

# Court Addresses Condo Issues

By Hans Huessy

*(Editor's Note: Huessy represented the condo associations in the following cases.)*

There have been two recent landmark Superior Court decisions that address the relationship between the developer and condominium owners.

One involves the developer's obligations to fully construct a project once started and the other relates to how much a developer can charge condominium owners to maintain common lands and roads.

## Stratton Mountain Resort

The first case involves Stratton Mountain Resort. In that case, the developer marketed the Founders condominium project using graphic representations of what the project would look like when fully constructed.

The developer proposed to build Founders in two phases, starting each phase when it obtained a certain minimum presale requirement. The developer quickly obtained the necessary commitments to move forward with Phase I and built the first half of the project.

However, the developer failed to meet the presale commitment for the second half of the project and elected not to move ahead.

This left the Phase I buyers without a promised pool (part of Phase II), with a large concrete slab next to their building (the foundation for both phases had been poured at the same time), and with much higher annual assessments than expected (about 30 percent higher).

Founders initially only sought to have the pool constructed. However, when the developer refused, Founders filed suit to compel the construction of the entire second phase.

Founders made two arguments.

First that while the Condominium Declaration clearly allowed the developer not to proceed until the pre-sale requirements were met, the developer had a good faith obligation to try to meet those requirements.

Second, that certain marketing materials showed the entire project built without any qualifying statements.

Under Vermont law, any marketing materials shown to condo buyers that show improvements the developer wants to reserve the right not to build, must be clearly marked "need not be built."

Founders presented evidence of many graphic depictions of the completed project that did not include this language, including a 3D model.

The Court held that the use of these marketing materials in the absence of the necessary qualifying language violated the statute and ordered the developer to complete the project as shown.

It remains to be seen whether Founders can recover additional damages in the form of almost 10 years' worth of higher than expected annual assessments.

Accordingly condominium owners may want to review their Public Offering Statements and related marketing materials to ascertain whether they received all that they were promised and going forward developers will want to take great care in the preparation and drafting of such documents.

## Smugglers Notch Resort

There had been a long standing dispute between the master condo association and the Resort over certain fees the Resort charged condo owners for maintenance and upkeep of common roads and areas.

The Resort declined to offer any support for the fees until compelled to do

so pursuant to the settlement agreement between the Resort and the master association.

The Resort disclosed that it allocated certain expenses between itself and condo owners on the basis of property values.

Several condo owners refused to pay the fee, arguing they were being overcharged and the Resort sued them to collect the funds.

The condo owners filed counterclaims alleging they were being overcharged for the services provided and that property tax value was not a valid basis for allocating these expenses.

The court agreed with the condo owners and ruled that the Resort's means of allocating expenses was inconsistent with the relevant state statute and that costs must be allocated in a fashion that reflects the party's respective use of the roads and common areas.

The case is still pending and the parties will likely present competing allocation methodologies.

Many resorts provide such services pursuant to contract and this case would only be relevant where such a contract has expired or there is no written agreement.

However, it could provide leverage to condo owners when negotiating such agreements, or extensions thereof, with resorts.

In a best case scenario, condo owners will be provided with sufficient transparency to ascertain exactly what they are being charged for and how much.

This will allow condo owners to get competing bids and make sure they make an informed decision as to what is a reasonable price for the services provided.

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