INSIDE THE LAW

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FLETCHER TILTON BUILDING BLOCKS

Third and fourth in a series of articles about how to avoid construction litigation

KNOW YOUR COLLATERAL: UNIQUE RISKS IN LENDING TO CONDOMINIUM PROJECTS

By Adam C. Ponte, Esq.
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When a real estate developer seeks financing from a lender in connection with a construction project, it is common for the lender to receive a mortgage from the developer on the property to be developed. This mortgage, along with the associated loan agreement and promissory note, constitutes security for the money loaned to the developer. The lender, if necessary, would foreclose on the property if the developer failed to satisfy its repayment obligations to the lender. This scenario is well-known to many construction professionals and banks.

What is often not known is the unique risk that lenders may take on when lending money to developers seeking to construct a condominium. That is, a lender's perceived security on a condominium construction project may actually **not** be in the land itself, but, instead, only in the developer's "development" or "phasing" rights. This may be so even if the lender received a mortgage on the "land" on which the condominium is being built.

MASSACHUSETTS LAW PROVIDES SPECIFIC RULES CONCERNING CONDOMINIUMS.

Massachusetts law formally recognized condominiums in 1963 when the legislature enacted M.G.L. c. 183A. Stated simply, a condominium essentially consists of individually owned dwellings, together with an undivided interest in the other "common areas" of the land on which the condominium is built. M.G.L. c. 183A, §§ 3 and 5. Each condominium unit owner owns his or her own dwelling, but also owns a percentage of the entire common area.

In order for a property to be considered a condominium, it must be "submitted" to condominium status under M.G.L. c. 183A. To do this, the project owner, such as the developer, must prepare and record a "master deed," which outlines a number of rules, rights, and obligations with respect to the condominium property. This includes a legal description of the land submitted to condominium status, a set of floor plans for the building, a description of the common areas, **and** identification of the developer's rights regarding future development of the property. For example, the master deed may state that the developer has the right to build and construct the condominium for a period of 7 years – thereafter, the condominium and its common areas become owned by the unit owners only, unless there is an extension of the developer's phasing rights.

It is crucial to understand that, once a developer records the master deed, the developer's title rights to the property could be subjected or subordinated to the master deed. This means that the developer's rights would be limited to the development period (e.g., 7 years) and, thereafter, the collective unit owners may own all common areas, which could include unused or unfinished portions of the construction project. Once land has been submitted to condominium status, the lender's mortgage in the property is only as good as the developer's ownership interest. Accordingly, despite the language in the mortgage, the lender's security might not be in the land itself, but only in the developer's "phasing rights" to build the condominium.

MASSACHUSETTS COURTS HAVE EXTINGUISHED LENDERS' SECURITY ON CONDOMINIUM PROJECTS DESPITE THERE BEING NO DISCHARGE OF MORTGAGES.

A handful of Massachusetts Land Court cases have involved condominium projects where a developer's phasing or construction rights have expired per the terms of the master deed, and the Court was confronted with the question of whether the lenders' mortgages were subordinated or otherwise discharged as a result. In cases where the developer submitted land to condominium status before conveying mortgages to lenders, the Land Court has consistently ruled

Once a developer records the master deed, the developer's title rights to the property could be subjected or subordinated to the master deed.

that the lenders' security was rooted in the developer's title interest and, thus, the developer's development rights. That meant if the developer's phasing or development rights expired, so did the lenders' security in the land, even if the lenders never recorded any mortgage discharges. See *Lebowitz v. Heritage Heights, Inc.*, 4 LCR 48 (1996); *Crasper v. Bondsville Partners, Inc.*, 14 LCR 432 (2006).

This being said, it is critical for a real estate developer or lending professional to understand the unique risks involved when lending to condominium construction projects. Even if a mortgage states that the "land" serves as security for the loan, a court may conclude that only the developer's phasing rights serve as collateral because the land had already been submitted to condominium status.

If you are a developer or lender looking to get involved with a condominium construction project, you should consult with a construction lawyer to fully understand and be aware of the potential risks and other pitfalls inherent in condominium projects. **FT**

DEMAND FOR DIRECT PAYMENT ON PUBLIC CONSTRUCTION PROJECTS

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Many subcontractors, after substantially completing their work, find themselves eagerly awaiting payment from their project general contractor – beyond the contractual deadline for payment. In such a situation, the general contractor also might be awaiting payment from the awarding authority for various reasons, even if the associated subcontractor's work is fully completed. For example, the general contractor may have erroneously omitted a subcontractor's completed work from a recent payment requisition to the awarding authority. Massachusetts law provides a potential remedy for particular subcontractors on **public** construction projects that have completed their work but have not been paid timely by the general contractor. That remedy is known as a "demand for direct payment" against the awarding authority.

