

# INSIDE THE LAW

Fall 2017

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## CONSIDERING CONVERTING YOUR MULTIFAMILY HOUSE TO CONDOMINIUMS?

By Samantha P. McDonald, Esq.

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Every time the housing market booms, owners or purchasers of multifamily houses contemplate whether they should keep the steady stream of rental income or if they can make more money by converting the property into condominium units and selling the units individually. We saw this in the 1980s and in the early 2000s, and it's happening again. Rates are still generally low, people are anxious to buy and a condo is typically priced more affordably than a single-family home.

Undoubtedly there are pros and cons of a conversion. From a developer's point of view, you'll generally realize a higher sale price. However, there are certain things you should think about when considering a conversion of a multifamily home into condominium units.

### THE PRE-PLANNING STAGE: KNOW YOUR COSTS AND TIMING.

Get a good real estate agent to do some fair-market-value price evaluations. What is the property worth right now as a multifamily? What would each condo unit be worth? The difference less your profit is the maximum you should spend on the conversion.

Obvious costs are the construction or renovation work, materials and permits. Remember that a conversion requires that the building and all units be brought up to current codes, and different utility requirements may be brought into play. Other, less obvious costs to factor in include legal fees, which will likely range between \$5,000 and \$20,000, depending on the locality and complexity; brokers'



*A condo conversion preserving the same number of units may require zoning relief, adding to the time and cost of the conversion.*

commissions on selling the units; recording fees and excise taxes; and engineers' and architects' fees, likely exceeding \$5,000, for drawing the necessary plans.

Additional costs and lengthy delays must be factored in if the property contains four or more units and the units are occupied. Tenants in such buildings are afforded greater protections by a patchwork of condominium conversion statutes. The laws vary by location, but the state statute applicable to all communities in the Commonwealth of Massachusetts mandates the following:

- A moratorium against evictions until notice is afforded to each tenant. Most tenants must be provided with notice of the developer's intent to convert one year before the developer can terminate their tenancy, but elderly, handicapped, and low- or moderate-income tenants must be provided two years' (or in some cases up to four years') notice.
- A cap on annual rent increases at CPI or 10 percent, whichever is less.
- A 90-day right of first refusal giving the tenant the right to purchase the unit on terms that are the same as or more favorable than those to be offered to the general public.
- A relocation payment of \$750 to \$1,000 per tenant, depending on whether the tenant is a member of a protected class. Elderly, handicapped, and low- or moderate-income tenants must also be provided with relocation assistance to help them find new housing in the same municipality at the same or a lower rental rate.

In addition, some municipalities have enacted stricter protections for tenants. For example, in the city of Boston, the notice period for elderly, disabled, and low- or moderate-income tenants is five years. Moving-cost reimbursement in Boston is now up to \$6,000, or \$10,000 for elderly, disabled, and low- or moderate-income tenants. In Somerville, the protections apply to two- and three-unit homes. At least 11 Massachusetts communities have specialized protections.

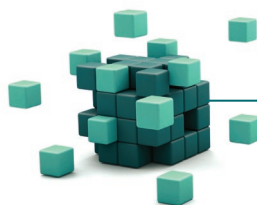
*Get a good real estate agent to do some fair-market-value price evaluations. What is the property worth right now as a multifamily? What would each condo unit be worth?*



Investigate the zoning. The condominium conversion process can reveal issues with current zoning compliance (such as illegal basement units). The current use may have more units than are legally permitted under the zoning ordinance or may be a grandfathered use. A condo conversion preserving the same number of units may require zoning relief, adding to the time and cost of the conversion.

Once you've completed the conversion, there are still more costs. The developer must obtain and pay for the master insurance policy — usually more expensive than individual building insurance — until the units are sold. The developer is also required to pay the monthly condominium fees for any unsold units from the time of recording the master deed until all the units are sold.

