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Issues In Condominium Law
Chapter 242 Of The Acts Of 1998

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Chapter 183A, the Massachusetts condominium statute, is a first generation condominium enactment, based upon an FHA Model Act. It is essentially an enabling act, and was so construed by the Massachusetts courts for many years after its enactment in 1963.

For example, in the case of *Tosney v. Chelmsford Village Condominium Ass'n*, 397 Mass 683 (1986), the court said: "Chapter 183A is essentially an enabling statute. Although it lays out certain minimum requirements for setting up condominiums, it also provides planning flexibility to developers and unit owners. Matters not specifically addressed in the statute should be directed to the parties to be worked out." Other cases followed the same trend.

However, in 1991 the Supreme Judicial Court decided the case of *Kaplan v. Boudreaux* 419 Mass. 435, which began a trend toward a narrower interpretation of Act. In that case, the unit owners amended the master deed by a 75% vote to grant the exclusive use of a walkway to the owner of the only unit served by the walkway. The court held that because the walkway was a part of the common areas, a 100% vote was required.

The Supreme Judicial Court adopted a rather more restrictive view in *Strauss v. Oyster River Condominium Trust*, 417 Mass. 442 (1994). This condominium consisted of 9 free-standing dwelling units. The master deed authorized each unit owner, with the written approval of a majority of the trustees of the condominium trust "to construct additions to his unit." On several occasions, unit owners obtained the written approval of a majority of the trustees and constructed additions to their units which extended into the common areas.

Unfortunately, the court held that such additions were unlawful because they were not approved by <u>all</u> the unit owners, and therefore the percentage of undivided interest in each unit in the common areas and facilities was altered. The case followed the unfortunate line of reasoning established in *Kaplan*. The result is particularly regrettable because the unit owners and the trustees acted in reliance upon a rather explicit provision of the master deed.

In late 1994 the legislature adopted Chapter 365 of the Acts of 1994 (which by its terms became effective on January 1, 1996) amending the Act to try to restore some flexibility to condominium associations to grant various rights to unit owners, but the enactment was unclear and unsatisfactory.

Fortunately, in 1998 the legislature passed Chapter 242 of the Acts of 1998 ("Chapter 242"), which restored to condominium associations some of the flexibility lost under the *Kaplan* line of cases. In fact, Chapter 242 specifically states that the grant of an easement in the common area, or the grant of limited common area, will not be deemed to affect or alter the undivided interest of any unit owner, thereby overruling the *Kaplan* decision on that point. (Section 5(b)(1) of C. 183A). I believe that Chapter 242 will overcome the difficulties created by the *Kaplan* case.

Chapter 242 was first enacted on March 2, 1998, but the acting governor refused to sign it. After various legislative machinations, it was passed again and signed by the governor on August 7, 1998.

Chapter 242 has three main thrusts:

1. Limited common areas and easements.
2. Phasing rights.
3. Superlien changes.

1. (a) <u>Limited Common Area</u>

The new enactment permits condominium associations to "Grant to or designate for any unit owner the right to use, whether exclusively, or in common with other unit owners, any limited common area and facility, whether or not provided for in the master deed. This means that the condominium association can create limited common area and grant the use of the same to one or more unit owners. Section 5(b)(2)(ii) of C. 183A.

Further, the grant or designation of the right to use limited common area may be made "upon such terms as deemed appropriate by the governing body of the organization of unit owners." Presumably, this means that condominium association can charge a unit owner for the use of limited common area. I have already used this very useful statute on a number of occasions. There are a number of requirements:

1. Consent must be obtained from all unit owners and first mortgagees of units shown on the recorded condominium plans as immediately adjoining the limited common area or facility so designated.

2. Consent must be obtained from 51% of the number of all mortgagees holding first mortgages on units who have given notice of their desire to be notified thereof as provided in subsection (5) of Section 4 of C. 183A. I'll call this the "51% of mortgagees requirement"—more on this requirement later.

3. If the limited common area or facility directly and substantially impedes access to any unit, the consent of the owner of that unit and its first mortgagee (if the mortgagee has requested notice as aforesaid) is also required.

4. The signature of the grantee and his/her mortgagee(s) is also required.

These requirements seem—and are—straightforward and simple, with the exception of the requirement for mortgagees' consents. Subsection (5) of Section 4 of Chapter 183A provides that the condominium association must provide to each mortgagee (not just first mortgagees) written notice of the association's name and mailing address and also any changes in name and mailing address. I recommend that this be given certified mail, return receipt requested and also first class mail. Each mortgagee (not just first mortgagees) must give written notice of the mortgagee's name and mailing address to the condominium association and also any changes in name and mailing address.