Subcontractors should be aware of their potential right to demand direct payment on public construction projects for work that is substantially completed.

DIRECT PAYMENT STATUTE AND ELIGIBILITY

Under Massachusetts General Laws, Chapter 30, Section 39F, certain subcontractors on public construction projects may bring a demand for direct payment against the awarding authority, such as a municipality or other public entity. To be eligible, the subcontractor seeking payment must have been (i) a filed sub-bidder on the project or (ii) approved, in writing, by the awarding authority to perform project work. A subcontractor is generally considered to be a filed sub-bidder when, in connection with submitting bids to perform work on a public construction project, it certifies and agrees to certain project requirements in writing pursuant to sub-bid forms furnished by the awarding authority. A common example of a sub-bid requirement is for the subcontractor to certify that its employees are trained in construction health and safety. See M.G.L. c. 149, § 44F. Massachusetts law, however, does not specify a particular form regarding the awarding authority's written approval of a subcontractor's project work. See *Hajjar v. City of Fitchburg*, 2010 WL 653987, at *3 (Mass. Super. Jan. 7, 2010); *Revoli Construction Co. v. Town of Andover*, 1999 WL 1203789, at *3 (holding daily project reports referring to subcontractor by name sufficient for written approval); but see *Regency Construction & Mgmt., Inc. v. BBC Company, Inc.*, 2005 WL 3721145 (Mass. Super. Dec. 16, 2005) (finding owner's general awareness of subcontractor insufficient to constitute owner approval).

MAKING THE DEMAND

An eligible subcontractor on a public construction project may seek direct payment from the awarding authority if the subcontractor does not receive payment within seventy (70) days after substantial completion of its work. To do so, the subcontractor must send a letter by certified mail to the awarding authority, providing (i) a detailed accounting of the monies due under the applicable subcontract; (ii) an itemization of the work performed; and (iii) the overall status of the subcontract; e.g., whether separate additional work remains. M.G.L. c. 30,

§ 30F(d). The letter also must be simultaneously sent to the general contractor. Importantly, the letter must be signed before a notary and affirmed under oath by the subcontractor's authorized representative. *Id*.

The general contractor may object to the subcontractor's demand within ten (10) days of receiving the demand. M.G.L. c. 30, § 30F(d). To do so, the general contractor must send a letter to the awarding authority, providing (i) a detailed accounting of the subcontract balance; (ii) a breakdown of work completed; (iii) an identification of amounts due for extra labor and materials furnished by the subcontractor to the general contractor; and (iv) an accounting of any monetary claims of the general contractor against the subcontractor. *Id*. The general contractor's written objection also must be sent by certified mail, sworn to and notarized.

If the general contractor fails to timely object to said demand, the awarding authority must pay the balance due and owing to the subcontractor, minus an amount the awarding authority contends covers incomplete or unsatisfactory subcontract work, within fifteen (15) days of receipt of the demand. M.G.L. c. 30, § 30F(e).

PAYMENT PARTICULARS

In the event the general contractor timely submits an objection to the entire balance claimed by the subcontractor, the awarding authority must deposit the entire disputed amount into a joint bank account, in the names of both the general contractor and the subcontractor. M.G.L. c. 30, § 30F(f). Those monies then must be held by the bank until the parties jointly instruct the bank to release the funds or until a court instructs the bank to disburse the funds in a particular manner. If the general contractor disputes only a portion of the amounts demanded by the subcontractor, then the awarding authority must pay the acknowledged balance to the subcontractor and deposit the remaining, disputed amount into a joint account. M.G.L. c. 30, §§ 30F(e)-(f).

CONCLUSION

Subcontractors should be aware of their potential right to demand direct payment on public construction projects for work that is substantially completed. The demand process afforded under M.G.L. c. 30, § 30F provides subcontractors with an avenue to compel general contractors to either pay amounts due or to dispute amounts due, under oath. This way, subcontractors know where they stand with respect to their contract balances and late payments. If you are a subcontractor, general contractor, or awarding authority, you should consult with an attorney in the event the demand for direct payment statutes are invoked on your project. **FT**

DECRIMINALIZATION OF RECREATIONAL MARIJUANA AND THE WORKPLACE

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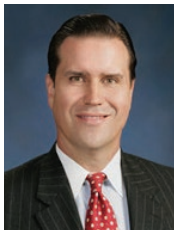


On November 8, 2016, the voters in Massachusetts decriminalized recreational use of marijuana. The law took effect on December 16, 2016.

