ex. C at 2.) The bylaws explain that this provision applies even where the declarant owns multiple units. (Id., Ex. C at 3.) As unit owners, Lilac votes on, among other things, the election and removal of members of the Board of Directors ("Board"). (Id., Ex. C at 3.) The bylaws dictate that the condominium is to be managed by a five member Board. (Id., Ex. C at 5.)

Currently, Steven Fee ("Fee"), Anthony Stevens ("Stevens"), James Plante ("Plante"), Venkat Badabagni ("Badabagni"), and Kenneth Anderson ("Anderson") are serving on the

[4] Like the floor plans, the phasing plan was not submitted on summary judgment but was submitted as an exhibit to the verified complaint. (Verified Compl., Ex. 6.) The verified complaint attests that the exhibit is a true and accurate copy of the phasing plan. (Id. ¶ 17.) Under these circumstances, the court may consider the exhibit for summary judgment purposes. See Sheinkopf, 927 F.2d at 1262; 73 Am. Jur. 2d Summary Judgment § 30.

condominium's Board. (Fee Aff. ¶ 2, November 5, 2015.) Fee and Anderson are managing members of Monument Garden; Stevens, Plante, and Badabagni are individual unit owners. (Id.) Monument Garden is displeased with the way in which the Board has been managing the condominium. (See id. ¶¶ 3–9.) It called, by letter, for a special meeting to remove Stevens as a member of the Board, claiming to hold the requisite 30% of the unit owners' votes.[5] (Klass Aff., Ex. C at 3; Verified Compl., Ex. 7.[6]) This action followed.

LEGAL STANDARD

In ruling on cross-motions for summary judgment, the court "consider[s] the evidence in the light most favorable to each party in its capacity as the nonmoving party." Eby v. State, 166 N.H. 321, 327 (2014) (citation omitted). Where "no genuine issue of material fact exists, [the court] determine[s] whether the moving party is entitled to judgment as a matter of law." N.H. Ass'n of Counties v. State, 158 N.H. 284, 287–88 (2009). "An issue of fact is 'material' for purposes of summary judgment if it affects the outcome of the litigation under the applicable substantive law." VanDeMark v. McDonald's Corp., 153 N.H. 753, 756 (2006). To demonstrate a genuine dispute regarding a material fact, the non-moving party "may not rest upon mere allegations or denials of his pleadings, but his response, by affidavits or by reference to depositions, answers to interrogatories, or admissions, must set forth specific facts showing that there is a genuine issue for trial." RSA 491:8–a, IV (2010).

ANALYSIS

Lilac's verified complaint seeks: a declaratory judgment that Lilac owns certain condominium units (Count I); a declaratory judgment that Monument Garden has no rights to further develop condominium lands (Count II); a declaratory judgment that Monument Garden lacks sufficient voting rights to control Lilac's board of directors (Count III); damages for unjust enrichment / disgorgement (Count IV); a declaratory judgment that Eastern Bank does not hold a valid note and mortgage to condominium lands (Count V); a prejudgment and lis pendens attachment (Count VI); a preliminary injunction ordering defendants to refrain from conveying

[5] Monument Garden claims ownership of all units in Buildings 13 and 14 and several units in Building 12.
[6] This letter was not submitted on summary judgment. The verified complaint, however, attests to the letter as true and accurate, (Verified Compl. ¶ 30), and thus the court may consider the exhibit for summary judgment purposes. See Sheinkopf, 927 F.2d at 1262; 73 Am. Jur. 2d Summary Judgment § 30.

their respective interests in certain property (Count VII); a preliminary injunction ordering Monument Garden to refrain from developing condominium lands (Count VIII); a preliminary injunction ordering Monument Garden to refrain from exercising voting rights premised upon its asserted ownership of certain condominium units (Count IX); and a preliminary injunction ordering Eastern Bank to refrain from exercising its claimed rights under the mortgage (Count X). (Verified Compl. ¶¶ 36–86.) By order dated December 8, 2015 (the "preliminary order"), the court (Temple, J.) denied Lilac's requests for preliminary injunctive relief and a prejudgment attachment. (Court index #25, at 20.) The court also declined to rule on Lilac's request for court approval to file a writ in the form of lis pendens, noting that court approval was not required for such a filing. (Id., at 17.)

