



Condominium Liens and Tax Sales

Over our many years of practice, we have assisted numerous condominium associations in matters relating to the enforcement of covenants and collection of assessments. The N.H. Condominium Act allows associations to file liens on units as security for unpaid assessments. The security afforded by the lien is dependent on its priority in relation to other liens and encumbrances. RSA 356-B. Despite past legislative efforts to change the lien law, the statutory condominium lien is subordinate and junior to purchase money mortgages. In the event of a first mortgage foreclosure, the condominium lien is usually extinguished, as there is typically insufficient equity in the property. Recently, the New Hampshire Supreme Court addressed whether a tax sale extinguishes a condominium lien. Bucholz v. Waterville Estates Association, _ NH _ (September 20, 2007). The case presented an issue of first impression in N.H. In a favorable decision for condominium associations, the Court held that a tax deed does not extinguish a condominium lien and the buyer of a property by tax deed is obligated to pay the unpaid assessments secured by a statutory condominium lien. In this changing economy, tax delinquency and mortgage defaults are on the rise. If a unit in your association is sold in connection with a tax sale, remember that you may pursue the new owner for payment of past due fees that are secured by a valid lien.

WELCOME ATTORNEY DANIEL D. MULLER, JR.

Please join us in welcoming Daniel D. Muller, Jr. to our practice. Attorney Muller has a B.A. from the University of New Hampshire and earned his law degree from Tulane University. Having worked as an attorney for the City of Manchester Solicitor's Office for over eleven years, Attorney Muller brings a wealth of land use, real estate and labor law experience to the firm.

THE SUPREME COURT DISCUSSES VARIANCES

As may you know, a substantial part of our practice includes the representation of property owners seeking land use permits and approvals. We often appear before Zoning Boards of Adjustments seeking a variance from the strict enforcement of the applicable zoning ordinance. Although the evidentiary requirements differ slightly when seeking a use variance (constructing a two-family residence in a single-family zone) as opposed to a dimensional variance (seeking to provide a ten foot setback where twenty is required), the property owner always has the burden of proof. In order to receive a variance, a property owner must prove: (1) granting the variance is not contrary to the public interest; (2) special conditions exist such that enforcement of the ordinance will result in an unnecessary hardship; (3) the use for which the variance is sought is consistent with the spirit of the ordinance; (4) substantial justice will be done if the variance is granted; and, (5) granting the variance will not diminish the value of surrounding properties.

Recently, the N.H. Supreme Court provided guidance of what evidence will be sufficient to satisfy the subjective elements of the variance. Specifically, a property owner may address the "spirit of the ordinance" in two ways. One way is to prove that granting the variance will not alter the essential character of the neighborhood. Another way is to show that granting the variance will not threaten the public, health, safety or welfare of the community. The "hardship" requirement that special conditions exist can be satisfied if the use proposed is allowed in the zone as a matter of right. For example, if you propose to build a single-family home in a single-family zone but need a variance due to the lack of frontage, you will be deemed to satisfy the "special conditions" requirement. The "substantial justice" requirement has always been a concern due to its subjective nature. The Court created an objective balancing test to clarify the requirements. This prong can be satisfied if the applicant shows that, on balance, the harm to the applicant in not granting the variance outweighs the benefit to the community if the variance is denied.

More “Changes” for the Land Use Change Tax

Owners of large parcels of undeveloped property are most likely familiar with current use taxation. To encourage preservation of open space, parcels that exceed 10 acres can be submitted to current use taxation. Once submitted, the parcel is taxed at a fraction of its fair market value. Thus, the owner pays a lower tax bill until such time as the use of the property changes. When the use changes, the property is said to be “taken out of current use” and the owner must pay a penalty known as the “land use change tax” (LUCT). The LUCT is calculated as 10% of the fair market value of the property at the time of the change of use.

Although the statute describing the method of determining the penalty is fairly clear, municipalities have taken dramatically different approaches to assessment of the LUCT. By delaying the time when the assessment is made, municipalities could easily manipulate the amount of the tax. For example, consider a 15 lot subdivision on 12 acres of land. Typically, development of the site would begin with clearing activities for the road. The question is how much of the land is

considered changed in use at that point for the purpose of calculating the LUCT. According to the statute, the LUCT is assessed on “the number of acres on which an actual physical change has taken place . . . and land not physically changed shall remain under current use assessment.” In a traditional subdivision, this allows municipalities to assess the tax on a lot-by-lot basis as the lots are sold.

On September 20, 2007, our Supreme Court took on this issue. The case was the result of the LUCT assessment on a 20 unit condominium cluster development. Like most developments of this size, a large parcel of open space was required by ordinance. Each unit owner would own an undivided interest in the open space. Although construction of the roads began in 2000, the LUCT wasn’t assessed until individual units were sold. At that time, each lot, together with the lot’s share of the open space, was assessed the tax. The developer paid the tax, but appealed the assessment asserting that the entire development should have been assessed the LUCT when the road construction began.