Also, any first mortgagee may, at any time give notice to both the unit owner and the condominium association of its desire to receive notice regarding the granting of an easement or other interest, or granting or designation of limited common area or the taking of other action by condominium association as provided in Section 5(b)(2) of C. 183A. The "51% of mortgagees requirement" discussed above may be simpler to comply with than it first appears, since one needs only the consent of first mortgagees ". . . who have given notice of their desire to be notified thereof as provided in Subsection (5) of Section 4." In practice, not many mortgagees make such a request; although more mortgagees may do so in the future as they become familiar with the provisions of this new enactment. In order to ascertain whether to give notice to mortgagees, one should ask the condominium association and its manager if any letters have been received from mortgagees asking for such notice. However, there is a trap for the unwary here. Record keeping in some small condominiums is not what it should be; the records being kept in the units of the trustees for the time being, and it is possible that a mortgagee's request may be lost or overlooked.

Another very useful provision of the new enactment is that any consent required by subsection (b)(2) of Section 5 will be deemed to have been given if the unit owner or mortgagee whose consent is required fails to object within sixty (60) days of written notice by certified and first class mail. The statute continues "The consent of each mortgagee, to the extent required hereunder, shall be counted separately as to each unit upon which such mortgagee holds a mortgage, based upon one vote for each unit. In no event may a consent required of a mortgagee under this subsection "[subsection (b)(2) of Section 5]" be withheld unless the interests of the mortgagee would be materially impaired by the action proposed. In the event of any conflict between the provisions of this subsection and of the master deed, trust or by-laws or other governing documents of the condominium, this subsection shall control. Any third party interested in title to said condominium or condominium unit or units may conclusively rely upon the recitation of compliance contained within any instrument recorded pursuant to this subsection." Very helpful language indeed.

The limited common area provisions (Section 5(b)(2)(ii)) will be extremely useful. As noted above, the 1998 enactment (Section 5(b)(1) of C. 183A) specifically states that the grant of an easement in the common area, or the grant of limited common area, will not be deemed to affect the undivided interest of any unit owner, thereby overruling the Kaplan decision on that point.

The new enactment defines limited common areas and facilities as "Limited common

areas and facilities, a portion of the common areas and facilities either (i) described in the master deed or (ii) granted or assigned in accordance with the provisions of this chapter by the governing body of the organization of unit owners, for the exclusive use of one or more but fewer than all of the units."

(b) Easements

The new statute also permits condominium associations to grant easements over the common areas and facilities. The consent of at least 51% of the number of all mortgagees holding first mortgages on units who have requested to be notified thereof as provided in Subsection (5) of Section 4 of C. 183A must be obtained. This is the same "51% of mortgagees requirement" discussed above. Section 5(b)(2)(i) of C. 183 A.

2. Phasing Rights

Condominium associations can now extend or revive phasing rights which were provided in the master deed, but have either expired, or are about to expire. Typically, phasing rights (the right to add additional units, and sometimes land, to the condominium) are reserved by the developer in the original master deed, which also sets forth the time limit within which the phasing rights can be exercised. Usually, the time period is seven years, because that is the period recommended by Fannie Mae, the largest purchaser of residential mortgages. During the real estate recession of the late 1980s and early 1990s, development came to a stop. Consequently, there were, and are, a number of condominiums whose phasing rights expired before the developer could exercise them. Under the new enactment, condominium associations can extend phasing rights, or revive those which have already expired. In order to exercise these rights, the association needs a vote of seventy-five percent of the owners of units, or such lower percentage, if any, as the master deed may provide. The consent of 51% of the number of mortgagees holding first mortgages who have given notice of their desire to be notified under Section 4(5) of C. 183A is required. This is the same "51% of mortgagees requirement" mentioned above.

"Any action taken pursuant to this subparagraph" the enactment says "shall be taken upon such terms and conditions as the organization of unit owners may deem appropriate . . ." Presumably, this means that the condominium association could charge a developer for the right to exercise development rights which have expired, but are revived by unit owner vote in accordance with the new statute.

3. Superlien Charges

The third major thrust of the new act affects the superlien that was added to Chapter 183A by Chapter 400 of the Acts of 1992. Under the new enactment, if a lender who holds a first mortgage agrees in writing that the association has a priority lien and agrees to pay, within sixty days (1) any delinquent condominium fees not exceeding six months of condominium expenses, (2) reasonable attorneys' fees (including a title search) and (3) all future common expenses until the mortgage is foreclosed or released, the association cannot bring a law suit to enforce its superlien. The amount covered by such an agreement cannot include late

charges or interest. The new statute says that special assessments are included if due after the notice of delinquency, but not special assessments under section 18 of Chapter 183A, which deals with unit owner votes on certain assessments. However, I think this special assessment language applies only to clause (3) because the enactment defines common expenses under clause (1) as ". . . regularly recurring budgeted common expenses . . . that would constitute a priority amount if an action had been commenced . . .," and Chapter 183A clearly excludes special assessments from the superlien.

This provision simply codifies an informal agreement that many condominium lawyers had worked out with Federal Home Loan Mortgage Corporation ("Freddie Mac"). In essence, if the bank agrees to pay the amount covered by the superlien, the association is precluded from bringing the suit.

