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LEGAL CONSIDERATIONS RELATED TO REDEVELOPMENT, RECONFIGURATION AND RE-SALE OF FAILED CONDOMINIUM PROJECTS AND SUBDIVISIONS

by Gregory J. Gamalski* and Paul A. Thursam**

Introduction

The collapse of the real estate market in Michigan preceded the national catastrophe by months, if not years, and the State has been in the real estate doldrums for some time—certainly longer than most of country. It seems to be our lot: as once Michigan led the manufacturing revolution at the start of the preceding century, it can be at the forefront of a real estate evolution as real estate projects are recast into other shapes and forms or re-used. The statutory schemes under the Michigan Condominium Act1 and the Land Division Act2 provide lawyers, developers and land owners with possible tools and mechanisms for re-casting fallow real estate projects.

This article will examine some of the issues and mechanisms that must be considered under the two Acts, with a primary focus on the Condominium Act, which has more flexibility and subtlety in its use and application. Because condominiums were such a large share of the housing and development market, a close examination of that Act and its provisions are our main focus. And while the discussion is focused on residential projects—the hurricane eye of the current real estate storm—many of the points discussed apply to commercial projects as well.

Condominium Act Flexibility

The Condominium Act offers a number of reconfiguration options and future development rights, all of which are usually found in condominium project documents, and most of which are drawn from Sections 31 through 41 of the Condominium Act.3 For instance, Section 324 allows for expansion of condominium Act.4 For instance, Section 324 allows for expansion of condominium projects. Typical master deed provisions related to expansion rights might state:

Area of Future Development. The Condominium Project established pursuant to the initial Master Deed consisting of 17 Units is intended to be the first stage of an Expandable Condominium under the Act to contain in its entirety a maximum of 50 Units. Any Project expansion will be undertaken only pursuant to a site plan approved by the applicable municipal authorities. Additional Units, if any, will be developed upon all or some portion or portions of the following described land (the “Area of Future Development”):

Part of the Southwest fractional ¼ of Section 31, T5N-R7E, Folly Township, Oakland County, Michigan, more particularly described as follows:

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1 MCL § 559.101 et seq.
2 MCL § 560.101.
3 MCL § 560.131-141.
4 MCL § 560.132.

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Increase In Number of Units. Any other provisions of this Master Deed notwithstanding, the number of Units in the Project may, at the option of the Developer, from time to time, within a period ending no later than six (6) years from the date of recording this Master Deed, be increased by the addition to this Condominium of any portion of the Area of Future Development and the development of residential Units thereon. The location, nature, appearance, design and structural components of all such additional Units as may be constructed thereon shall be determined by the Developer in its sole discretion. All improvements shall be reasonably compatible with the existing development in the Project, as determined by the Developer in its sole discretion. No Unit shall be created within the area of future development that is not restricted exclusively to residential use.

If one can expand, can one contract and then re-expand? There is no statutory bar, but the master deed would have to so provide. When reviewing a master deed for a foreclosing lender or scavenger buyer, that issue should be investigated. If lacking, an amendment to the master deed incorporating that re-expansion right might be wise, assuming the developer or its assignee still has rights to amend. If so, a statement could be inserted such as: “The Master Deed is amended to allow any land withdrawn to be reincorporated as an Area of Future Development.”

The amendment process is detailed in Sections 90 and 90a of the Condominium Act. Section 90a allows for a sort of silent consent where a mortgagee can, in some instances, be notified and deemed to have consented if no objection is made after the notice is given. This is useful to successors in interest to the original developer if spot sales of a few units produced mortgagees from several far-flung and uncommunicative or disinterested lenders. Only the consent of first mortgagees is required under Section 90a. The consent requirement is based on the number of units covered by the mortgage, not the number of mortgages held. Second mortgagees do not get to vote or consent.

Section 33 of the Condominium Act complements Section 32 and, as discussed above, allows projects to be contracted. Section 33 requirements parallel Section 32, being a reservation of an election on the part of the developer or its successors to contract the condominium project, a statement of the restrictions on that election, a time limit of not more than six years after the initial recording of the master deed, a general description of the land that may be withdrawn from the condominium project and a statement as to whether portions of the land may be withdrawn from the condominium project at different times. Typical contraction rights might be stated as:

Right To Contract. As of the date this Master Deed is recorded, the Developer intends to establish a Condominium Project consisting of 17 Units on the land described in Article II, all as shown on the Condominium Subdivision Plan. Developer reserves the right, however, to establish a Condominium Project consisting of fewer Units than described above and to withdraw from the Project all or some portion of the land described in Article II, except that in no event may the Project consist of fewer than two Units, being Units 1 and 2 as they are depicted on Exhibit B. Furthermore, any land added under Article VI above, shall be deemed to be part of the Contractible Area under Article VII (the "Contractible Area"). Therefore, any other provisions of this Master Deed to the contrary notwithstanding, the number of Units in this Condominium Project may, at the option of the Developer, from time to time, within a period ending no later than six (6) years from the date of recording this Master Deed, be contracted to any number determined by the Developer in its sole judgment, but in no event shall the number of Units be less than two (2). There is no obligation on the part of the Developer to withdraw from the Condominium all or any portion of the Contractible Area described in this Article, nor is there any obligation to withdraw portions thereof in any particular order.

Withdrawal of Land. In connection with such contraction, the Developer unconditionally reserves the right to withdraw from the Condominium Project such portion or portions of the land described in this Article as is not reasonably necessary to provide access to or otherwise serve the Units included in the Condominium Project as so contracted. Developer reserves the right to use the portion of the land so withdrawn to establish, in its sole discretion, a rental development, a separate condominium project (or projects) or any other form of development. Developer further reserves the right, subsequent to such withdrawal, but prior to six (6) years from
the date of recording this Master Deed, to expand the Project as so reduced to include all or any portion of the land so withdrawn.\(^\text{10}\)