Consult with an experienced attorney before putting together your cost analysis to ensure you do not encounter any expensive or time-consuming surprises in your conversion. **FT**



## FLETCHER TILTON BUILDING BLOCKS

*Sixth in a series of articles about how to avoid construction litigation*

### QUICK TIPS FOR PROJECT OWNERS NEGOTIATING CONSTRUCTION AGREEMENTS

Prior to breaking ground, the project general contractor typically presents the project owner with a construction agreement using form language published by one or more of the (i) American Institute of Architects (AIA), (ii) Design-Build Institute of America (DBIA), and (iii) ConsensusDocs. Owners should pay particular attention to, among the many provisions in these form contracts, the requirements for progress payments, along with the provisions covering lien releases and project milestones. The owner's construction lawyer should also review and negotiate many other aspects of the construction agreement. An owner can avoid needless surprises and other project disputes by requiring the following contract terms.

#### OWNER SHOULD REQUIRE PENCIL REQUISITION PROCESS

Whether the construction agreement calls for a stipulated lump-sum or "costs-plus" contract price, there is likely a section dedicated to progress payments due and owing from the project owner to the general contractor. Typically, form contracts



*Owners should pay particular attention to the requirements for progress payments, along with the provisions covering lien releases and project milestones.*

require an owner to make monthly progress payments to the general contractor based upon applications for payment that are submitted by the contractor to the project architect. These applications typically identify the completion percentage for various areas of the project, and request payment of an amount commensurate with the percentage completed as of the date of the application. Standard contract provisions, such as those found in the AIA A101-2007, contain language obligating the owner to pay, by month's end, amounts "certified" by the project architect, so long as the architect receives the payment application within the first week of any given month. This process can often lead to rushed project inspections and payments, which could put the project budget at risk, and/or cause other problems.

To protect against such risk, owners should require general contractors to use the "pencil requisition" process as a condition precedent to the submission of formal payment applications and the owner's subsequent payment. Owners should require contract language obligating the contractor to first submit a draft "pencil" requisition to the project architect within the first week of any given month. The architect then would have, for example, five to seven business days to review the draft requisition and seek revisions if necessary. After architect approval of the draft requisition, the contractor would submit the formal payment application, and the owner thereafter would have, for example, 25-30 business days to remit payment (minus retainage) based upon the amounts certified in the application. By requiring the pencil requisition process, the project architect will have additional time to confirm that the general contractor's reported percent completion is accurate. Further, this process prevents rushed inspections and payments. By the time the owner receives the approved payment application, said application already has been fully analyzed to ensure that the payment requested is appropriate. Negotiating this relatively straightforward change to any form construction agreement will help owners avoid overpayment on progress payments.

## LIEN RELEASES ARE A MUST

Form construction contracts usually do not describe in great detail any processes related to lien releases to be furnished to the project owner from the general contractor and/or its subcontractors or suppliers. Although that is not the topic of this article, an owner should be vigilant to protect against liens being recorded on the project, particularly where lenders could cease financing the project until any such liens are dissolved. Accordingly, owners should seek contract language requiring the general contractor to submit lien releases simultaneously with any application for payment.

To do this, the owner should require that, with each and every payment application, the contractor submit a current lien waiver from the contractor and lien waivers from any applicable subcontractors or suppliers whose work is included with the payment application being submitted. These waivers should: (i) include a representation that all subcontractors and suppliers (including lower-tier subcontractors) have been fully paid to date; and (ii) be executed by authorized representatives of said contractors or suppliers. By requiring the general contractor to furnish lien waivers with any application for payment, the owner can protect against liens being recorded against the project property.

## PROJECT SCHEDULE MUST BE EXPLICITLY CONFIRMED

Project owners and general contractors often glaze over the contract requirements for construction commencement dates and/or dates for substantial completion. It is common to find executed construction agreements that fail to stipulate any actual start date or substantial completion date. To avoid any confusion as to when warranty periods commence, or, perhaps, when certain delay damages may accrue, owners should demand that explicit milestone dates be identified in their construction agreements.

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AIA, DBIA or ConsensusDocs agreements usually permit the contracting parties to insert time periods or dates upon which the project starts and finishes. General contractors will frequently insert, instead of a date certain, a buffer period during which a project may start and/or finish. For example, a contractor could request language that the start date will be “within thirty (30) days of its receipt of a building permit” and/or that the substantial completion date will be “the date upon which the project receives a certificate of occupancy.”

Leaving such crucial requirements open-ended can easily lead to disputes concerning project coordination and scheduling. Owners, therefore, should require dates certain in their construction agreements so there is no dispute as to when a project will start and finish.