Notice that clause (3) provides that as a part of the agreement, the lender must agree to pay all future common expenses until the mortgage is foreclosed or released. Suppose, as often happens, that the delinquent unit owner—or the lender—pays the arrearage to the condominium association, and the lender does not foreclose the mortgage. Under clause (3), the lender is required to pay all future common expenses. Of course, lenders are not compelled to enter into such agreements. It may be that the legislature made a mistake when it wrote this provision—or it may be that the banking industry was satisfied to accept the obligation to pay all future common expenses in return for protection from suits by condominium associations. From the point of view of the banking industry, lenders can avoid the "rolling lien" feature of the superlien law—to which they always took umbrage—by paying common expenses.

This could be a useful provisions because it allows lenders to concede that a superlien exists without the association having to file a lawsuit; but I do not think it will be utilized much because of the requirement that the lender must also agree to pay all future common expenses.

Within ten days of request by a first mortgagee, the association must provide a written statement in "reasonable detail" of the dollar amount the first mortgagee would be required to pay, if it so elected, in order to cause the association not to sue to collect the superlien. The first mortgagee has fourteen days to enter into a written agreement described above, but I do not think the mortgagee is compelled to do so. Of course, if it does not, the association can sue. Unless the association has notice of a first mortgagee's foreclosure sale scheduled within thirty days, it can take no action to enforce its superlien for twenty-four days after receipt of a request for a statement from a first mortgagee or fourteen days after the association mails the statement, whichever is less. It was always my practice (and that of most condominium attorneys) to stop enforcement action if the mortgagee agreed to pay within a reasonable time.

4. Other changes

The new enactment makes a number of other changes.

Condominium associations may now charge "a reasonable fee" for a 6(d) certificate. No fee can be charged to a mortgage holder in connection with a foreclosure of a mortgage if the mortgage holder has given the association notice of its intention to foreclose.

The new statute changes Section 5(b)(1) to read "The percentage of the undivided interest of each unit owner in the common areas and facilities as expressed in the master deed shall not be altered without the consent of all unit owners whose percentage of the undivided interest is materially affected, expressed in an amendment to the master deed duly recorded; provided, however, that the acceptance and recording of the unit deed shall constitute consent by the grantee to the addition of subsequent units or land or both to the condominium and consent to the reduction of the undivided interest of the unit owner if the master deed at the time of the recording of the unit deed provided for the addition of the units or land and made possible an accurate determination of the alteration of each unit's undivided interest that would result therefrom."

This makes clear that in a phased condominium, the acceptance and recording of a unit deed constitutes the grantee's consent to the addition of subsequent units or land or both and consent to the reduction of the undivided interest of the unit owner. Since the total of the undivided interest of all units in the common areas and facilities must always equal 100%, whenever the condominium is expanded by adding additional phases, the percentage of the undivided interest of the existing units must diminish. The language quoted above "if the master deed . . . made possible an accurate determination of the alteration of each unit's undivided interest that would result therefrom" is an interesting provision. Some feel it means that the master deed must set forth a formula by which one can calculate the alteration of each unit's undivided interest as new units are added. The wording is odd, however, because under C. 183A there can only be one way in which to calculate percentage interest; specifically the language of Section 5(a) which reads "Such percentage shall be in the approximate relation that the fair value of the unit on the date of the master deed bears to the then aggregate fair value of all the units." Since this is only method possible under the statute, what was the point of including in Chapter 242 the phrase "and made possible an accurate determination of the alteration of each unit's undivided interest that would result therefrom?" Is it now permissible to simply recite in the master deed of a phased condominium that the undivided interest in the common areas and facilities of units in future phases will be calculated in accordance with Chapter 183A? Does this meet the requirements "made possible an accurate determination of the alteration of each units undivided interest that would result therefrom"? It may mean that one has to set forth a very explicit formula; but what is the point of such a requirement since the formula would only restate the requirement of Section 5(a)? In the case of a registered land condominium, the Land Court has long required that the original master deed set forth the undivided percentage interest for all of the units in all of the future phases at the outset; the Land Court may agree that these percentages can be changed in future phases in relatively small amounts. But since section 5(a) sets forth the one and only way in which undivided interest can be calculated—no other way is possible under the statute—why isn't it sufficient to state that the undivided interest of each unit in future phases will be calculated in accordance with the statute? What other way is there?

The new enactment also makes it possible for the association to "Sell, convey, lease or mortgage any rights or interest created as a result of the exercise of rights established [in Section 5(b)(2)(iii)]." For example, the sale of withdrawn land.

Chapter 242 also makes changes in Chapter 254 as it relates to the foreclosure of the lien for common expenses.

The new law has already had an impact upon the operations of condominiums in Massachusetts. The "superlien agreement" provisions clarify and simplify the process of collecting common expenses, while reducing legal costs. The provisions regarding designation of limited common areas, and granting of easements give additional flexibility to condominium associations. The provisions regarding the extension and revival of development rights will clarify the status of many condominiums caught in limbo when development rights expire.