**Land Division Act Contrast**

Consider the plat amendment process by comparison. The Land Division Act\(^\text{11}\) states that the circuit court may, as provided in Sections 222 through 229,\(^\text{12}\) vacate, correct or revise all or a part of a recorded plat. While there are provisions for changing easements within a plat by agreement under Section 222a, there are no provisions for wholesale changes other than Section 222 through 229. In *Brookshire v Oneida*,\(^\text{13}\) the court ruled the agreement provisions of Section 109(a)\(^\text{14}\) of the Land Division Act have fairly limited utility in the plat amendment context. The plat amendment complaint requires naming and serving everyone who has an interest in the plat, mortgagees (including land contract vendees), married couples (both husbands and wives) and also parties within 300 feet of the plat. And plat amendment does not amend underlying restrictions or enlarge or contract property rights.\(^\text{15}\) The Condominium Act by comparison allows changes to the subject land and to restrictions within the condominium documents with relative ease. In any case, if amending a plat, the declaration of restrictions for the platted subdivision must, therefore, be reviewed. There may or may not be a means to amend the restrictions. Unlike a condominium, where the restrictions and allocations of ownership are wrapped up in one document, the plat and the restrictions are two separate legal documents and the changes in one may not effect changes in the other, although the recorded plat maps, especially in older plats, often contain in the dedication language important statements of the owner’s and declarant’s rights.\(^\text{16}\) As an example, some declarations or restrictions state:

The provisions of this Declaration shall run with and bind the land for a term of twenty-five (25) years from the date of Declaration as recorded, after which time they shall be automatically extended for successive periods of five (5) years unless amended.

This Declaration may be amended by an instrument signed by not less than two-thirds (2/3) of the Lot Owners. Any amendment must be recorded with the County Register of Deeds before the amendment becomes effective.

Most declarations recorded this century and in the last decades of the previous century made some provision for the declarant or developer to make changes during the period of development, but has the new owner or bank taken an assignment of those rights? Merely taking title to the remaining rights might not be sufficient to vest the declarant’s right to amend in the foreclosing mortgagee, purchaser or deed in lieu title holder.

**Condominium Subtleties: Section 67(3)**

Returning to the condominium context, amendments in 2000 to a Developer’s contraction rights added some additional flexibility to the Act beyond the scope of Section 33. The drafters must have been thinking of our current “end of the world” scenario when they presciently added this language. Section 67(3), as added in 2000, states:

**Section 67(3).** Notwithstanding section 33, if the developer has not completed development and construction of units or improvements in the condominium project that are identified as “need not be built” during a period ending 10 years after the date of commencement of construction by the developer of the project, the developer, its successors, or assigns have the right to withdraw from the project all undeveloped portions of the project not identified as “must be built” without the prior consent of any co-owners, mortgagees of units in the project, or any other party having an interest in the project. If the master deed contains provisions permitting the expansion, contraction, or rights of convertibility of units or common elements in the condominium project, then the time period is 6 years after the date the developer exercised its rights with respect to either expansion, contraction, or rights of convertibility, whichever right was exercised last. The undeveloped portions of the project withdrawn shall also automatically be granted easements for utility and access purposes through the condominium project for the benefit of the undeveloped portions of the project. If the developer does not withdraw the undeveloped portions of the project from the project before expiration of the time periods, those undeveloped lands shall remain part of the project as general common elements and all rights to construct units upon that land shall cease. In such an event, if it

\(^{10}\) Note that this right thus ties back into the expansion right discussed above.

\(^{11}\) MCL § 560.101.

\(^{12}\) MCL §§ 560.222-560.229.

\(^{13}\) 225 Mich App 196; 670 NW2d 294 (1997).

\(^{14}\) MCL § 560.109(a).

\(^{15}\) Tomachek v Baos, 482 Mich 484; 759 NW2d 178 (2008).

\(^{16}\) MCL § 560.144; MCL § 560.194.
becomes necessary to adjust percentages of value as a result of fewer units existing, a co-owner or the association of co-owners may bring an action to require revisions to the percentages of value under section 95.17.

Thus, under Section 67(3), it is possible to remove land from a condominium even after the six year period under Section 33 has expired to the extent that land contains unbuilt units or improvements identified as “need not be built.” This is a powerful tool and it is not available to the owners of failed plats except through litigation under Land Division Act Sections 222 through 229.

Because it is possible that Section 33 contraction rights might have expired by now in a project created in 2003, Section 67(3) rights are sure to have future utility until perhaps as late as 2013, or even beyond, depending on when construction started. This is true because actual construction may not have commenced on the date the master deed was recorded, though it is also possible construction could have commenced before the master deed was recorded. Consider whether a foreclosing lender or scavenger successor might want to prophylactically exercise expansion or conversion rights to keep the Section 67(3) right alive for projects created in 2004 or 2005 to protect the rights under Section 67(3). For instance, in a project recorded in 2004 with a conversion right exercised in 2010, the successor in interest might be able to take land out under Section 67(3) in 2016, because one can contract for up to ten years after construction was commenced or six years after the rights under Section 31, 32 or 33 were exercised. This could be nearly 12 years if the timing is right. If the master deed were recorded in 2006 and the conversion right was used in 2012, under Section 67(3), land with the unbuilt “need not be built” units or improvements can be withdrawn until 2018 under the right circumstances.

Also consider whether assignees, subsequent developers or other parties would be wise to file an affidavit of fact as to matters on the chain of title prospectively to make sure the clocks are set right. A condominium association likewise might want to do so to run the clock out.

**Condominium Act Section 67(3) Versus The Assessor**

Under Section 67(3), if the “need not be built” units are not in fact built, they magically fade away into common elements and cease to exist. One thing the prescient drafters of Section 67(3) did not consider is who persuades the assessor to eliminate the tax parcel numbers and assessments related to the units reabsorbed under Section 67(3)? One doubts the tax lien is extinguished. Is it spread over the units that now exist in the project? Will the assessor even respond to the inquiry? Can the assessor foreclose on the units absorbed as common elements? Section 67(3) is self-activating, but it is not clear about any of these issues. And heaven forbid there is an outstanding special assessment. Unlike the amendment process under Sections 32 and 33 of the Condominium Act, which require tax certification before an amendment is recorded to add or remove land or units, there is no tax certification requirement under Section 67(3)—it simply happens by operation of law and passage of time. The courts likely will end up cutting this knot at some point in the future.

**Condominium Act Conversion Rights**

The next key concept available to owners or acquirers of failed condominium projects is the conversion rights under Section 33 of the Condominium Act. Conversion rights (being conversion of part the property to other kinds of components like units or common elements, not “conversion” of an apartment building to condominium units) are useful. The language will be familiar after reviewing Sections 31 and 32 of Condominium Act, because the master deed must contain reference to the convertible area within the condominium project, the number of condominium units that may be created within the convertible area, a statement describing what types of condominium units may be created on the convertible area, the extent to which a structure erected on the convertible area will be compatible with the condominium project, a description of improvements that may be made and a description of the developer’s reserved right, if any, to create limited common elements within any convertible area, and designation of common elements that may subsequently be assigned as limited common elements. Typical text on this point might state:

**Designation of Convertible Areas.** All of the units and Common Elements in the Condominium project are shown on the Condominium Subdivision Plan as Convertible Areas within which the Units and Common Elements may be modified as provided herein and within which Units may be created.

