



by Frank A. Lombardi, Esq.



Case Closed

R.I. Supreme Court Clarifies Development Rights

In 2003, I began arguing a case before the Providence County Superior Court: Alessi vs. Bowen Court Condominium Association. Nine years later, the case was heard on appeal by the Rhode Island Supreme Court. On June 4, 2012, the Supreme Court affirmed the lower court's judgment, granting a victory for my client, the Association: Case No. 2010-436-Appeal (PC 03-235). This decision clarifies the Rhode Island condominium law with respect to development rights. The ruling states if development rights expire unexercised, not only does the developer lose the rights to develop, but with this case, any successor in interest to those development rights are subject to the same time limitations.

The Facts

On Jan. 10, 1989, a developer created the Bowen Court Condominium by declaration. The declarant conveyed to the condominium several lots consisting of approximately 6.7 acres. In the Declaration of Condominium, he gave himself 10 years to fully develop the condominium and the right to withdraw one of the original lots from the condominium. In 1990, the developer specifically designated that lot as "withdrawable real estate." In other words, should economic times not warrant construction of more units, he could withdraw it and not make it part of the condominium. At the same time, the developer secured financing to build more units on the lot. Unfortunately, he went bankrupt soon after. To make matters worse, the lender that held his mortgage itself became insolvent, and the R.I. Depositor Economic Protection Corp

(DEPCO) took possession of the loan.

After the developer declared bankruptcy, DEPCO foreclosed on the mortgage. At the time, the developer had three years left to develop the lot. At the foreclosure auction, Dr. Joseph Alessi bought the lot, along with the right to develop the property. Unfortunately, he failed to exercise his right to develop the lot or withdraw it from the condominium until one year after the 10-year right to develop expired. After the rights expired, Dr. Alessi demanded the association permit him to withdraw the lot. It refused and he sued the association.

Trial of the Case

At trial, Dr. Alessi's attorney argued even though the original developer's right to withdraw the property expired, because DEPCO had taken over the mortgage and sold it to him, Section 34-36.1-2.18 of the R.I. Condominium Act gave him the right to withdraw or exclude the property from the condominium complex. He argued that because the statute provision was silent with respect to a time frame, his client could require the association to exclude it at any time, even after development rights expired.

He argued that RIGL 34-36.1-2.18, permitting a bank that foreclosed on a portion of condominium property to exclude it from the condominium also gives it super powers above and beyond the original developer.

I argued on behalf of the association that Dr. Alessi should not have more rights than the original developer, and that the bank and he "stood in the same shoes" as the original developer and were subject to the same limit. Further, I argued even though the

statute is silent as to a time period, when the development rights expired, the property no longer became withdrawable under the terms of the Declaration and as such, neither the developer nor anyone else could withdraw it from the condominium. The trial court agreed and held that the lot now belonged to the association.

Dr. Alessi appealed, and the R.I. Supreme Court affirmed the trial court's decision in our favor.

Lessons Learned

In the current economy, foreclosures are sure to arise. Condominium declarations will list time limits for fully developing the condominium, and developers and/or their banks may fail to develop the property within that time period. When this happens, associations have the ability to refuse permission to build or they can negotiate compensation in exchange for extension or resurrection of development rights. With respect to lending money on a project, lenders should monitor development so that rights do not expire unexercised. Third-party buyers at auction should always do a title exam and be mindful of development time limits.

Associations need to be aware of the development rights in the declaration and if fortune is on their side and the developer or its bank or further successor in interest loses those rights, they may take advantage of this newly acquired property. 

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