The defendants and Lilac now cross-move for summary judgment. (Court index #15, 21–22, 31.) While the defendants assert entitlement to summary judgment on all ten of the claims asserted in Lilac's verified complaint, Lilac seeks summary judgment on all claims except for Count IV—its claim for unjust enrichment / disgorgement. The parties raise various arguments in support of and in opposition to their cross-motions for summary judgment. These arguments will require the court to determine: (1) the extent of the interests in the condominium conveyed to Monument Garden by the 2012 deed; and (2) whether the condominium is subject to certain provisions of RSA chapter 356-B, which relate to "convertible land." The court first considers these issues in turn, and then discusses the effect its determinations have on Lilac's claims.

I. Interests Conveyed by Deed

In its earlier pleadings, Lilac argued that the 2012 deed failed to convey any ownership interest in the condominium land to Monument Garden on the basis that the land had already been conveyed to Lilac by the declaration. (See, e.g., Verified Compl. ¶¶ 23–26; Pl.'s Mem. Law Supp. Mot. Prelim. Inj. at 5–6.) It relies on this argument as a partial basis for some of its claims. (See Verified Compl. ¶¶ 45–52, 58–61.) Lilac still appears to pursue this argument. (See Pl.'s Mem. Supp. Cross-Mot. Summ. J. and Obj. Defs.' Mot. Summ. J., at 15 n.11.) The court finds that such an argument is misplaced for the reasons stated in the preliminary order, which the court incorporates herein by reference. (See court index #25 at 6–9.) Accordingly, the court determines that New Meadows retained the right to develop the property in accordance with the site plan, as well as ownership of the units not yet constructed and those units'

respective undivided interests in the common area. It subsequently transferred those rights to Monument Garden by deed in 2012.

II. Convertible Land

The parties dispute whether the condominium contains convertible land, and, consequently, whether Monument Garden was required to adhere to the relevant statutory provisions governing the creation and conversion of such land. The court thus considers whether the condominium is subject to certain provisions of the Condominium Act, see RSA chapter 356-B, which relate to "convertible land." See RSA 356-B:3, X (Supp. 2015) (defining "convertible land" as "a building site which is a portion of the common area, within which additional units and/or a limited common area may be created in accordance with this chapter.") Determination of this issue will require the court to engage in statutory interpretation of RSA chapter 356-B, which is a matter of law. See Trefethen v. Town of Derry, 164 N.H. 754, 755 (2013). The court considers the statute as a whole and ascribes the plain and ordinary meaning to the words used. Id. (citation omitted). The court "interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." Id. (citation omitted). The court "construe[s] all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result." Petition of Carrier, 165 N.H. 719, 721 (2013) (citation omitted). Furthermore, the court should "not consider words and phrases in isolation, but rather within the context of the statute as a whole." Id. (citation omitted). This approach "enables [the court] to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme." Id. (citation omitted).

"The Condominium Act, RSA chapter 356-B, applies 'to all condominiums and to all condominium projects' in New Hampshire." Holt v. Keer, 167 N.H. 232, 240 (2015) (quoting RSA 356-B:2, I (2009)). "In order to create a condominium, certain 'condominium instruments' must be recorded with the registry of deeds in the county where the condominium is located." Id. (quoting RSA 356–B:7 (2009), :11 (2009)). "The condominium instruments include a declaration of condominium, which defines the rights as among the condominium owners, the condominium association, and the developer." Ryan James Realty, LLC v. Villages at Chester Condo. Ass'n, 153 N.H. 194, 196 (2006). Under the Act, condominiums can contain convertible land. See RSA 356-B:16, II (2009). If the condominium contains convertible land, certain

requirements must be met. For example, the declaration must contain, among other things, a legal description of the convertible land. Id. Similarly, a site plan depicting "the location and dimensions of any convertible lands within the submitted land" must be recorded along with the declaration. RSA 356-B:20, I (Supp. 2015). Additionally, to convert convertible land into units, a declarant must "record an amendment to the declaration describing the conversion" along with applicable site plans and floor plans. RSA 365-B:23, II (2009). The statute places a five-year limitation on the conversion of convertible lands. RSA 356-B:20, III.

Although Lilac agrees that the condominium instruments do not reference convertible land, it argues that, under the Condominium Act, the only method by which a declarant can develop a condominium in phases is by designating certain portions of common area as convertible land and by later converting that land to units. (Pl.'s Mem. Supp. Cross-Mot. Summ. J. and Obj. Defs.' Mot. Summ. J., at 6–14.) In contrast, the defendants contend that all five buildings and 120 units were part of the original condominium as submitted, and that Monument Garden is not, therefore, required to convert land in order to construct them. (Defs.' Mot. Summ. J., at 4–9.) The defendants' contention is correct.