**The Developer’s Right To Create and Modify Units and Common Elements.** The Developer
reserves the right, in its sole discretion, during a period ending no later than six (6) years from the date of recording this Master Deed, to modify the size, location, design or elevation of Units and/or General or Limited Common Elements and to create Units up to a maximum of ____ additional Units within the Convertible Areas designated for such purpose on the Condominium Subdivision Plan, so long as such modifications do not unreasonably impair or diminish the appearance of the Project.

Critical to these provisions is whether or not the right to create units is set forth in the section. These provisions must be read with care. Not all condominium documents reserve the right to create added units. Also consider if one can “devolve” units into common elements. Section 41 appears to authorize such action for “convertible areas.” Might it be desirable to get rid of one last unit in a site condominium by “converting” it to a park to get it off the tax rolls and the books? And if one paid the current taxes, can one then avoid the future liability but some years later recreate the units and sell them? There is an interesting discussion of these issues in Richmond Street LLC v City of Walker. Essentially, the Tax Tribunal ruled that common elements denominated as convertible areas could be taxed as separate tax parcels, but the Court of Appeals overruled that poorly reasoned decision. A careful reader will certainly tease out some interesting possibilities for management of property taxes.

Expansion by the Association in a Mature Project

One other bit of flexibility is found in Section 36:

The master deed may provide that undivided interests in land may be added to the condominium project as common elements in which land the co-owners may be tenants in common, joint tenants, or life tenants with other persons. A condominium unit shall not be situated on the lands. The master deed, or any amendment to master deed under which the land is submitted to the condominium project shall include a legal description thereof and shall describe the nature of the co-owners’ estate therein.

Should one consider inserting such a provision by amending an existing master deed if one succeeds to the developer’s interest, or should existing associations consider such a change? Can this be a way to include a hindquarter of detention pond, roadway or other useful scrap into a project to make a surviving component of a failed project complete from an engineering or administrative point of view? How does the assessor deal with this added land? As a common element, the added land should be treated and taxed as part of the units for assessment purposes.

Might an aggressive existing association desire to use this to add buffers of now available cheap land? On its face, Section 36 does not seem to suggest site plan approval would be necessary. But an extant planned unit development agreement or cluster option agreement might impose limits, as might terms of original site plan approval. It does suggest a way to get rid of land abutting a completed project that a developer or banker simply no longer cares to carry on the books, along with the associated taxes and liabilities.

General Amendment Rights Under Section 90

While not contemplated in Section 36 or directly by the Condominium Act, it also seems possible that a general amendment made under Section 90 could be used to eliminate some units within a project if the new owner wanted to be rid of them (think of site condominium units taken over by a taxing authority) and create open spaces. Such an amendment would likely not use Section 33 and might simply aver that with the consent of two-thirds of the co-owners and mortgagees, the units were eliminated and turned into common element or limited common element. It does not appear such an amendment would be of a material nature requiring mortgagee consent from other mortgage holders if the mortgage(s) did not burden the eliminated unit(s).

Subdivision and Consolidation

One might also reconfigure a condominium project by combining or dividing units, subject, of course, to applicable land use regulations. This may be one area where lots platted under the Land Division Act have an advantage over condominium units under the Condominium Act. Lots in a subdivision can be sold in pieces or made part of the adjoining lot pretty much by mere conveyance without much grief, although no subdivided lots can be broken into more than four

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19 MCL § 559.141.
21 MCL § 559.136.
Condominium units can also be subdivided, though not quite as simply as a lot can be divided under the Land Division Act. Section 4924 states that if the condominium documents permit the subdivision of units, then units may be subdivided. A condominium unit cannot be subdivided unless the condominium documents expressly permit it. Thus, some projects might require technical amendment in order to exercise the right under Sections 48 and 49, although it is likely the amendment incorporating the rights could be combined with the exercise of that right as one document (assuming proper consents are obtained). The amendment to the master deed assigns new numbers to the new condominium units, allocates the undivided interest in the common elements to the subdivided unit and should state that the new units jointly share all rights and obligations with regard to any limited common elements. The bylaws must then be amended to allocate the votes and expenses. Again, surplus units could be divested by subdividing and consolidating those units under Sections 48 and 49. Query: Would transfer taxes be imposed or be collected as a result of such amendments?

Easements And Rights Related To Development

Continuing with review of the Condominium Act and how its provisions might affect the scavenging buyer, the issue of easement rights comes to the forefront. Under the Land Division Act, easements are dedicated within the plat and defined in detailed, albeit limited, fashion on the plat itself. Usually, the easements are only those created on the face of the plat map and within the dedication clause of the proprietor’s certificate. Because plat easements are almost universally dedicated to the public, in the plat context at least, future public access is assured for adjoining parcels. But, as noted above, realignment or elimination of the easements requires a lawsuit under Sections 222 through 229 of the Land Division Act, or an agreement under Land Division Act Section 222a (a near practical impossibility). Also, the declaration accompanying the plat might grant other ancillary rights. Thus, the following comments related to the master deed, at least as to reserved rights rather than easements depicted on the record plat, might also apply to the platted land. In any case, Section 35 of the Condominium Act states:

Section 35. Where fulfillment of the purposes of sections 31, 32, 33 or any other sections of this act reasonably requires the creation of easements, then the easements shall be created in the condominium documents or in other appropriate instruments and shall be reasonably described in the condominium documents.25

The utility of these provisions cannot be overstated. The developer has these rights, though it is unclear if a successor in title to a developer, absent an assignment of the developer’s rights, has them. It is critical to know what the “area of future development”26 or “contractable area” is, as defined in the master deed; sometimes the drafter might even have enlarged the benefited area to include land abutting or adjoining the condominium project (as might the drafter of a declaration for subdivision plat).