In light of the new recreational marijuana use law, employers have three common questions:

1. *What impact does the new recreational marijuana use law have on an employer's ability to discharge or discipline an employee who comes to work under the influence of marijuana?*
2. *What impact does the new recreational marijuana use law have on an employer's ability to prohibit the possession of small, recreational use amounts of marijuana on company property?*
3. *May an employer continue to drug test employees for marijuana now that it has been decriminalized, and may an employer make hiring or termination decisions based on a positive marijuana test result?*

The short answer to the first two questions is "none." The decriminalization of marijuana for recreational use by persons twenty-one and over has no impact whatsoever on an employer's ability to continue to prohibit all employees from being under the influence of marijuana at work, from using it during work time, or from possessing it in the workplace. It is business as usual for employers with policies which address these first two questions and for employers seeking to implement such policies. An express provision within the recreational marijuana use law provides that employers may "enact and enforce workplace policies restricting the consumption of marijuana by employees." MGL c. 94G, section 2(e).

Regarding the third question, an employer's ability to test for marijuana use now depends on the timing of and reason for the drug test: Is it pre-employment, reasonable suspicion, or random testing of persons in safety-sensitive positions? What is the employer's need for the information?

In Massachusetts there is no express law which prohibits drug testing. However, through case law, the Massachusetts courts have weighed the privacy rights an individual has regarding bodily fluids, or the expectations of privacy of the

individual, against the employer's need for the information. See MGL. c. 214 section 1B. See also *Barbuto v. Advantage Sales & Marketing, Inc.,* 48 F.Supp.3d 145 (D. Mass. 2015) (medical marijuana case presently on direct appellate review by Mass. Supreme Judicial Court).

Regarding **pre-employment drug testing**, it may occur so long as:

1) the applicant is made aware of the drug testing in the job posting before he or she applies for the job;

2) it only occurs after the employee has been given a conditional offer of employment -- conditioned only on his or her passage of the drug test; and

3) all recipients of conditional offers for the particular position are also drug tested. If the employer drug tests for a particular position, all selected candidates for that particular job should be tested.

Turning to the question of whether an employer may choose not to hire a candidate for failing a marijuana drug test, there is nothing in the law which prohibits the employer from doing so. However, given that marijuana has been decriminalized, the question becomes whether an employer wants to limit its successful candidates to only those who have no trace of marijuana in their systems at the time of the pre-employment drug test -- especially when the usage may have been several days before.

Regarding **reasonable suspicion drug testing**, an employer may require an employee to submit to a drug test if it has reasonable suspicion to conclude that an employee is presently under the influence of drugs. It is helpful for employers to be trained in identification of the common indicia of behavior and appearance that lead to reasonable suspicion. When an employer believes an employee is working under the influence, testing for marijuana along with all the other drugs is still logical and justified. Employers are encouraged to create clarity about drug policies by expressly stating in the employee handbook that it is prohibited to be in possession of or under the influence of any alcohol or drugs in the workplace, and that violation of this policy can lead to disciplinary action up to and including termination.

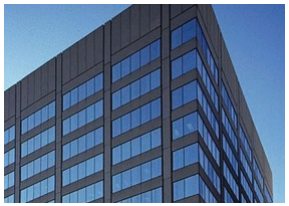
Employers have every right to make sure employees are not under the influence of marijuana while at work — just as they do not want employees under the influence of alcohol at work.

Regarding mandatory testing pursuant to a commercial driver's license program required by the federal Department of Transportation (DOT) or similar licensing authority, the testing should continue as usual and marijuana use should be tested for. DOT testing, for example, is a federal program, and marijuana use is still illegal under federal law.

With the exception of post-accident drug testing, the final drug testing protocol is **random drug testing** of people in safety-sensitive positions. Where an employer conducts a random drug testing program of its current employees, the following continue to be recommended prerequisites:

- The position is a safety-sensitive position.
- A causal nexus exists between the safety-sensitive nature of the position and the need to random drug test.
- The employees in the safety-sensitive positions are aware, in advance, that random drug testing occurs on persons in their positions.
- There is a pre-established protocol in place for determining when employees will be "randomly" tested.