Somewhat surprisingly, the Court agreed with the developer. The Court first noted that the general rule of lot-by-lot assessment does not apply “when land, though not physically changed, is used in the satisfaction of density, setback, or other local, state or federal requirements as part of a contiguous development site” Since, in the example of the case before the court, the project included open space to satisfy the local ordinance, the open space is considered changed in use at the time construction begins. In addition, since the open space is part of the “contiguous development site,” the statute treats the property and the open space as a single parcel of property regardless of the number of units approved for development. Consequently, the entire “development site” is considered changed in use when construction begins. The Court also determined that the Current Use Board had no authority to change this interpretation by rule. Thus, the benefit to the developer that took on the battle is an assessment presumably based on a lower fair market value resulting in a lower LUCT.

Who Is The Client, And Does It Matter?

Recently, a unit owner in a condominium association that our firm represents wanted to attend a board meeting scheduled with us to discuss our defense of a pending lawsuit. We explained to the association board our view that the unit owner should not be present for fear that the conversation would not fall within the lawyer-client privilege. The owner logically and clearly stated that since all unit owners are members of the association and pay the legal bill, all unit owners are the client and the communication should remain privileged. Unfortunately, the law does not support such a broad view of the privilege.

The purpose of the lawyer-client privilege is to encourage clients to disclose everything to their lawyers so that the lawyer can fully understand the matter at hand. If the communication is not protected, clients may withhold what they view to be damaging information for fear that it will negatively impact the case. When the client is an artificial entity such as a corporation or condominium association, which communications are protected?

According to court rules, the privilege extends to communications with representatives of the client “having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.” Thus, in our condominium association example, since only the officers and directors of the association can contract for any service on behalf of the association, the privilege does not extend beyond that group. With a non-board member present, there is no privilege. In the corporate setting, the privilege applies to communications with the officers, directors and upper level management. Unfortunately, the rule becomes less clear as we proceed further down the chain of command. When sensitive communications will occur at a meeting, the attendance should be limited to the smallest group possible with a need to know.

Your Dependents Just Got Older

In 2006, the New Hampshire legislature weighed in on an emotional debate. A recent tragic story involving health insurance coverage for a terminally ill young woman was at the center of the discussion. The young woman was a college student who could no longer continue full-time status due to her illness. Under existing law, her parents' coverage was only available to dependents between the ages of 19 and 24 if they were full-time college students. Thus, she no longer qualified for coverage under her parents' plan and was left to deal with her catastrophic illness and how to finance treatment.

The end result of the debate in the legislature was a new definition of a "dependent" for purposes of determining who is eligible to obtain health insurance benefits. Under prior law, dependent children could not be older than 18 or, if in school, not older than 19. According to the new law effective September 15, 2007, a dependent now includes a child by blood or by law who is less than 26 years of age; is

unmarried; is a resident of New Hampshire or is enrolled as a student at a public or private institution of higher education; and is not covered under any other plan.

Although drafted with the unfortunate circumstance of the part-time college student in mind, the law actually goes further. With the new definition, a dependent does not need to be in college if the young adult is a resident of New Hampshire. In addition, the enrollment in higher education criteria has been broadened to also include part-time students. Thus, a young independent adult who no longer lives with mom or dad has a new option. If the young adult chooses not to participate in an employer sponsored plan for whatever reason, the young adult can obtain coverage under a parent's plan. In most instances, participating in the family coverage will be less expensive for the young adult than a stand-alone health plan. Thus, healthy young adults who may otherwise have chosen to go without coverage may find a more cost effective choice.

The statute provides a limited opportunity to add new dependents to existing coverage outside of the standard enrollment period. Thus, if this is an issue of concern for employers or those seeking to add their young adult children to existing coverage, the matter should be raised with the insurer as soon as possible.

Upcoming Seminar

We are proud to announce that Attorney John Cronin will be hosting a National Business Institute continuing legal education seminar titled *Operations and Conflict Resolution in Condominiums and Homeowners' Associations* on November 13, 2007 at the Radisson Hotel in Manchester, New Hampshire. The program deals with strategies to manage community associations and handle disputes with owners. Contact us for information on how to register!

Read Any Good Emails Lately?

How many email messages are in your inbox? Many of us who pride ourselves in our organizational skills and well ordered desks have hundreds of electronic messages on our systems. A company of ten or more employees could have more than 10,000 messages at any given time. This easy at-our-finger tips communication has replaced traditional correspondence with an actual ink signature. A telephone conversation is now viewed by many as an unnecessary waste of time. In the not too distant past, a simple business letter was likely dictated, typed, proofread and mailed. Two or more people may have been involved. That is clearly no longer the case. The world of instant messaging is here to stay.

Our legal system is not usually the first to embrace change, but email messages are showing up more frequently in the Courts. We recently relied on email messages to establish important terms of a contract to support our client's breach of contract action. Email messages have also been used in New Hampshire Courts to justify a wage claim against a former employer; as evidence of stalking and harassment in criminal cases; to support a claim that a former employee had violated a non-competition agreement; as evidence of illegal retaliation in a whistle blower action; and to establish that an applicant for admission to the New Hampshire Bar had exhibited an inability to exercise reason and good judgment.

Once litigation has started, all relevant email messages must be preserved. Now, the first letter in most legal proceedings is a request to preserve all electronic information that may be remotely connected to the matter at hand. If email messages are subsequently deleted, there will be charges of spoliation of evidence, sanctions and the suggestion that there must be something to hide. Because email messages are so easy to copy, forward and share, they never truly disappear. Email messages have legal significance. They can be legally binding contracts, admissions, and evidence. Before hitting "send," give your email messages a second look.