During the ’80s, ’90s and even into the 21st century, before the tectonic plates shifted, the comet hit, and flood tides rose in the real estate world, a number of new projects were successfully developed because these residual easement rights still existed within fallow projects abutting the land that was never added or that had been taken out of condominium projects. The scope of such rights depended on the language used by the drafter. Usually, because of an abstracting quirk, the easement rights may not show up in title work before the tectonic plates shifted, the comet hit, and flood tides rose in the real estate world, a number of new projects were successfully developed because these residual easement rights still existed within fallow projects abutting the land that was never added or that had been taken out of condominium projects. The scope of such rights depended on the language used by the drafter. Usually, because of an abstracting quirk, the easement rights may not show up in title work for the area of future development, for instance, if it were never added to the condominium project. The condominium is a defined parcel, but the area of future development is not within the project, having yet to be incorporated into the master deed. Thus, an abutting owner developing the fallow site at a later date, which at one time was an area of future development, might

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22 MCL § 560.263. For an interesting overview of the interplay of the Condominium Act and Section 163 of the Land Division Act, see Williams v City of Troy, 269 Mich App 670, 713 NW2d 805 (2005) (concluding that creation of a condominium over a large lot did not require replatting nor was it a violation of Section 163 of the Land Division Act).

23 MCL § 559.148.

24 MLC § 559.149.

25 MCL § 559.135.

26 MCL §§ 559.132 & 559.133 each require identification of expansion areas or contractible areas, which is most often expressed by a metes and bounds description. These areas are most often called “areas of future development” or “contractible areas.”
not ever know these rights accrue to the area of future development she acquired. The same might hold true for land withdrawn. One lesson to be learned is that if there is a condominium or existing subdivision next to a parcel, get that master deed or declaration too. Interesting rights and information might be gleaned for the adjoining owner’s benefit.

It is also worthwhile to consider the ease with which an easement of any kind in a condominium might be amended, as opposed to the easements in a recorded plat. The best hope for amending a plat easement is found in Section 222a of the Land Division Act, which requires all parties benefitting from the easement, like the utility companies and municipality, and a mere two-thirds of the lot owners sign an agreement. This section leaves open the question of whether mortgagees must consent. But under Sections 90 and 90a of the Condominium Act, 28 and with some ordinary drafting, easements can be relocated with the consent of the grantee and at the whim of the developer or holder of the developer’s rights. Typically, the developer’s rights in this regard are not keyed to the six year periods under Section 31, 32, or 33 but tie back to a “development and sales period” concept, lasting as long as the developer owns a unit it is offering for sale, or until a year after the last unit is constructed, or some period after control passes to the co-owners. Thus, it is much simpler to remove, revise or relocate easements in the condominium setting than in the plat. In that regard, typical master deed provisions might state:

**Granting of Utility Easements.** The Developer reserves the right at any time during the Development and Sales Period to grant easements for utilities over, under, and across the Condominium to appropriate governmental agencies or public utility companies and to transfer title of utilities to governmental agencies or to utility companies. Any such easement or transfer of title may be conveyed by the Developer without the consent of any Co-owner, mortgagee or other person and shall be evidenced by an appropriate amendment to this Master Deed and to the attached Exhibit B, recorded in the County Records. All of the Co-owners and mortgagees of Units and other persons interested or to become interested in the Project from time to time shall be deemed to have irrevocably and unanimously consented to such amendments to this Master Deed as may be required to effectuate the foregoing grant of easement or transfer of title.

Or in a pinch, the association can grant the easements or dedicate roads:

**Grant of Easements By Association.** The Association, acting through its lawfully constituted Board of Directors (including any Board of Directors acting prior to the Transitional Control Date) shall be empowered and obligated to grant such reasonable easements (including dedication of the sidewalks), licenses, rights-of-entry and rights-of-way over, under, and across the Condominium Premises for utility purposes or other lawful purposes as may be necessary for the benefit of the Condominium, subject, however, to the approval of the Developer so long as the Development and Sales Period has not expired. No easements created under the Condominium Documents may be modified, nor may any of the obligations with respect thereto be varied, without the consent of each person benefited or burdened thereby.

**Association Right To Dedicate Public Rights-of-Way and Act Upon Special Assessment Proceedings.** The Association, upon expiration of the Development and Sales Period, acting through its lawfully constituted Board of Directors shall be empowered to dedicate to the public a right-of-way of such width as may be required by the local public authority over any or all of the roadways or sidewalks in Wasteland Commons, shown as General Common Elements in the Condominium Subdivision Plan. Any such right-of-way dedication shall be evidenced by an appropriate amendment to the Master Deed and to the attached Exhibit B, recorded in Oakland County Register of Deeds. The Association shall further be empowered, at any time, to execute petitions for and to act on behalf of all

27 MCL § 560.222a:
(1) Notwithstanding Section 222, a public utility easement that is part of a recorded plat may be relinquished without filing an action in circuit court if a written agreement for that purpose is entered into among all of the following parties:
(a) Each public utility or municipal entity that has the right to use the recorded easement.
(b) The owner or owners of record of each platted lot or parcel of land subject to the easement.
(c) A two-thirds majority of the owners of record of each platted lot or parcel of land within 300 feet of any part of the recorded easement.
(d) The governing board of the municipality in which the subdivision covered by the plat is located.
(2) An agreement described in subsection (1) shall meet all applicable requirements for recordation and is effective upon being recorded with the register of deeds and filed with the department of labor and economic growth. The register of deeds and the department of labor and economic growth shall cross-reference the document to the affected plat.
28 MCL §§ 559.190 & 559.190a.
Co-owners in any statutory proceedings regarding special assessment improvements of the roadways in the Condominium. All of the Co-owners and mortgagees of Units and other persons interested or to become interested in the Project from time to time shall be deemed to have irrevocably and unanimously consented to such amendment or amendments of this Master Deed to effectuate the foregoing right-of-way dedication. There is no promise that any such dedication will ever take place, notwithstanding the reservation of this right.

