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Fractured Condos Fraught With Buyer Risk



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The current real estate market presents potentially profitable opportunities for developers or property investors looking to invest in situational or fractured condominium projects. However, the same market conditions that give rise to the potential returns present many legal pitfalls that must be bridged. One significant pitfall is the possibility of a buyer being considered a “successor” developer. A purchaser of as few as seven condominium units may be considered either a “successor” or “concurrent” developer as defined by the Florida Statutes and the Florida Administrative Code. Unfortunately, the statutes and regulations are unclear as to the parameters for determining with certainty which class may apply to any given set of facts. The differences between the classes are significant in the areas of liability, association control and access to developer rights.

“Successor” developers are defined as “any person, other than the creating developer or concurrent developer who offers condominium parcels for sale or lease in the ordinary course of business.” This definition seems circular, but there is another part to the test. As noted below, a successor developer who desires to have the rights of the original or “creating” developer will typically seek a written assignment of developer rights along with the transfer of units.

“Concurrent” developers are defined as “any person who acts concurrently with a developer in selling or leasing condominium parcels in the ordinary course of business.” Logically, a concurrent developer cannot be the only developer offering parcels for sale; there has to be at least one other developer, either a creating or successor developer, or potentially another concurrent developer.

A successor developer has succeeded to the rights and interests of the creating developer. The successor developer gets the creating developer’s rights reserved in the condominium declaration and assumes control of the condominium association as such control may exist at the time of the acquisition of units. In order to assume control of the condominium association, the regulations require that the transfer of units be accompanied by a written assignment of all developer rights. By assumption of the rights, the successor developer also assumes the existing obligations of the seller. In many cases, the rights gained are substantial; the successor developer is able to complete the development of an incomplete project, can usually select the Board of Directors, and continue the developer’s marketing efforts. These are tremendous benefits, but they come at a cost. By taking these rights, the successor developer assumes the warranties on units sold by the creating developer and various other obligations including claims by the association.

A concurrent developer usually seeks to operate independently of the creating developer. While not addressed in either the statutes or regulations, a logical inference would be that the liability of the concurrent developer should be limited to units sold personally. While a concurrent developer does not automatically

assume control of the association, he or she is able to vote their unit shares for the Board of Directors. Additionally, it is unclear whether a concurrent developer succeeds to the developer's rights in the condominium declaration. Most provisions in a typical condominium declaration granting rights to the "developer" refer to the creating developer and their "successors or assigns". Of course, a concurrent developer does not typically want to be a "successor" and would not want to accept an assignment that could trigger assuming all obligations.

When making a bulk purchase of units, the purchaser will, in most instances, be classified as either a successor or concurrent developer. Without a bright-line test to determine the classification, the risks cannot be eliminated with certainty. There are, however, steps that can be taken to reduce some of the risk, particularly if the buyer is only acquiring completed units. Some may involve clarification of the terms of the condominium declaration for the project or providing adequate security for association budget shortfalls.

Furthermore, successor developers may benefit from association control but they are subject to statutory turnover requirements that will divest the successor developer. In one case, a buyer of 60% of all units was deemed to be a successor developer and, because turnover should have previously occurred, was divested of all voting rights. The concurrent developer votes the developer's units as does any other unit owner; leaving control of the Board based on the relative number of units owned.

Given the potential risks, each transaction must be individually examined in order to assess the impact of either being a successor or concurrent developer, with the advantages and disadvantages being weighed after thorough due diligence. A careful investigation of the project, its physical condition, the association budget and actual spending, association services provided by the creating developer and other operational costs that may impact existing unit owners, should be undertaken with the aid of skilled professionals. ■