## CONCLUSION

When presented with a construction agreement, owners can avoid certain pitfalls and other disputes on a project by negotiating contract terms requiring: (i) the pencil requisition process; (ii) lien waivers contemporaneous with payment applications; and (iii) explicit dates for project milestones. Project owners should, of course, seek counsel from a construction attorney when negotiating construction agreements. **FT**

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## MY ADULT CHILD IS GETTING DIVORCED, SO WHY AM I BEING ASKED ABOUT MY ASSETS?

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When their child is getting divorced, most parents are appalled to learn that the state of Massachusetts, unlike other states, allows the court to consider the future inheritance of a divorcing spouse when determining how to divide the marital estate. Although a future expectancy of an inheritance is not divisible in a divorce, “the opportunity of each for future acquisition of capital assets and income” is one factor, among many, that the court weighs in the process of equitable distribution. G.L. c. 208, sec. 34.

In order to determine a party’s opportunity to acquire assets and income in the future, it is common for parents (and even grandparents or aunts/uncles) to be asked to provide information regarding their estate plan and their net worth in the context of their child’s divorce. Often, when the parents learn they must produce this information, they are outraged; their child may not even know what their estate plan provides or what they’re worth, and now they need to turn this information over to their soon-to-be ex-daughter-in-law or ex-son-in-law. What about their right to privacy? After all, this isn’t their divorce; it’s their child’s divorce.

To balance one spouse’s right to know about his or her spouse’s opportunity to acquire future capital assets and income against the parents’ right to keep their estate plan and their financial and personal documents confidential, the Supreme Judicial Court has created a compromise in the form of a Vaughan Affidavit.<sup>1</sup> Rather than subjecting the parents to document production and a deposition during which they are questioned at length about their estate plan, their assets

*What about their right to privacy? After all, this isn’t their divorce; it’s their child’s divorce.*



<sup>1</sup> The Vaughan Affidavit was first recognized in the case of *Vaughan v. Vaughan*, SJC Single Justice, No. 91-485 (1991) (unpublished).

and their liabilities, the parents may prepare a Vaughan Affidavit containing the following information:

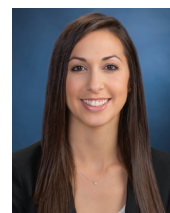
1. their approximate total net worth;
2. a general description of their current estate plans and wills; and
3. the date, if any, when their estate plans and wills were last amended.

A Vaughan Affidavit can be an important tool in determining how assets currently owned by the parties should be equitably divided between the parties in a divorce action. The attorneys at Fletcher Tilton PC have confronted this issue many times in our representation of divorce clients and estate planning clients. If you are thinking about divorce, are in the process of divorce or are the parents of a divorcing child, the Domestic Relations Practice Group at Fletcher Tilton PC has the experience and expertise to navigate you through this difficult time. **FT**

## WHY DO I NEED A POWER OF ATTORNEY?

By Lauren E. Miller, Esq.

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A power of attorney is a legal document in which you can designate a person to make financial decisions for you. Unlike a will (which takes effect only after your death), the authority under a power of attorney is valid only while you are alive. If you start to need help managing finances, it can be helpful to designate a trusted family member, friend, or professional as a power of attorney before you become incapacitated.

For example, the person with a power of attorney can speak with or request documents from financial institutions, help complete applications for public benefits, or sign checks to pay bills. Be cognizant that this person can also enter into transactions on your behalf such as selling your house or moving funds from your accounts.

Instead of executing a power of attorney, some seniors opt to add one of their children to their bank accounts as a joint owner. This can have unintended consequences. Upon the parent’s death, confusion can follow as to whether the account funds were meant to be split equally among all the children or left only to the child who was made joint owner. Similarly, adding a child to a real estate deed can have serious tax implications upon a later sale of the property, result in the parent becoming ineligible for Medicaid benefits, or affect the eligibility of children or grandchildren for need-based student financial aid. An experienced elder law attorney can draft the power of attorney document to address the unique challenges faced by elders and their families. **FT**

# FirmNews




## FLETCHER TILTON WELCOMES ATTORNEY SCOTT REGAN

Scott Regan is an associate attorney who concentrates his practice in commercial and employment litigation. Mr. Regan represents corporate entities and individuals in all aspects of litigation, from pre-litigation counseling through trial and appeal. He defends and prosecutes claims involving a wide variety of business disputes. Attorney Regan works out of our Worcester office and can be reached at [sregan@fletchertilton.com](mailto:sregan@fletchertilton.com).

