Does a Successor Developer Have an Obligation to Pay Assessments under the Michigan Condominium Act?

By Kevin Hirzel, Esq.

The recent upswing in the real estate market has led to a resurgence of failed condominium projects in Michigan. During the economic downturn, many condominium developers went out of business and lost title to all of their units via a deed in lieu of foreclosure, foreclosure by a bank, tax foreclosure or bankruptcy leaving many condominiums unfinished. As a result, many developers are now becoming successor developers as they purchase lots in these failed condominium projects with the intent of completing the condominium. Similarly, many developers that weathered the downturn in the real estate market are now able to sell lots in their existing inventory to other developers at a profit. Accordingly, the improving economy has led to an increase in successor developers for Michigan condominiums.

While many issues often arise as to the obligations of a successor developer with respect to a condominium, one of the most common issues is whether a successor developer has an obligation to pay assessments to the condominium association. While this area of the law is not settled, as will be discussed below, it is the opinion of this author that a successor developer is likely obligated to pay assessments to a condominium association and that condominium associations should not forego collecting assessments from successor developers.

What is a successor developer?

MCL 559.235 defines a statutory successor developer as follows:

> *… a person who acquires title to the lesser of 10 units or 75% of the units in a condominium project, other than a business condominium project, by foreclosure, deed in lieu of foreclosure, purchase, or similar transaction.*

In addition to having a statutory successor developer under the Michigan Condominium Act, the Master Deed often defines a "developer" as the original developer entity and its "successors and assigns." Accordingly, depending on the language of the Master Deed, an entity may qualify as a "successor" of the developer under the Master Deed merely by acquiring units that were owned by the original developer or receiving an assignment from the original developer.

Is a successor developer liable for the payment of assessments?

Many condominium associations mistakenly believe that a successor developer is not obligated to pay full assessments to the condominium association. This belief is often based on a provision in the condominium bylaws that states that a developer is not responsible for paying assessments or that a developer is only obligated to pay assessments after a certificate of occupancy is obtained. Given that a Master Deed often defines a "developer" to include any "successors" of the developer, it is common for a successor developer to claim the same exemption from the payment of assessments that the original developer included in the condominium bylaws. At first glance, this argument has practical appeal, as the condominium documents are contractual in nature and the Michigan Court of Appeals has held that condominium documents are to be interpreted according to their plain language. See *Rossow v. Brentwood Farms Dev, Inc,* 251 Mich App 652, 658, 651 NW2d 458 (2002). Accordingly, many condominium associations do not attempt to collect assessments from a successor developer based upon a "developer exemption" contained in the master deed and bylaws.

However, the Michigan Condominium Act places limits on a developer's ability to exempt itself from assessments. MCL 559.156(a) of the Michigan Condominium Act states that the condominium bylaws may contain provisions "as are deemed appropriate for the administration of the condominium project not inconsistent ***with this act*** or any other applicable laws." (emphasis added). MCL

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559.156 is a codification of the longstanding common law principle that a court will not enforce an illegal contract. See *Cook v Wolverine Stockyards Co,* 344 Mich 207; 73 NW2d 902 (1955) (holding that an illegal contract is against public policy and will not be enforced).

MCL 559.169 of the Michigan Condominium Act provides as follows with respect to the payment of assessments by each co-owner in a condominium:

> (1) Except to the extent that the condominium documents provide otherwise, common expenses associated with the maintenance, repair, renovation, restoration, or replacement of a limited common element shall be specially assessed against the condominium unit to which that limited common element was assigned at the time the expenses were incurred. If the limited common element involved was assigned to more than 1 condominium unit, the expenses shall be specially assessed against each of the condominium units equally so that the total of the special assessments equals the total of the expenses, except to the extent that the condominium documents provide otherwise.
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> (2) To the extent that the condominium documents expressly so provide, any other unusual common expenses benefiting less than all of the condominium units, or any expenses incurred as a result of the conduct of less than all those entitled to occupy the condominium project or by their licensees or invitees, shall be specially assessed against the condominium unit or condominium units involved, in accordance with reasonable provisions as the condominium documents may provide.
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> (3) The amount of all common expenses not specially assessed under subsections (1) and (2) shall be assessed against the condominium units in proportion to the percentages of value or other provisions as may be contained in the master deed for apportionment of expenses of administration.
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> (4) A co-owner shall not be exempt from contributing as provided in this act by nonuse or waiver of the use of any of the common elements or by abandonment of his or her condominium unit.

