

JEFFREY H. LEVIN
COUNSELLOR AT LAW
85 DEVONSHIRE STREET, SUITE 1000
BOSTON, MASSACHUSETTS 02109

www.levinlaw.justia.net

Telephone 617. 720 .3030
Facsimile 617. 742. 9130

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BUYING A CONDOMINIUM IN MASSACHUSETTS-ITEMS TO CONSIDER

This outline is designed to review some of the issues that should be considered from both a legal perspective and a practical one by the Attorney representing a condominium purchaser and of course by the purchaser, before a deposit is delivered and a Purchase and Sale Agreement is signed.

Although a condominium unit comprises a legal interest in real estate under Massachusetts law (Massachusetts General Laws, Chapter 183A, Section 3), owning one is fundamentally quite different from owning a house. A condominium unit consists of three components:

1. The exclusive right to use the air space between the perimeter walls of the condominium unit.
2. An undivided percentage interest in the common elements comprising the condominium. Common elements generally consist of the land beneath the buildings, other land within the condominium complex, the buildings themselves, all structural and mechanical components including elevators, common hallways, and all common amenities such as pools, clubhouses or other recreational facilities. This percentage interest determines the weight of your vote in managing the affairs of the condominium.

3. Possibly an easement or exclusive right to use a parking space or two, a storage area, or other appurtenance.

An important point to remember is that living in a condominium is basically living within a "mini-municipality," where each unit is afforded a vote in the major decisions made by the unit owner's association, whether the association is a condominium trust or unincorporated association. In such a democracy, one must be prepared to live with decisions made by a majority of owners. This can often lead to tension among owners. For instance, in some complexes, so-called "empty nesters" intending to reside there several years may desire to spend significant amounts of the association's funds on preventive maintenance and improvements, and may encourage special assessments upon each unit owner, and/or higher condominium fees. On the other hand, there may be investors (non-owner occupants), or elderly owners on fixed income, or younger owners anticipating a move who oppose spending any more money than absolutely necessary to run the complex. The existence of a substantial percentage of investors may create problems since tenants are unlikely to maintain the property in the same manner that owner-occupants would.

A significant portion of the Attorney's work involves obtaining and analyzing quite a number of documents. Among these documents are the Master Deed, the Condominium Trust if any, By-Laws and Rules and Regulations of the Condominium Association, the floor plan of the unit, site plan, if any, specimen title insurance policy, if any, tax bill, management agreement, if any, unit owner association operating budget, and financial statements. Of course, in addition to determining the legal sufficiency of the condominium and pointing out to the client the important legal consequences of the condominium documents, the Attorney will review with the client the bundle of rights to be acquired together with the attendant obligations, paying particular attention to those items affecting the individual unit and client. The purchaser should also review these documents prior to signing a purchase and sale agreement, as these documents contain quite a number of practical items that a purchaser should be aware of, including policies with respect to pets, parking, leasing, units owners meetings, insurance, maintenance responsibilities of unit owners and so forth.

MASTER DEED

The most important of the condominium documents is the Master Deed, which legally creates the condominium in accordance with the provisions of the Massachusetts Condominium Act (General Laws, Chapter 183A). The Master Deed sets forth legal descriptions of the land, and all units, and describes the entire complex and the common elements. It also may provide for future growth or expansion (phasing). It indicates restrictions on use of units, together with easements appurtenant to each unit (parking, storage, balconies, etc.) and the percentage interest of each unit in the common elements.

The floor plans, which are a component of the Master Deed, show the legal boundaries of each unit. If there is a discrepancy between the unit as built, and the floor plan, a prospective purchaser could be in for quite a surprise after buying the unit and learning that he does not legally own the entire unit. This situation occurs when a unit owner combines units and renovates them without the aid of a real estate attorney and architect.

The site plan or parking plan, if any, is important to denote the actual location of parking spaces within the common areas, and perhaps to designate other common areas outside the building, including "exclusive use common areas." A visual inspection of any parking space should also be made to verify its location, adequacy of size, and accessibility. Imagine buying a right to use a parking space and subsequently learning that your auto is too long for the space, or perhaps that access to the space is impeded by a post or other immovable object. This has happened in densely populated, older urban areas where a developer has tried to squeeze in more parking spaces than the parking area can adequately accommodate.

The Master Deed will set forth all of the rights with respect to the use of parking spaces, if any. Generally, the concept of a "deeded parking space" is a misnomer. Most condominium Master Deeds provide for the grant of an "exclusive easement" (exclusive right to use) to a parking space rather than a deed granting ownership of the space in fee simple. Some Master Deeds provide for merely an assignment by the condominium association of parking spaces. Assignments, as such are less enforceable than a deed or grant containing an exclusive right to use a particular parking space, as assignments can be changed or perhaps revoked by the association. It is only through the contractual relationship with the association that the unit owner with an assignment derives rights with respect to parking spaces. As a practical matter, with a well run association, there is usually not much consequence to unit owners whichever method of providing for parking spaces is used. In the rare case of a true "deeded space" where the unit owner also owns in fee simple the parking space (often it is a garage space), the space will be designated as a unit and have a percentage of the common elements (and condominium monthly charges) allocated to it.

