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The Condominium Doctor is In: Common Condominium Problems and How to Solve Them

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In the following materials, I will set forth a problem, followed by a provision (or provisions) that solves (or at least addresses) the problem.

Problem 1. **A suburban development consisting entirely of detached single-family homes, developed by two developers with adverse interests.**

Issue 1.
"Happy Acres" (obviously a pseudonym) is a development of sixty detached single-family homes, served by a private sanitary system that the developer constructed. In such cases the Department of Environmental Protection ("DEP") is concerned about the maintenance, repair and eventual replacement of the private sanitary system over the years. The DEP usually insists that such a development be created as a condominium, since the condominium law and related cases provide a well-established method by which the homeowners can be compelled to make monthly payments for the maintenance, repair and replacement of the common areas and facilities – in this case, most prominently, the private sanitary system.

Solution: The development was created as a condominium.

A purchase and sale agreement was entered into between Developer A, as seller, and Developer B, as buyer, under which Developer B agreed to purchase numerous parcels of Developer A's land, at closings about three months apart, over a period of three years. There were sixty residential phases. Each phase consisted of a single-family detached house. When a unit (house) was completed, developer B would add it to the condominium by phasing amendment to the master deed. Appurtenant to each unit was an easement, for the exclusive use of a parcel of land called an "Exclusive Use Area" (or "EUA"). For example, Unit 25 would be a detached single-family home, appurtenant to which would be the exclusive right to use EUA 25. Architecturally, the development looks like sixty detached single-family homes, with lovely yards. Legally, it is a condominium.

There were two developers. Developer A had owned the land for many years. Developer A wished to construct retail buildings in the condominium, but he did not want to develop residences. Developer "B" wanted to develop the residential portion of the condominium.

Issue 2: Developer B's attorneys (us) were concerned about the possibility of later disharmony between Developer A and Developer B, or the possibility of Developer A experiencing financial difficulty, in which case there might be liens on the land which Developer A had contracted to sell to Developer B, and Developer A might be incapable of satisfying these liens out of the sale proceeds. This would obviously interrupt Developer B's plan to proceed

with the entire residential development.

Solution: The solution was to provide that when a unit and its EUA were added to the condominium, if it had been owned by Developer A immediately prior to its being added to the condominium, then the unit so added would remain the exclusive property of Developer A, and Developer A, acting alone, could execute a phasing amendment to add the unit to the condominium. Developer A, acting alone, could execute a deed or mortgage of the unit. The same applied to Developer B. Therefore, although both Developer A and Developer B were declarents of the master deed, phasing amendments for "A's units" could be signed unilaterally by A alone, as could deeds and mortgages to "A's units". Similarly, phasing amendments for "B's units" could be signed unilaterally by B alone, as well as deeds and mortgages to "B's units."

A residential unit consisted of an entire house; both structural as well as non-structural portions, including the foundation, footings, exterior walls, roof, and HVAC systems.

It is said that "Lawyers are paid for worrying about things they know will never happen." In this case, the development proceeded on schedule, was successful, there was no disharmony between Developer A and Developer B, and neither suffered any financial setbacks. All of the residential units have been sold.

Developer A built commercial units, and added them to the condominium.

Problem 2. A newly constructed high-rise luxury, mixed-use condominium in Boston, with different budgetary requirements for retail units and residential units.

The ground floor of this urban condominium contains retail units. It also contains an entrance lobby for the residential units, and an automobile entrance for a three-level subterranean garage. The second through eighteenth floors consist of a large number of rather pricey residential condominium units.

Issue 1 Urban mixed-use condominiums offer many advantages and I believe they will become more numerous in the future. The post-World War II suburban concept that retail and residential areas should be separated (preferably with a large buffer) has no application to the city. (It may not even make sense in the suburbs.) It is common, however, for tension to develop between the owners of the retail units and the owners of residential units in any mixed-use condominium. The owners of the retail units should have the flexibility to operate their units without undue interference by the residential unit owners, but the residential unit owners should be protected against problems that might occur if the commercial units are poorly managed; for example, garish signs, "undesirable" uses such as pornographic bookstores, massage parlors, or similar emporiums of sin, or at least bad taste.

Solution: In this condominium, the master deed and condominium trust provisions permitted flexibility to the owners of the commercial units, while protecting the rights of the residential owners. See Extracts of Master Deed of High Rise Towers Condominium.

Issue 2 The budgetary requirements for the commercial units differ from those of the

residential units. For example, there is no reason for the commercial units to have to pay for the twenty-four hour concierge service, or the elevators to the residential floors. Also, only unit owners who own easements for the use of a parking space should be required to pay for the maintenance of the garage, since it seems unfair to require residents who don't own a parking space to have to contribute to the maintenance of the garage.

<u>Solution</u>: This problem was solved by the use of four condominium budgets:

Budget A. A condominium common area budget containing items that affect the entire condominium such as, for example landscaping and insurance.

Budget B. A commercial budget, covering only the commercial common areas.

Budget C. A residential budget, covering only the residential common areas.

Budget D. A parking budget, which represents the cost of maintaining the parking garage, divided by the number of parking spaces.

Each unit owner, whether residential or commercial, pays his/her share of Budget A. Each commercial unit owner pays his/her share of Budget B, but not Budget C. Each residential unit owner pays his/her share of Budget C, but not Budget B. Each owner of one or more parking space easements pays his/her share of Budget D. Thus, the condominium form is preserved, but the various expenses are shared in a fair manner (and one that probably wasn't contemplated when our condominium statute was enacted back in 1963.)

<u>Problem 3.</u> An industrial condominium consisting of six seafood-processing plants located on land owned by an agency of the City of Boston. The land was leased from an agency of the City of Boston for 60 years (with no extension option). The project was financed by means of Industrial Revenue Bonds that were supported by a letter of credit from a major bank. The bank took a mortgage on the leasehold to secure the debt of the unit owners to the bank in the event that the bank was called upon to pay under its letter of credit.

A problem inherent in all leasehold condominiums is the danger of a summary process action in which the rights of all unit owners would be extinguished, even though at least some of the unit owners contributed to the payment of the ground rent.

<u>Solution:</u> Fortunately Chapter 183A, Section 8A, subsection 6(b) provides "After the consent of a lessor is recorded, neither the lessor nor any successor in interest of the lessor may terminate the leasehold interest of a unit owner, who makes timely payments or tender of said timely payment by certified mail of such unit owners' share of the rent and otherwise complies with all covenants and conditions which, if violated, would entitle the lessor to terminate the lease. A unit owner's leasehold interest is not effected by failure of any other person to pay rent or fulfill any other covenant or condition."