### UPCOMING SEMINARS

#### MANAGING A CHANGING WORKPLACE

**Thur., Oct. 5** - 8:30-10:30 a.m.  
**Speaker:** Attorney Joseph Bartulis, Jr.  
**Location:** Verve Crowne Plaza, Natick, MA

#### THE COMPREHENSIVE ESTATE PLAN

**Thur., Oct. 12** - 5:30-8 p.m.  
**Speaker:** Attorney Richard Barry, Jr.  
**Location:** Resort & Conference Center Hyannis, MA

#### MANAGING A CHANGING WORKPLACE

**Tue., Oct. 17** - 8:30-10:30 a.m.  
**Speaker:** Attorney Joseph Bartulis, Jr.  
**Location:** Cyprian Keyes, Boylston, MA

#### THE COMPREHENSIVE ESTATE PLAN

**Wed., Oct. 18** - 5:30-8 p.m.  
**Speaker:** Attorney Richard Barry, Jr.  
**Location:** Ken's Steak House, Rte. 9, Framingham, MA

#### HOW TO ADMINISTER A SPECIAL NEEDS TRUST

**Sat., Oct. 28** - 8 a.m.-1:30 p.m.  
**Speakers:** Attorneys Frederick Misilo, Jr., Theresa Varnet and the Special Needs Practice Group Team  
**Location:** Courtyard Marriott, Marlborough, MA

#### ESTATE PLANNING SEMINARS

**With** Attorney Michael Lahti  
**Tue. Oct. 17** - 10 a.m. & 1 p.m.  
**Location:** Kirkbrae Country Club Lincoln, RI  
**Tue. Oct. 24** - 10 a.m. & 1 p.m.  
**Location:** Capitol Ridge at Providence, RI  
**Tue. Nov. 7** - 10 a.m. & 1 p.m.  
**Location:** Lobster Pot Restaurant Bristol, RI  
**Tue. Nov. 14** - 10 a.m. & 1 p.m.  
**Location:** Blackinton Inn Restaurant Attleboro, MA

For details and to register, visit [FletcherTilton.com/seminars-events](http://FletcherTilton.com/seminars-events)



## Managing a Changing Workplace: The Trump Effect, Pot & More.

### You're invited!

Breakfast seminar with Attorney Joseph Bartulis  
 Chairperson of Fletcher Tilton's Labor & Employment Practice Group



**Thursday, October 5, 2017 | Natick, MA**

**Tuesday, October 17, 2017 | Boylston, MA**

8:30 check-in and hot breakfast buffet. 9:00-10:30 Seminar. Fee of \$20 includes breakfast.

Register online at [FletcherTilton.com/seminars-events](http://FletcherTilton.com/seminars-events)

## The Comprehensive Estate Plan

**Join us** for a complimentary light buffet and learn about Estate Taxes, Probate, Retirement Accounts, and Distributions to Beneficiaries. If your total estate will exceed \$1 million, including life insurance, you should attend.



Presented by attorney Richard Barry, Jr.

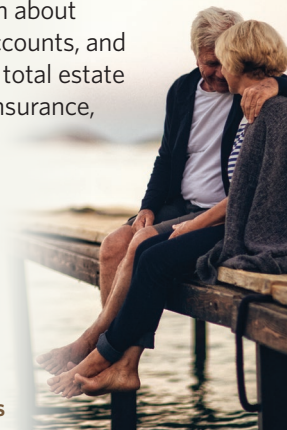
**October 12, 2017**

5:30-8:00 p.m. | Hyannis, MA

**October 18, 2017**

5:30-8:00 p.m. | Framingham, MA

Register online at [FletcherTilton.com/seminars-events](http://FletcherTilton.com/seminars-events)



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**FALL SEMINARS (see pg. 9)**

- |         |   |
|---------|---|
| Oct. 5  | Managing a Changing Workplace           |
| Oct. 12 | The Comprehensive Estate Plan           |
| Oct. 17 | How to Administer a Special Needs Trust |
| Oct. 24 | Estate Planning Seminars                |
| Nov. 7  |   |
| Nov. 14 |   |