In order to use these rights, the scavenger buyer or foreclosing lender must, of course, hold the rights of the developer. Otherwise, one must go on bended knee to the association. This issue is too often overlooked. The typical condominium documents (and subdivision declarations) are loaded with many privileges that benefit a developer, which a foreclosing lender, deed in lieu grantee or distressed sale buyer must have. The “developer,” as defined in the master deed or declaration, can grant easements, expand and contract a condominium, maintain sales offices, and get special treatment on dues payments. A buyer without an assignment may not have the developer’s rights, hamstringing re-sale, re-development or reformatting of a project. For instance, Section 44 of the Condominium Act states:

Section 44. Subject to any restrictions the condominium documents may specify, the developer has a transferable easement over and on the common elements for the purpose of making improvements on the submitted land and any additional land pursuant to the provisions of those documents and of this act, and for the purpose of doing all things reasonably necessary and proper in connection therewith.29

Other rights, if reserved, are available under Section 45:

Section 45. Offices, model units, and other facilities; maintenance; costs; restoration of facilities. The developer and its duly authorized agents, representatives, and employees, and residential builders who receive an assignment of rights from the developer, may maintain offices, model units, and other facilities on the submitted land. The developer may include provisions in the condominium documents relative to the facilities as may reasonably facilitate development and sale of the project. The developer shall pay or be responsible to require a residential builder to pay all costs related to the condominium units or common elements while owned by developer and to restore the facilities to habitable status upon termination of use.30

Also, keep in mind that the rights under Sections 31, 32, and 3331 are reserved to “developers,” not mere co-owners. And the developer can often forestall association driven amendments in both master deeds and declarations too. Typical provisions might state:

**Developer Amendment Rights.** During the Development and Sales Period, the Condominium Documents shall not be amended, nor shall the provisions thereof be modified in any way without the written consent of the Developer.

Therefore, an assignment of these rights is critical. What risk is attendant to taking the assignment? Mere assignment does not make one a successor developer. MCL § 559.235 makes that clear. A party becomes a successor developer in a condominium by taking title to some minimum number of the units. This is merely part of the proverbial bundle of sticks making up property rights. Most master deeds contain a right to assign the developer’s rights, a right distinct from the successor developer’s obligations. Typical language might say:

**Assignment.** Any or all of the rights and powers granted or reserved to the Developer in the Condominium Documents or by law, including the power to approve or disapprove any act, use or proposed action or any other matter or thing, may be assigned, in whole or part, by it to any other entity or entities or to the Association. Any such assignment or transfer shall be made by appropriate instrument in writing duly recorded in the office of the County Register of Deeds.

The successor developer worry is a shibboleth anyway. If one takes this assignment one no more becomes the successor developer than an easement

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29 MCL § 559.144.

30 MCL § 559.145.

31 MCL §§ 559.131, 559.132 & 559.133 each use the term “developer" as defined in MCL § 559.106(2) as the party holding the rights under those sections. Section 6(2) states “Developer" means a person engaged in the business of developing a condominium project as provided in this act. Developer does not include any of the following:

(a) A real estate broker acting as agent for the developer in selling condominium units.

(b) A residential builder who acquires title to 1 or more condominium units for the purpose of residential construction on those condominium units and subsequent resale.

(c) Other persons exempted from this definition by rule or order of the administrator.
The developer has so many rights under the typical master deed (or subdivision declaration) to approve plans, grant easements, control the homeowners association, amend documents, market units, maintain models, control signage and enforce restrictions that a foreclosing lender would be wiser to consider taking an assignment of rights rather than dithering about successor developer liability issues. Consider just the association dues issue, which also suggests itself in the platted subdivision context. Many condominium and subdivision restrictions exempt the developer or a builder for dues in all or part, but do those provisions cover investor owners, banks and municipalities who have not been assigned the developer’s rights and hold no residential builder’s license? The assessment clock then starts to run when they become owners (rather than mortgagees) and the assessment level is most likely higher than that imposed on the original developer. The question of whether one holds the developer’s rights thus again comes to the forefront. Developers have strong rights that one might want assigned to the buyer or that the foreclosing lenders might want to take.

### Successor Developer Liability

There is considerable mythology associated with successor developer liability that seems not currently well founded. The statute has two sections providing a basis for this analysis. First is MCL § 559.235, which states:

1. **As used in this section, “successor developer” means a person who acquires title to the lesser of 10 units or 75% of the units in a condominium project, other than a business condominium project, by foreclosure, deed in lieu of foreclosure, purchase, or similar transaction.**

2. A successor developer shall do both of the following:
   
   (a) Comply with this act in the same manner as a developer before selling any units.
   
   (b) Except as provided in subsection (3), assume all express written contractual warranty obligations for defects in workmanship and materials undertaken by its predecessor in title. A successor developer shall not be required to assume, and shall not otherwise be liable for, any other contractual obligations of its predecessor in title.

3. A successor developer shall not be required to comply with subsection (2)(b) with respect to any express written contractual warranty obligations for defects in workmanship and materials, if either of the following is maintained with respect to units for which such a warranty was undertaken by the predecessor in title:

   a. An insurance policy, in a form approved by the insurance bureau, that is underwritten by an insurer authorized to do business in this state. The insurance policy shall provide coverage for express written contractual warranty obligations for liability for defects in workmanship and materials.

   b. An aggregate escrow account with an escrow agent which contains not less than 0.5% of the sales price of each unit. If the escrow account described in this subdivision is initiated by a developer before a successor developer acquires title, 0.5% of the sales price of each unit in the project shall be deposited by the developer in the aggregate escrow account periodically upon the sale of each unit. If the escrow account described in this subdivision is initiated by a successor developer after acquisition of title, a total amount equal to 0.5% of the sales price of all units for which the warranty period plus 6 months has not expired shall be deposited by the successor developer in the aggregate escrow account, and 0.5% of the sales price of each unit shall be deposited by the successor developer in the aggregate escrow account periodically upon the sale of each remaining unit. Funds in an escrow account described in this subdivision shall not be released for a unit until 6 months after the expiration of the warranty period for that unit.

   (4) A successor developer that acquires title to the lesser of 10 business condominium units or 75% of the business condominium units in the condominium project shall not be required to assume, and shall not otherwise be liable for, any contractual obligations of its predecessor in title.

   (5) A residential builder who neither constructs nor refurbishes common elements in a condominium project and who is not an affiliate of the developer shall not be required to assume and be liable for any contractual obligations of the developer under this section, and shall not be considered a successor developer or acquire any additional
Section 137:
and statutory.33 The rule of non-liability, with exceptions (both common law and statutory) now comes in two flavors: common law liability (as it first developed) and statutory liability (as it appears now). Michigan has adopted the traditional concept and liability scheme has since been adopted, a creditor or plaintiff with a claim against the selling entity could assert that claim against, and collect payment from the purchasing entity. Successor liability as imposed, a creditor or plaintiff with a claim against the selling entity could assert that claim against, and collect payment from the purchasing entity.