By its plain language, the Condominium Act allows for the creation of a condominium that includes planned future development, including the construction of units, but does not contain convertible land. RSA 356-B:7 provides that condominium instruments cannot be recorded "unless all units located or to be located on any portion of the submitted land, other than within the boundaries of any convertible lands, are depicted on site plans and floor plans that comply with RSA 356-B:20, I and II." (Emphasis added). This provision necessarily implies that a condominium can be created prior to the completion of construction on all units, without the need to classify portions of the condominium land as convertible—i.e., that not all units "to be located" within the condominium must be located on subsequently converted land.

This interpretation is supported by other provisions of the statute. For example, RSA 356-B:20, I, describes the information necessary to include in site plans and floor plans where the planned development is not complete, but the condominium does not contain convertible lands. This provision states, in relevant part:

> In the case of any improvements located or to be located on any portion of the submitted land other than within the boundaries of any convertible lands, the site plans shall indicate which, if any, have not been begun by the use of the phrase

> "(NOT YET BEGUN)" and which, if any, have been begun but have not been substantially completed by the use of the phrase "(NOT YET COMPLETED)."

RSA 356-B:20, I (emphasis added).[7] As another example, a different provision of the statute provides that, under certain circumstances, a declarant has an affirmative duty—as opposed to a mere right—to complete the development in accordance with the site plans where construction is not yet completed or not yet begun. See RSA 356-B:29, II (2009) ("The declarant shall complete all improvements labeled '(NOT YET COMPLETED)' on site plans . . . and shall, in the case of every improvement labeled '(NOT YET BEGUN)' on such site plans, [identify] 'the extent of the obligation to complete the same . . . .'" (emphases added)).

The court is not persuaded by Lilac's argument that the language "to be located" refers only to the term "convertible space." The Act does not define "convertible space" as a unit or other area "to be located" in the condominium. See RSA 356-B:3, XI (defining "convertible space" as "a portion of a structure within the condominium which portion may be converted into one or more units and/or common area, including but not limited to limited common area, in accordance with this chapter" (emphasis added)). Moreover, the Act uses the phrase "to be located" and the term "convertible space" in multiple provisions. RSA 356-B:7 ("to be located"), :20, II (both), :24 ("convertible space"). From this, it appears that "to be located" and "convertible space" carry different meanings. See Ettinger v. Town of Madison Planning Bd., 162 N.H. 785, 791 (2011) ("When the legislature uses different language in the same statute, we assume that the legislature intended something different." (citation omitted)); State Employees Ass'n of N.H., SEIU, Local 1984(SEA) v. N.H. Div. of Pers., 158 N.H. 338, 345 (2009) (same principle applied to related statutes).

Contrary to Lilac's contention, this interpretation is consistent with RSA 356-B:20, I. Lilac claims that part of this provision requires that all units be substantially completed at the time of a condominium's creation. (Pl.'s Mem. Supp. Cross-Mot. Summ. J. and Obj. Defs.' Mot. Summ. J., at 8–10.) The sentence Lilac relies upon states:

> . . . Each site plan shall be certified as to its accuracy and compliance with the provisions of this paragraph by a registered land surveyor, and the said surveyor shall certify that all units or portions thereof depicted on any portion of the

[7] Applying the common meaning of the term, a unit is an "improvement." See Webster's Third New International Dictionary 1683 (unabridged ed. 2002) (defining "improvement" as "a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs").

> submitted land other than within the boundaries of any convertible lands have been substantially completed. . . .

RSA 356-B:20, I. However, considering the statute as a whole, Trefethen, 164 N.H. at 755, the plain language of this provision does not require a surveyor to certify that all units are substantially completed prior to the creation of the condominium.[8] Rather, it requires a surveyor to certify that all units are substantially completed to the extent depicted in the submitted plans. See RSA 356-B:20, I (requiring the surveyor to "certify that all units or portions thereof depicted . . . have been substantially completed . . ." (emphasis added)). To conclude otherwise would not only nullify earlier portions of RSA 356-B:20, I, but would also ignore language contained in the very sentence Lilac relies upon. See id.

