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TELECOPIER NUMBER:
(302) 575-1642

August 22, 1989

*ALSO FLA. BAR
**ALSO PENNA. BAR
***ALSO N.Y. BAR

Mr. Richard E. Yerger
Vice-President
Ticor Title Insurance Company
1222 King Street
Wilmington, DE 19801

Re: Coffee Run Condominium

Dear Dick:

We are representing Mr. and Mrs. John E. Campanelli who have contracted to purchase from Max Ambach & Sons 45 condominium units in proposed Building A of Coffee Run Condominium together with the development rights which seller has with respect to such units.

The operative condominium documents of which I am aware include the following:

1. Declaration of Max Ambach & Sons dated September 21, 1973 (Deed Record H, Volume 88, Page 703);
2. Amendment to Declaration dated June 15, 1978 (Deed Record H, Volume 102, Page 201);
3. Amendment to Declaration dated March 21, 1979 (Deed Record V, Volume 105, Page 153);
4. Amended Code of Regulations recorded May 23, 1978 (Deed Record G, Volume 101, Page 278);
5. Amendment to Code of Regulations dated May 23, 1979 (Deed Record V, Volume 105, Page 131);
6. Third Amendment to Code of Regulations dated March 25, 1981 (Deed Record Q, Volume 118, Page 232);

Mr. Yerger
August 22, 1989
Page Two

7. Fourth Amendment to Code of Regulations dated May 11, 1982 (Deed Record G, Volume 118, Page 236); and

8. Declaration Plan consisting of five (5) sheets (Microfilm No. 2418).

Enclosed are copies of items, 1, 4, and 6 and the first sheet of item 8 which may relate to the issues raised below.

Building A has never been constructed. The Coffee Run Condominium has been in existence since 1973. My client is interested in acquiring from the developer, Max Ambach & Sons, the 45 condominium units in Building A together with all of developer's development rights with respect to same, constructing Building A thereon, then selling the completed units to third parties. I am concerned about the following title issues:

1. Can my clients receive good marketable title to the 45 units from Max Ambach & Sons at settlement? I would not think so since the Delaware Unit Property Act appears to require that the building in which the units are located be built before the units can exist. Note that 25 Del. C. §2220 requires that the Declaration Plan show the location of the building on the property, the building and the layout of the floors of the building.

2. What security can my clients give to the lender who provides the construction financing? Can the security be a mortgage against the unbuilt 45 units? Would Ticor authorize the issuance of a title binder which insures the mortgage as a valid first lien against a fee simple interest subject to the condition that Building A be constructed as shown on the Declaration Plan?

3. Would Ticor authorize the issuance of a title binder which insures my clients that they will own fee simple marketable title to the 45 units in Building A subject to the requirement that Building A be constructed as shown on the Declaration Plan.

4. The Declaration Plan shows 226 units at Coffee Run Condominium (45 units in each of Buildings A through E and one unit in Building F). The Declaration provides at Paragraph 7 that "Each Unit Owner shall be entitled to a 1/226 percentage of ownership in the Common Elements" and provides at Paragraph 12 that "Each Unit Owner shall pay his proportionate share of the expenses of the administration and operation of the Common Elements... Such proportionate share of the common expenses for each Unit Owner shall

Mr. Yerger
August 22, 1989
Page Three

be in the same ratio as his percentage of ownership in the Common Elements". 25 Del. C §2205 provides that "no owner may exempt himself from liability with respect to the common expenses by waiver of the enjoyment of the right to use any of the common elements".

I suspect that the common expenses for Coffee Run Condominium have been divided up equally among the existing 181 units and that Max Ambach & Sons has not been paying any common expenses for the Building A units. Would Ticor authorize the issuance of a title binder which insures my clients that the units in Building A will not be subject to the lien of any common expenses which are assessed prior to the date the units in Building A are completed?

I discussed these issues with Dan Kristol last week and he suggested that I follow up with a letter to you. Settlement is scheduled for November 10, 1989.

I look forward to hearing from you.