Successor liability first developed in the law as an exception to the general rule that, when one corporate or other legal person sold assets to another, the assets were transferred free and clear of all but valid liens and security interests. When successor liability was imposed, a creditor or plaintiff with a claim against the selling entity could assert that claim against, and collect payment from the purchasing entity. Successor liability as a concept and liability scheme has since been adopted, either wholesale or with modification, by other areas of law, including condominium law. Successor liability now comes in two flavors: common law liability (as it first developed) and statutory liability (as it appears most frequently). Michigan has adopted the traditional rule of non-liability, with exceptions (both common law and statutory).33

The general rule of non-liability protects the purchasing entity, its shareholders and creditors from claims that should rightfully be brought against the selling entity. The general rule also greatly facilitates and promotes the free alienability of property, since a successor enjoys non-liability. The purpose of successor liability is to provide contract and tort creditors with an avenue for recovery in appropriate cases against successor entities, when the predecessor that contracted with them committed the tort, or the action that later gave rise to the tort, had sold (or lost) all or substantially all of its assets and is no longer a viable source of recovery. Today, successor liability is usually managed by statute, shifting burdens to successors or predecessors depending on the intent of the legislature. The Condominium Act follows the general rule of non-liability with a few modifications. As noted above, with the exception of any express, written contractual warranty obligations for defects in workmanship and materials, a successor developer shall not be required to assume, and shall not otherwise be liable for, any other contractual obligations of its predecessor in title.34 Michigan courts are bound by precedent to interpret the terms of a statute according to the plain meaning rule (plain, certain and unambiguous statutes are not subject to judicial construction). It therefore seems illogical that successor liability under the Condominium Act would cause so much doubt when its terms are so clear.

A fundamental principle of statutory construction is that "a clear and unambiguous statute leaves no room for judicial construction or interpretation."35 When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case.36

For instance, Oregon’s statutory scheme for successor developer liability is comparable to Michigan's. ORS §100.220(3) describes the obligations of a successor developer. As long as a successor developer is not an affiliate of the predecessor developer, the successor is not liable for any statutory warranty requirements, any other warranties made by the predecessor, or any breach of fiduciary obligation by the predecessor.

Where exceptions to the general rule of non-liability are accepted, they typically require an additional element over mere acquisition of the assets or continuation of the work of an entity to justify imposition of successor liability. These additional elements appear in a variety of legal contexts, and probably contribute to the confusion that surrounds successor developer liability under the Condominium Act. Each of the following legal frameworks will impose liability upon a successor (or third party) when certain requirements are met. Importantly, none of them is, alone, sufficient to impose liability on a successor developer under the Condominium Act, beyond the requirement to assume express, written warranties.

32 MCL § 559.237.
34 MCL § 559.235(2) (b).
The first is enterprise liability. As a concept, enterprise liability assumes that regardless of safety measures taken by manufacturers and distributors, accidents and injuries will inevitably occur that can be fairly said to have been wholly or partly caused by some defective characteristic of the product involved. Accidents and injuries, in this view, are seen as an inevitable and statistically foreseeable "cost" of the product's consumption or use. As a remedy, enterprise liability would require all losses to be borne by the producer. Michigan law does not recognize enterprise liability as a cause of action.37

Second, a successor who intentionally assumes a liability of his predecessor will be held to his assumption.38 A successor can easily avoid this kind of liability through careful contract drafting and transaction structuring. The Condominium Act only requires a successor to assume express, written warranties. No additional assumptions are required by the Condominium Act.

Third are fraudulent schemes to escape liability by improperly defeating the legitimate interests of creditors and potential claimholders. Successor liability may be imposed in these instances to prevent injustice.39 However, there is no obvious fraud in a foreclosure or other arms' length transaction or sale.

Fourth is a typical statutory merger, where the successor becomes liable for the predecessor’s debts. A de facto merger allows liability to attach when an asset sale has mimicked the results of a statutory merger except for the continuity of liability. The typical condominium successor developer rarely, if ever, merges with the predecessor assets.40

Fifth is the mere continuation doctrine, which protects creditors and claimholders by imposing successor liability where a court finds that the predecessor and the successor are essentially the same entity, with the same shareholders. Different jurisdictions will require different proofs, but the underlying theory is the same. Assuming the typical successor developer is distinct, liability premised on this theory should virtually never arise.

Sixth is continuity of enterprise. This theory mimics the mere continuation exception to the general rule of non-liability, but does not require the successor business to have the same shareholders. Instead, this theory usually requires different additional elements. For example, Michigan requires the successor to hold himself out as a continuation of the predecessor business.41 Like the mere continuation exception, if a successor developer has no relationship with the predecessor, the general rule of non-liability will attach.

There are several other contract considerations, all of which all still lead to the conclusion that strict liability will not be imposed on a successor developer. One is novation. Novation substitutes a new party for an original party to a contract. It requires the consent of all parties and completely releases the original party. Given the statutory protection a successor developer in Michigan receives, a successor should never accept a novation. Next is assumption and as discussed above, the only assumption a successor developer must make concerns written, express warranties. No other assumption need or should be made. Last is assignment. A transfer of a right under a contract is an assignment. Assignments rarely arise in the case of a successor developer, as there is usually no need to assign any part of the predecessor’s contract to the successor (although a developer’s rights under the master deed can be assigned, consistent with any reserved assignment rights).

Thus with the exception of express, written warranties, a successor developer is not required to assume, and should not otherwise be liable for any other contractual obligations of its predecessor in title. Under Section 135 of the Condominium Act it is possible to avoid even the assumption of express, written contracts if the successor developer meets the insurance or escrow exceptions to the assumption requirement. Can a tax foreclosing municipality become a successor developer if it takes title by foreclosure of tax lien for more than 10 units or 75% of the project? It seems like a 100 unit site condominium could have 10 units lost by tax sale with some ease. Does the municipality have warranty obligations? It is unlikely because the typical one-year warranty will have expired by the time the three year tax forfeiture and foreclosure process is completed.

**Termination Option**

Of course, it may be that contraction, conversion, subdivision or consolidation is not enough. One might have to resort to the proverbial nuclear option: termination.