In interpreting MCL 559.169, the Michigan Court of Appeals has stated as follows:

> In this case both the bylaws and the act require the assessment of fees to cover the common expenses of the project. M.C.L. § 559.169(3); M.S.A. § 26.50(169)(3); Newport West Condominium Bylaws, art. II, § 4. Under M.C.L. § 559.169(4); M.S.A. § 26.50(169)(4) a co-owner may not be exempted from contributing his or her share of the common expenses by nonuse or waiver of the use of any common element or by abandonment of his or her unit.
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> *Newport West Condo Ass'n v Veniar,* 134 Mich App 1, 10; 350 NW2d 818, 822 (1984).[2]

The plain language of MCL 559.169(1) requires that "…common expenses associated with the maintenance, repair, renovation, restoration, or replacement of a ***limited common element*** shall be specially assessed against the condominium unit to which that ***limited common element*** was assigned…." However, MCL 559.169(1) allows for the condominium bylaws to modify the manner in which an assessment is made with respect to a limited common element. MCL 559.169(2) states that the condominium bylaws may contain provisions that require a co-owner to pay any unusual expenses that benefit less than all of the condominium units and only benefit a specific condominium unit. Finally, MCL 559.169(3) requires

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all remaining common expenses, i.e. ones that are not specific to a limited common element or to a unit, to be assessed equally as to ***all units,*** irrespective of whether the unit is owned by the developer, a successor developer or other co-owner. Accordingly, while there is no published case law that specifically addresses this issue, the plain language of MCL 559.169(3) indicates that the condominium bylaws cannot be modified to eliminate the obligation of a developer or successor developer to pay for common expenses, i.e. general assessments, if assessments are determined based upon the percentage of value assigned to each unit. Given that virtually all condominium documents determine assessments based upon percentage of value, and MCL 559.109(1) requires each unit to be assigned a percentage of value, it follows that a developer and successor developer would be obligated to pay for assessments so long as they own a unit, irrespective of whether they utilize the common elements or attempt to exempt themselves from payment. See *Newport W Condo Ass'n, supra*.

In many instances, developers and/or successor developers will also attempt to define a "unit" in such a manner that would exempt themselves from paying assessments. It is not uncommon for a developer or a successor developer to include language in a Master Deed that defines a "unit" as a completed structure with a certificate of occupancy. A developer or successor developer will then argue that the plain language of the Master Deed indicates that a "unit" does not exist until construction is completed and therefore no assessments can be paid until the "unit" is completed. However, defining a "unit" in such a fashion to avoid paying assessments is also contrary to the plain language of the Michigan Condominium Act. MCL 559.104(3) defines a condominium unit as "…that portion of the condominium project designed and intended for separate ownership and use, as described in the master deed, regardless of whether it is intended for residential, office, industrial, business, recreational, use as a time-share unit, or any other type of use." MCL 559.103(7) defines the common elements of a condominium as "…the portions of the condominium project other than the condominium units." Accordingly, everything that is identified in the condominium subdivision plan is required to be a "unit" or a "common element". See MCL 559.166. While units can be labeled as "must be built" or "need not be built", there is nothing in the Michigan Condominium Act that indicates that payment of assessments is contingent on whether a "unit" is required to be built or that payment of assessments on a "unit" commences when the "unit" is actually built. As such, attempting to redefine a "unit" in the Master Deed in a manner that is contrary to the Michigan Condominium Act is likewise not a justification for a successor developer to not pay assessments.

Conclusion

The author of this article is aware of at least two (2) circuit court opinions in which a court has held that a successor developer is responsible for the payment of assessments. However, given that there is no published case law from the Michigan Court of Appeals or Michigan Supreme Court that specifically indicates that a developer or successor developer is required to pay full assessments for common expenses, the issue of assessing developers and successor developers will remain a hotly litigated issue for the foreseeable future. In many instances, the condominium association and a successor developer will come to a practical resolution that will allow for the condominium to be completed without resorting to litigation. However, until there is published case law resolving this

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issue, successor developers need to be aware of the potential pitfalls associated with paying assessments when they purchase lots in an unfinished condominium. Similarly, condominium associations should be aware that a successor developer may be an additional source of revenue for a condominium association. ■

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Footnotes:

1 This definition is further limited by MCL 559.235(5), which provides in pertinent part:

> A residential builder who neither constructs nor refurbishes common elements in a condominium project and who is not an affiliate of the developer shall not be required to assume and be liable for any contractual obligations of the developer under this section, and shall not be considered a successor developer or acquire any additional developer obligations or rights in the absence of a specific assignment of those obligations or rights from the developer. However, a residential builder that sells a condominium unit shall deliver to the purchaser of that condominium unit the condominium documents that the developer is required to deliver to the purchasers under section 84a(1). This subsection applies only to condominium projects established on or after the effective date of the amendatory act that added this subsection.

2 A developer would also qualify as a co-owner under the Michigan Condominium Act. MCL 559.106(1) defines a "co-owner" as "…a person, firm, corporation, partnership, association, trust, or other legal entity or any combination of those entities, who owns a condominium unit within the condominium project…."