Yours truly,

Tom

Thomas Mammarella

TM/ra

Enclosures

cc: Mr. and Mrs. John E. Campanelli
Daniel Kristol, Esquire (with enclosures)

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October 10, 1989

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Mr. and Mrs. John E. Campanelli
714 Kilburn Road
Wilmington, DE 19803

Re: Coffee Run Condominium

Dear Mary Jane and John:

This letter will advise you of the status of the title issues related to your acquisition of the development rights and/or unbuilt condominium units in Building A of Coffee Run Condominium.

A. Title Insurance.

Nancy Cook, in-house counsel to Transamerica Title Insurance Company, and Dean Lusky, President of Atlantic Title & Abstract Company, an authorized agent for Transamerica, have both advised me by telephone that Transamerica is willing to issue to you a policy of owner's title insurance insuring that the deed from Max Ambach & Sons will convey to you a good and marketable fee simple title to the 45 condominium units in Building A. I have ordered the title search from Atlantic Title & Abstract Company. Upon receipt of same, I will prepare the title binder and forward same to Mr. Lusky for his written approval.

B. Legal Research.

Enclosed for your review is a memorandum prepared by my associate, Joseph Saleh, which summarizes the results of his research into various title issues involved in this project. I will comment briefly on these issues.

1. Expiration of Development Rights. It does not appear that the mere passage of time will cause Max Ambach & Sons to lose any rights it has to construct Building A. This conclusion is supported by the holding in American Savings Service Corporation v. Kosaka.

2. Title to Unbuilt Units. The research indicates that in Delaware condominium units can not exist until after the building in which the units are located has been constructed. The Delaware Superior Court held in the Nargiz case that the Declaration Plan must show the building as it actually exists, not just as it is proposed to be erected. Therefore, the Declaration Plan must be recorded after the building is constructed.

Under this technical reading of the Delaware condominium law, many of the other unit owners would have a similar problem with title. Richard Levine advised me that only one of the buildings was constructed prior to the recording of the Declaration Plan. Therefore, 136 units were constructed after the Declaration Plan was recorded. Because these units have been owned, mortgaged, occupied and recognized by the taxing authority, the condominium council and others as condominium units, equitable considerations weigh in favor of treating these as legally valid condominium units.

While the unbuilt units in Building A do not present the same case, the following considerations argue in favor of recognizing them (either unbuilt or as constructed) as valid condominium units: (1) the original Declaration and Declaration Plan both expressly describe and contemplate 45 units in Building A; (2) according to Richard Levine, the New Castle County has assigned 45 tax parcel numbers to these units and Max Ambach & Sons has been paying property taxes on these units for the last 17 years; (3) all buyers in Coffee Run Condominium purchased their units with actual or construction knowledge that Building A would eventually be constructed. Richard Levine told me that his client always intended to construct Building A and never represented the contrary.

3. Condominium Assessments. The cases cited in the memorandum generally hold that a developer is liable for unpaid assessments on both unbuilt units and on built but unsold units. This result is consistent with §2205 of the Delaware condominium law. Richard Levine told me that the Coffee Run Condominium Association has never made demand on Max Ambach & Sons that it pay any condominium fees. Section 2237 of the Delaware condominium law provides that

"...any person who shall have entered into a written agreement to purchase a unit shall be entitled to obtain a written statement from the treasurer setting forth the amount of unpaid assessments charged

Mr. and Mrs. John E. Campanelli
October 10, 1989
Page 3

against the unit and its owners and, if such statement does not reveal the full amount of the unpaid assessments as of the date it is rendered, neither the purchaser nor the unit shall be liable for the payment of an amount in excess of the unpaid assessments shown thereon."

Nancy Cook suggested that we obtain such a statement.

C. Plan of Action.

I will follow up with Transamerica to obtain their written approval to issue the policy of owner's title insurance insuring your interest in the 45 unbuilt units in Building A.

You shall pursue the permits and approvals you need to commence construction of Building A as provided for in Paragraph 3 of the July 13, 1989 Agreement of Sale with Max Ambach & Sons.

We should consider involving the condominium council in the project. For example, we could discuss with the council issues related to the construction of Building A such as the following: (1) construction entrance, (2) storage of construction equipment, (3) hours during which construction work will be done and (4) liability and property insurance. By reaching some sort of agreement with the council on these issues, the council will have tacitly consented to the construction of Building A. Please call me to discuss any proposed dealings with the council.

Yours truly,



Thomas Mammarella

TM:db
Enclosure