38 See Foster, 597 NW2d at 509-10.
Under the Land Division Act, a plat can only be terminated by court action. But the Condominium Act provides a breathtakingly simple mechanism and termination of condominium project is serious game changer. Section 51 states that if there is a co-owner other than the developer, termination requires agreement of the developer and unaffiliated co-owners of condominium units holding eighty percent of the votes in the association of co-owners; if the condominium units are not residential units, however, then the condominium documents may specify voting majorities less than the eighty percent minimum.\(^{42}\) If there are no other co-owners, the process is pretty much the same, except that Section 50 provides that in instances where there are no co-owners, the developer and its mortgagee may act alone.\(^{43}\) The termination document must be signed and recorded. After it is recorded, the property is owned by the co-owners as tenants in common in proportion to their respective undivided interests in the common elements. The assets of the association are distributed in proportion to the co-owners’ undivided interests in the common elements.

A typical master deed might state:

**Termination, Vacation, Revocation or Abandonment.** The Condominium Project may not be terminated, vacated, revoked or abandoned without the written consent of the Developer and 80% of non-Developer Co-owners and mortgagees, allocating one (1) vote for each unit on which a mortgage is held.

The termination document in the end is about one sentence:

The Master Deed for the Empty Villas, recorded in Liber 0000 Page 000, End of Times County Records, ETCCSP No. 000 is Terminated. The land within the terminated project is set forth on Exhibit A, attached.

The recording information for the original document, the condominium subdivision plan number and a metes and bounds description will do the trick. Real property taxes will have to be paid currently before termination. Query: What happens to any special assessments with open roll parts? Must they be paid in full?

What real property tax assessment relief is available for building sites once they devolve to a vast metes and bounds parcel? Does different tax treatment accrue if a multi-unit condominium building ceases to be a condominium? The tax assessment and valuation methods used are murky; hence, the value of a failed condominium project seems to be a bit of gray area.\(^{44}\)

What happens to construction liens? One might suspect that instead of being attached to only one unit, the resulting devolution would be to spread the lien over the whole parcel. Thus, consider the impact of the liens when proceeding with a termination plan. The same issue occurs when contracting projects. Likely, the lien will remain attached to land affected.

### Construction Lien Issues

Keep in mind that construction liens can be complicated under Section 132\(^{45}\) of the Condominium Act:

Section 132. A construction lien otherwise arising under the construction lien act, 1980 PA 497, MCL § 570.1101 to 570.1305, is subject to the following limitations:

(a) Except as provided in this section, a construction lien for work performed upon a condominium unit or upon a limited common element may attach only to the condominium unit upon which the work was performed or to which the limited common element is appurtenant.\(^{46}\)

(b) A construction lien for work authorized by the developer, residential builder, or principal contractor and performed upon the common elements may attach only to condominium units owned by the developer, residential builder, or principal contractor at the time of recording of the statement of account and lien.\(^{47}\)

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\(^{42}\) MCL § 559.151.

\(^{43}\) MCL § 559.150.

\(^{44}\) See 3333 Moores River v Lansing, 143 Mich App 253; 372 NW2d 523 (1985) (requiring a comparable sales approach, like residential housing offered for sale); cf Hackenburg v Three Rivers, MTT Docket No. 119191 (1991). In Hackenburg, the Tribunal ruled that an income approach as suggested by the property owners was the correct valuation method, even while acknowledging and distinguishing 3333 Moores River.

\(^{45}\) MCL § 559.232.

\(^{46}\) Comment: A marble countertop in Unit 1 does not create a lien right in Unit 2.

\(^{47}\) Comment: It seems that an inchoate construction lien ceases to exist on sold Units and Common Elements if the lien is recorded after the sale.
(c) A construction lien for work authorized by the association of co-owners may attach to each condominium unit only to the proportionate extent that the co-owner of the condominium unit is required to contribute to the expenses of administration as provided by the condominium documents.48

(d) A construction lien may not arise or attach to a condominium unit for work performed on the common elements not contracted by the developer, residential builder, or principal contractor or by the association of co-owners. Thus construction lien rights are tricky in a condominium. A less than careful lien claimant might have an issue if an inarticulate lien is filed given Section 132(b). The other co-owners are protected in part from lien claims filed by those contracting with the developer. The Construction Lien Act has parallel limits and protections.49

Sales Programs by Developer Successors

One set of subtle and interesting questions is how the units owned by a foreclosing lender or scavenger buyer (or even the lucky unit of government with more than ten tax foreclosed units) must be marketed and sold. Condominium Act Section 135(2) requires that a successor developer shall: “Comply with this act in the same manner as a developer before selling any units.” Thus, the successor developer must comply with Section 84 and 84a, including the escrow requirement imposed under Section 84(3) and 84(4)(c). Sections 84 and 84a and attendant regulations under the Condominium Act impose on the developer the obligation to both (a) escrow purchaser deposits, and (b) assure funds are escrowed (or other adequate security is provided) in an amount sufficient to assure all “must be built” improvements are completed. If they are not, the developer and the escrow agent are liable for the damages.50

Thus, a circular bit of reasoning flows as follows. Under Section 135, a successor developer must comply with Section 84. Section 84 requires, essentially, that there must be an escrow to cover the costs to complete “must be built” items; therefore, does this mean that the successor developer must complete any open “must be built items” if the successor developer must “comply with this act in the same manner as the developer before selling any units?”

Arguably, some comfort can be taken from Section 84 which uses the defined term “developer” and from the absence in Section 84 of another defined term “successor developer.” And further comfort can be taken from Section 137, which says the transfer of the developer’s interest does not affect the developer’s obligation to the Association and co-owners (which these “must be built” denominations must be, arising as they do out of the master deed prepared by the developer). So, perhaps the successor developer has no such obligations to complete “must be built” improvements under the Condominium Act. That, of course, leaves entirely open the question of whether a municipality will require that “must be built” items have to be completed before issuing additional building permits or certificates of occupancy.

In fact, the resale of condominium units is still a complicated issue, raising all sorts of problems for the new owners, particularly foreclosing lenders, but also the opportunistic buyer. Consider, for instance, a typical provision in a Michigan township ordinance and how it might impact a foreclosing lender or buyer of the hindquarter, be they successor developer or not. For instance, Van Buren Township’s Zoning Ordinances Section 20.548 states with respect to a condominium project:

48 Comment: Liens for work by Association contractors are proportionate. Caution: Expenses of administration are not universally equal to percentages of value or voting rights.
49 MCL § 570.1126 states:
   (1) A construction lien, concerning a condominium, arising under this act is subject to the following limitations:
      (a) Except as otherwise provided in this section, a construction lien for an improvement furnished to a condominium unit or to a limited common element shall attach only to the condominium unit to which the improvement was furnished.
      (b) A construction lien for an improvement authorized by the developer of a condominium project and performed upon the common elements shall attach only to condominium units owned by the developer at the time of recording of the claim of lien.
      (c) A construction lien for an improvement authorized by the association of co-owners of condominium units shall attach to each condominium unit only to the proportional extent that the co-owner of the condominium unit is required to contribute to the expenses of administration, as provided by the condominium documents.
      (d) A construction lien shall not arise or attach to a condominium unit for work performed on the common elements, if the work was not contracted for by the developer or the association of co-owners of condominium units.