For random drug testing of employees in safety-sensitive positions where there is no reasonable suspicion that the employee is under the influence of drugs, it is now suggested that employers consider no longer testing for marijuana, given that it is now decriminalized. Unlike alcohol, which wears off within hours of use, marijuana can remain in a person's system long after the effects of the drug have worn off. It is possible that testing for nonwork recreational marijuana use may violate an employee's privacy rights. While employers have every right to make sure employees are not under the influence of marijuana while at work -- just as they do not want employees under the influence of alcohol at work -- they should have little or no interest in how employees spend their nonwork hours so long as the conduct outside work is not illegal under Massachusetts law and has no impact on their fitness for work while at work. **FT**



FIRM NEWS

FLETCHER TILTON ADDS NEW MEDFIELD OFFICE

It's official! Fletcher Tilton now has an office in Medfield, MA with the addition of attorneys John J. McNicholas and Mary F. Proulx, specializing in Elder Law, sophisticated Long Term Asset Planning, complex Medicaid/MassHealth applications and appeals, and addressing the sudden financial crisis brought on by an unplanned need for long term care. Our new office is located in Olde Medfield Square at 266 Main Street, Building 3, Suite 39.

Join us for Jack and Mary's educational breakfast seminars:
May 2nd in Foxborough • May 23rd in Milford • June 8th in Millis.
Visit *www.fletchertilton.com/seminars-events* for details and to register.

ATTORNEY DANI RURAN ELECTED OFFICER

We are pleased to announce that trust & estate attorney Dani Ruran has been elected Officer of the firm. Upon joining the firm in July, 2016, after accumulating nearly 20 years of experience as a trust & estate lawyer, Dani quickly won the confidence of the entire team with his intelligence, sophisticated knowledge, and impeccable work style.

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You can do so by telling us in an email sent to:
solutions@fletchertilton.com or by calling 508.459.8095.

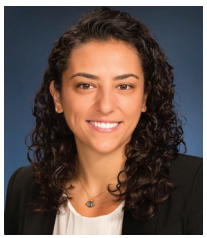
ATTORNEY JESS OYER JOINS ADVISORY BOARD OF THE VENTURE FORUM

Litigation attorney Jess Oyer has joined the Advisory Board for The Venture Forum. Formerly known as the WPI Venture Forum, The Venture Forum is a not-for-profit community for technology entrepreneurs at any stage – a place to test out ideas, gain useful feedback, and find needed resources.

The VentureForum Inspiring Innovative Entrepreneurs | Join us at **The Venture Forum's "*5-Minute Pitch*" event on April 25**, which is reminiscent of a popular TV show, but more locally relevant.
Register to attend at ***www.TheVentureForum.org*** and we will see you there!

ATTY. MARK DONAHUE MODERATES JAN. 26TH C9 LEGISLATIVE BREAKFAST

Visit *www.FletcherTilton.com/firm-news* to watch a video of Mark's eloquent opening comments.



FLETCHER TILTON WELCOMES ADAMANTIA GIANNAKIS TO THE FIRM

Associate Adamantia Giannakis focuses primarily on real estate and corporate transactions. Prior to joining Fletcher Tilton, Adamantia worked in the General Counsel's Office of a Fortune 200 company. She works from our Framingham office.

PETER BARBIERI AT WORK

In January, Attorney Peter Barbieri obtained Planning Board and Conservation Commission approvals for the development of approximately 98,000 square feet of self storage space on Route 135 in Ashland. This is Phase 1 of mixed use development to include an additional 7,000 square feet of commercial space and 35 residential units.

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UPCOMING SEMINARS

BEST PRACTICES IN ASSET PROTECTION AND ESTATE PLANNING FOR YOUR FAMILY

- **May 2,** Renaissance Patriot Place Hotel, Foxborough, MA
- **May 23,** Courtyard Marriott, Milford, MA
- **June 8,** Primavera Restaurant, Millis, MA

Register online at:
FletcherTilton.com/seminars-events

SAVE THE DATE

- **September 19,** *Estate Planning for Mass.-Florida Snowbirds*, Hyannis, MA
- **October 3,** *Special Needs Planning for CFPs and CPAs*, Framingham, MA
- **October 28,** *How to Administer a Special Needs Trust*, Marlborough, MA

For details and to register go to:
FletcherTilton.com/seminars-events