

RHODE ISLAND LAWYERS WEEKLY

VIEWPOINT

Associations now in control of development rights

By Frank A. Lombardi

In 2003, I began arguing *Alessi v. Bowen Court Condominium Association* in Providence County Superior Court. Nine years later, the case was heard on appeal, and on June 4 the Rhode Island Supreme Court affirmed the lower court judge's ruling, granting a significant victory for my client, the defendant association.

This decision further clarifies the Rhode Island condominium law in regard to development rights. Specifically, Section 34-36.1-2.10 (b) of the Condominium Act and the cases that interpreted that statute state that development rights that expire unexercised become the property of the unit owners' association. The Court in the *Bowen* case extended the law to apply to lenders holding mortgages on undeveloped condominium property and persons who purchase such property from the lenders at foreclosure.



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Background

On January 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 of land in East Providence. In Article 7 of the Declaration of Condominium, he gave himself 10 years to fully develop the condominium, or, depending on the economic circumstances, 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 further construction of more units, he could simply withdraw it and not make it part of the condominium. At the same time, the developer secured financing to build more condominium units on the lot. Unfortunately, he went bankrupt soon after. To make matters worse, the lender that held his mortgage, the Rhode Island Central Credit Union, itself became insolvent, and the RI Depositor Economic Protection Corp (DEPCO) took possession of the loan.

After the developer declared bankruptcy, DEPCO stepped in and foreclosed on the mortgage on behalf of the Credit Union. At the time of the foreclosure, the developer had three years left to develop the lot. At the mortgage foreclosure auction, Dr. Joseph Alessi bought the lot along with the right to develop the property. Unfortunately, the good doctor failed to exercise his right to either develop this lot or withdraw it from the Condominium until one year after the 10-year right to develop had expired. After the rights had expired, Dr. Alessi demanded that the Association permit him to withdraw the lot from the Condominium. His attorney

acknowledged that the right to develop the property had expired but cited a different statute, RIGL 34-36.1-2.18, which he interpreted to read that upon foreclosure, a lender or a third party taking title to the subject property has a right to exclude the property from the Condominium at any time.

When the Association refused, he sued the Association.

Who Has More Rights?

At trial, Dr. Alessi's attorney argued that even though the original developer's right to withdraw the property had expired, because DEPCO had taken over the mortgage and later sold it to him, 34-36.1-2.18 gave him the right to withdraw or exclude the property from the Condominium complex. He further argued that because the statute provision was silent with respect to a time frame, that his client could require the association to exclude it at any time, even after the development rights had expired. Specifically, he argued that RIGL 34-36.1-2.18, which permits a bank that has foreclosed on a portion of condominium property to exclude the property from the condominium, also gives it super powers above and beyond that of 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" of the developer and therefore were subject to the same time limit. The court indicated that 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 with my argument and held that the lot now belonged to the Association.

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

Understanding the Precedent

As stated above, the RI Supreme Court had in an earlier case ruled that when a developer fails to exercise development rights on a parcel dedicated to the Condominium, the Association takes title when time runs out. In our case, the Court clarified another section of the Rhode Island Condominium Act (34-36.1-2.18) that was previously unclear and, if left unaddressed, could be detrimental to the interests of associations.

It was determined that this situation involved a bank that had foreclosed on the developer and had sold it to a third party. Specifically, the court held that the State's Condominium Act RIGL 34-36.1-1.01 *et seq*, which is designed to protect consumers' rights, did not create a *perpetual* right for a lender holding or foreclosing on a mortgage. Nor did it create the right of a buyer at a foreclosure sale to exclude or withdraw the property from the Condominium. Rather, all these parties were indeed subject to the same time limitations as the original developer.

In short, the Supreme Court supported the Association's position that the lender and its buyer "stood in the same shoes" as the developer regarding time limitations to exercise his development rights. Bad news for Dr. Alessi but certainly good news for the Condominium, which assumed control of the lot and the enormous value attached to it.

Lessons Learned?

Given the current economic climate, additional foreclosure scenarios such as the one presented here are sure to arise. Condominium declarations will list the time limits for fully developing the condominium, and sure enough, either the developer and/or his bank may fail to develop the property within the given time period. When this happens, Associations and their representatives now will have the ability to refuse to grant developers and their banks permission to build—and they may also be able to negotiate for compensation in exchange for the possible extension or resurrection of developer rights. Or, even better, they may simply refuse any deal offered and keep the land for their own uses.

For lenders, the takeaway is that before lending money on a condominium project, carefully monitor the progress so that the rights do not expire unexercised.

And for the third party buyer at auction, do a title exam and be mindful of the time limitations therein for developing the property.

In the final analysis, nine years has been a long waiting period. But the perseverance has paid off as a significant matter has been resolved.

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