This interpretation is, likewise, consistent with the Act's purpose. RSA 356-B:7 proscribes the creation of a condominium before the recording of site plans and floor plans, and RSA 356-B:20 sets forth what those plans must depict. The plain language of these provisions indicates that they are designed to protect the interests of potential condominium unit owners—particularly, by ensuring that they are apprised of the details of the planned development. See RSA 356-B:7, :20; see also Holt, 167 N.H. at 241–42 ("Based upon the statute's plain language, the purpose of RSA 356–B:19 is to provide protection for condominium unit owners, relating to their interest in common areas and limited common areas."). Interpreting the Act as allowing for the creation of a condominium that includes planned future development but does not contain convertible land has no effect on this purpose; so long as the site and floor plans depict the requisite information, potential unit owners will be fully informed. Additionally, that the Act contains no express time limits for completion of such planned future developments does not alter this result. Regardless of the lack of such a limitation, the potential unit owners are apprised of the development plan. Indeed, the legislature provided unit owners with a vehicle to ensure that the development plan is fully executed to the extent depicted in applicable site and floor plans. See RSA 356-B:29, II.

Having determined that RSA chapter 356-B allows for the creation of a condominium that includes planned future development but does not contain convertible land, the court next

[8] The court disagrees with Lilac's assertion that Rhode Island law is instructive on this point. The Rhode Island Condominium Act's substantial completion requirement differs significantly from the requirements of the New Hampshire Condominium Act. Compare 34 R.I. Gen. Laws Ann. § 34-36.1-2.01(b) (WEST 2016) ("A declaration . . . may not be recorded unless all structural components and mechanical systems of the building containing or comprising any units thereby created are substantially completed . . . ."), with RSA 356-B:20, I.

addresses whether the condominium at issue here is such a development. Considering the relevant provisions of RSA chapter 356-B, it is apparent from a review of the condominium instruments that, although the condominium was not fully developed, it did not contain any convertible land. As noted above, the site plan indicates that construction on Building 13 was not yet completed, and that construction on Buildings 14, 15, and 16 had not yet begun. (Klass Aff., Ex. D at 1; Verified Compl., Ex. 4 at 6.) Specifically, sheet 1 of the site plan depicts all five buildings, labeling Building 12 as "EXISTING BUILDING," Building 13 as "EXISTING BUILDING . . . UNDER CONSTRUCTION," and the remaining buildings as "PROPOSED BUILDING . . . NOT YET BEGUN." (Klass Aff., Ex. D at 1.) Additionally, the floor plans accompanying the site plans describe Building 12 as "SUBSTANTIALLY COMPLETE," Building 13 as "WEATHER TIGHT SHELL COMPLETE, INTERIOR NOT YET COMPLETE," and the remaining buildings as "NOT YET BEGUN." (Verified Compl., Ex. 4 at 6.) Thus, the site plan and floor plans appear to have been created in an effort to comply with RSA 356-B:20, I, and RSA 356-B:29, II—the provisions addressing continuing construction on "any portion of the submitted land other than within the boundaries of any convertible lands." RSA 356-B:20, I.

The meaning of the term "convertible land" further supports this determination. The statute defines "convertible land" as "a building site which is a portion of the common area, within which additional units and/or a limited common area may be created in accordance with this chapter." RSA 356-B:3, X. Thus, land is only classified as "convertible" where the building site was initially intended to be "common area" and where that area is being converted into units. Here, Monument Garden has not built units on any portion of the condominium previously identified as "common area," and does not plan to do so in the future. (Klass Aff., Ex. B at 1 (defining "common area" as "all parts of the [p]roperty other than the [u]nits"); Verified Compl., Ex. 4 at 6 (depicting "units"—including those that are the subject of the present dispute).) Because the units in dispute were always identified as units, they were never part of the "common area," and there is, accordingly, no need to convert the common area into units. See RSA 356-B:3, II (defining "common area"), X ("defining convertible land"); see also J. A. Bielagus and J. F. Bielagus, A Practical Guide to Residential Real Estate Transactions and Foreclosures in New Hampshire, § 5.5 (2010).