CONDOMINIUM OWNERS ASSOCIATION

The second most important document is that which contains the By-Laws of the owner's association, generally in the form of a Condominium Trust. This document establishes an organization of unit owners and grants authority to a Board of Trustees or a Board of Managers to operate the condominium. It details how the condominium is to be managed and includes provisions for hazard insurance, annual budgets, periodic financial reports, maintenance, election of Trustees or Managers, voting requirements, meetings, payment of condominium fees, restrictions on use of units, leasing units, professional management, utilities, and possible rights of first refusal on sale of a unit. In larger complexes the management duties of the Trustees or Managers are delegated to a professional property management company.

The By-Laws generally include Rules and Regulations which may set forth policies including those with respect to: pets; parking; Trustees' or Managers' retention of unit keys and their access to units in event of emergency; use of recreational facilities; and exterior decoration of units. For example, it is quite common for By-laws to regulate the color of window treatments visible from outside the unit.

OPERATING BUDGET AND FINANCIAL STATEMENTS

A review of the budget will indicate how much it costs to run the condominium complex per year, the amount of condominium monthly charges paid by each unit owner and whether such charges include utilities (heat, water, etc). By multiplying the yearly budget by the unit percentage interest in common areas, one derives the condominium charge per unit per year. Of course, the monthly charge is one-twelfth of that sum. It is instructive to try to ascertain whether the budget is realistic. If the budget is too low, condominium charges may rise. If reserves are not allocated, special assessments on each unit owner may be charged in addition to monthly charges. The financial statements should indicate whether the Association is well run, and should show that the Association is solvent, and has money in the bank, especially reserves for major repairs of items such as roofs, boilers, and so forth. For example, abnormally high receivables, or a large percentage of defaulting owners indicate problems. Speaking with other unit owners is suggested as a possible method of determining if the Association is well run. Another possible method of determining if there are problems within the condominium, i.e. maintenance problems, lawsuits, etc. is by asking for copies of: minutes of last owners meeting, management co. reports, reserve analysis, capital plans, engineering study and history of special assessments. You may wish to compare the condominium monthly charge for the unit to other comparable condominium projects. A large discrepancy may indicate problems within the condominium.

HOME INSPECTION

A professional home inspection is strongly suggested to determine the condition of the unit and common areas before signing a purchase and sale agreement. In an older building the inspector may discover that major building components are past their useful life. Buying a unit in such a building may result in higher condominium fees and significant special assessments to cover costs of such repairs. A professional inspection may also disclose items within the unit which need repairs, or even within a newly constructed unit, items which, if not corrected, could cause serious problems in the future. Professional inspectors are trained to look for many signs that the typical purchaser forgets to investigate or overlooks in the course of a "showing" by the broker or owner. With an inspection report in hand, a decision can be better made as to whether to buy the unit, or perhaps re-negotiate with the Seller as to price, performance of certain repairs, or credits towards the purchase price.

HAZARD INSURANCE

It is important to remember that your condominium common charges pay for hazard and liability insurance insuring the association against loss involving primarily the structural components and common areas of the condominium. This insurance does not cover personal possessions or contents of units, and may not cover such items as carpeting, wall coverings, cabinets and so forth. There are basically three types of master condominium coverage available to condominium associations:

1. Bare Walls-does not cover property except common building elements.
2. Original Specifications-covers property initially installed in accordance with original plans and specifications, including fixtures and major appliances.
3. Single Entity or "All-in"-covers following property owned by unit owner: fixtures, installations and additions comprising a part of the building, refrigerators, air conditioners, cooking ranges, dishwashers and clothes washers and dryers.

Before the closing date, you should obtain homeowners insurance to protect your personal possessions or contents and items not covered by the master condominium association policy (gaps), together with liability insurance for claims brought by visitors for injuries incurred within your unit. The standard condominium homeowners individual unit policy is called an HO6 policy and may contain riders for specific valuable items such as jewelry, art, furs and so forth. It may also protect against other items such as loss assessments made against a unit owner

because of a loss which exceeds the association's master insurance coverage. Additional coverage for permanent additions and alterations to the unit can also be obtained. Some experts recommend purchasing an HO6 policy from the carrier on the master policy, as it should know best what gaps, if any, there may be in the master coverage. This may eliminate the common scenario of an insurer denying coverage based on another insurer's responsibility.

MORTGAGE LOAN FINANCING

_____ In the course of speaking with a mortgage loan originator, it is wise to ask questions pertaining to the particular condominium. Many lenders will only lend on condominiums that have met the very strict requirements of the Federal National Mortgage Association (FNMA/Fannie Mae). The requirements of FNMA change often and usually include presale requirements, majority percentage of owner/occupants and other requirements. Oftentimes, in a new condominium development, the Seller suggests applying to a particular lender who has pre-committed to the project, and who perhaps has orchestrated the approval through FNMA. The choice of a lender is a major decision and should be discussed at length by the buyer with his or her attorney.

PURCHASE AND SALE AGREEMENT

Only after reviewing the foregoing condominium documents, can the purchaser and his or her Attorney have adequate information to negotiate a purchase and sale agreement.

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