The court is not persuaded by Lilac's argument that the instant case is analogous to Shepherds Hill Homeowners Ass'n, Inc. v. Shepherds Hill Dev. Co., LLC, Hillsborough-southern judicial district, No. 13-CV-241 (March 18, 2014) (Order, Colburn., J.) (hereinafter "Shepherds Hill"), aff'd New Hampshire Supreme Court, 2014-0306 (April 2, 2015) (non-precedential order).[9] In Shepherds Hill, the trial court found that an amendment to a condominium declaration was void because it frustrated the purposes of the Condominium Act and violated the declaration itself by improperly exercising the convertible land requirements contained in the statute. Id. at 7–8. However, whether the land in question was "convertible land" was not a disputed issue in Shepherds Hill. See id. at 1 ("The land on which the additional units could be built is referred to by the parties and the New Hampshire Condominium Act . . . as 'convertible land.'"). Even if it had been at issue, the condominium instruments applicable in Shepherds Hill made clear that the land in question was convertible in nature. There, unlike the site plans applicable here, the site plans expressly identified the land in question as "convertible land." (Compare Klass Aff., Ex. F at 1–10 (Shepherds Hill site plans labeling certain areas of land as "PHASE II CONVERTIBLE LAND" and only depicting buildings and floor plans for separate area labeled as "PHASE I SUBMITTED LAND"), with Klass Aff., Ex. D at 1, and Verified Compl. Ex. 4 at 6 (Lilac site and floor plans depicting all buildings and units but not labeling any portion of land as "convertible land").) Additionally, unlike the declaration applicable here, the declaration of the Shepherds Hill condominium described the land as "convertible." (Compare Klass Aff., Exs. E at 3–4 §§ H (Shepherds Hill declaration stating "a legal description of all land reserved as convertible land is attached as [an exhibit]"), J (entitled "Special Provisions Regarding Convertible Land . . ."), with Compl., Ex. 1 (Lilac declaration containing no similar provisions).)

Accordingly, the court determines that the condominium is not subject to the provisions of the Condominium Act regulating "convertible land."

III. Effect on Lilac's claims

Since the court has determined that Monument Garden has certain development and ownership rights, and that the condominium is not subject to the provisions of the Condominium Act regulating "convertible land," the court must consider the effect these determinations have

[9] The New Hampshire Supreme Court's order affirming the trial court's decision is available at http://www.courts.state.nh.us/supreme/finalorders/2015/20140306.pdf.

on Lilac's claims. As explained above, Lilac's verified complaint includes four declaratory judgment claims and a claim for unjust enrichment/disgorgement. (Verified Compl. ¶¶ 36–61.) Each of these claims is dependent upon a finding that: (1) the 2012 deed failed to convey New Meadows' development and ownership interests to Monument Garden; or (2) the condominium is subject to the provisions of the Condominium Act regulating "convertible land." (See id.) Because of this dependence, and because the court has already found in Monument Garden's favor on these issues, Monument Garden is entitled to summary judgment on these claims.

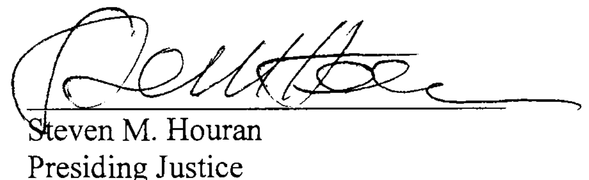
Lilac also asserts four claims seeking injunctive relief and a claim seeking an attachment. (Id. ¶¶ 62–86.) To the extent these claims seek preliminary injunctive relief, a pre-judgment attachment, and court approval to file a writ of lis pendens, they have been resolved by the court's (Temple, J.) preliminary order. (See court index #25.) Additionally, to the extent these claims seek permanent injunctive relief and a post-judgment attachment, for the reasons set out in this order and the preliminary order, Lilac has failed to establish entitlement to such relief. See N.H. Dep't of Envtl. Servs. v. Mottolo, 155 N.H. 57, 63 (2007) ("[A] party seeking an injunction must show that it would likely succeed on the merits." (citation omitted)); RSA 511:1 (2010) ("[P]roperty may be attached following the entry of judgment for the plaintiff." (emphasis added)). The defendants are, therefore, entitled to summary judgment on these claims to this extent.

CONCLUSION

For the foregoing reasons, the court GRANTS the defendants' motion for summary judgment on Counts I–X[10]. Lilac's cross-motion for summary judgment on Counts I–III, and V–X is DENIED.

So Ordered.

June 8, 2016



Steven M. Houran
Presiding Justice

[10] As did the court (Temple, J.) in the December 8, 2015 preliminary order, and for the same reasons, the court does not rule on Lilac's request for court approval to file lis pendens, as court approval is not required for such a filing. (Court index #25, at 17.)

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2016, I served two (2) copies of the foregoing document to counsel by priority mail, postage prepaid, as follows:

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