(2) This section shall be subject to the definitions and limitations of Act No. 59 of the Public Acts of 1978, being sections 559.101 to 559.272 of the Michigan Compiled Laws.

50 See Hills of Lone Pine v Texel Land et al, 226 Mich App 120, 572 NW2d 256 (1997) (title company escrow agent was held liable for the cost of incomplete “must be built” items).
SECTION 6.09A SURETY BOND

The Township Director of Building and Planning may allow occupancy of the condominium development before all improvements required by this Ordinance are installed provided that cash, a certified check or irrevocable bank letter of credit is submitted sufficient in an amount and type to provide for the installation of improvements before the expiration of the temporary occupancy permit without expense to the Township. The expiration of a temporary occupancy permit shall be as determined by the Director of Building and Planning upon the issuance of the permit.

Thus, if an ambitious and naïve new builder buys even one unit in a site condominium, will she able to acquire a certificate of occupancy (or even a building permit) if there are incomplete items in the overall project? And could the municipality (or, more exactly, should the municipality), if it wished to waive the requirement in the cited section, issue a certificate of occupancy and still be in good faith with applicable laws and ordinances, without endangering the health or safety of the occupants or users. When a building or structure is entitled thereto, the enforcing agency shall issue a certificate of use and occupancy within 5 business days after receipt of a written application therefore on a form to be prescribed by the enforcing agency and payment of the fee to be established by it. The certificate of use and occupancy shall certify that the building or structure has been constructed in accordance with the building permit, the code and other applicable laws and ordinances. The application for a certificate of use and occupancy for a new dwelling with a unit or units for rent shall set forth the information required in an application for a certificate of compliance for such a dwelling pursuant to the state housing law, and the certificate of use and occupancy for such a dwelling shall be deemed its initial certificate of compliance. The enforcing agency shall give the owner of the building or structure or his agent at least 12 hours' notice of the time of any final inspection, by the enforcing agency of the work covered by the building permit, pursuant to the application for a certificate of use and occupancy.

Thus, in the example, because the zoning ordinance has not been met (perhaps because the road and detention pond are incomplete), a certificate of occupancy cannot be issued because the building official cannot certify compliance with applicable laws.

There are also problems for a foreclosing lender presented by Section 11 of the Condominium Act:

Sec. 11. A residential condominium in this state shall not be offered for sale unless in compliance with article 24 (re: builder’s license) or article 25 (re: real estate broker’s license) of the occupational code, Act No. 299 of the Public Acts of 1980, being sections 339.2401 to 339.2412 and 339.2501 to 339.2516 of the Michigan Compiled Laws.

Section 2401 of the Michigan Occupational Code states:

Sec. 2401. As used in this article:

(a) “Residential Builder” means a person engaged in the construction of a residential structure or a combination residential and commercial structure who, for a fixed sum, price, fee, percentage, valuable consideration, or other compensation, other than wages for personal labor only, undertakes with another or offers to undertake or purports to have the capacity to undertake with another for the erection, construction, replacement, repair, alteration, or an addition

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51 MCL § 125.1513 (emphasis added).
52 MCL § 559.111 (parentheticals added).
to, subtraction from, improvement, wrecking of, or demolition of, a residential structure or combination residential and commercial structure; a person who manufactures, assembles, constructs, deals in, or distributes a residential or combination residential and commercial structure which is prefabricated, preassembled, precut, packaged, or shell housing; or a person who erects a residential structure or combination residential and commercial structure except for the person’s own use and occupancy on the person’s property. 53

Not being a licensed builder or broker, the foreclosing lender or other scavenger must engage a licensed real estate broker to sell the units. Direct sales are not permitted under the Condominium Act unless a license is held by the seller under the occupational code. The builder’s exception does these sellers no good: it covers sales by builders, not re-sales to builders, 54 builders being allowed to sell to consumers without necessarily having a real estate broker’s license. In the end, this is likely to be a small matter because lenders are sure to engage brokers to list the foreclosed property. However, the unwary lender or scavenger re-seller, making a direct deal with a bulk buyer, could find itself disappointed if the buyer chooses to rescind, because the sale without the benefit of a broker is illegal and the contract is thus likely unenforceable. 55

53 MCL § 339.2401 (emphasis added).
54 MCL § 359.2403.
55 See Schmidt v Warren Metals, Inc, 65 Mich App 322; 237 NW2d 309 (1975) where Court of Appeals stated in applying the predecessor statute:
The statute plainly denies to unlicensed residential builders the capacity to sue. If this were all the statute did, then plaintiff’s contention would be correct; but the statute does more. It imposes upon the plaintiff the duty to plead and prove the existence of a license. In thus providing, the statute adds an element to a cause of action brought in our courts by a residential builder/plaintiff.

Conclusion

The Condominium Act and the Land Division Act make re-development and re-positioning of failed real estate projects possible, with the Condominium Act suggesting more flexibility in that regard. However, in both types of projects, condominiums and plats, the underlying documents will hold the key to successful re-configuration and resale. And while the likelihood of liability being imposed on successors in interest is low, there are a number of ancillary considerations that must be addressed, particularly with respect to rights to re-sell, re-configure and even market the failed project, and a number of statutes need to be considered and reviewed when beginning such endeavors, including the Condominium Act, Land Division Act, the Occupational Code, the Construction Lien Act, the federal Interstate Land Sales Full Disclosure Act, 56 and Michigan’s Land Sales Act. 57 If a troubled project is to be brought back into the marketplace, there are likely numerous other subtle issues—not addressed herein due to space limitations—that must be addressed. (For instance, if one contracts a condominium, must one have an available division under the Land Division Act?) But what is laid out here is the beginning of a useful guide, one we can carry with us into the post-apocalyptic world known as the Michigan real estate market.

Without alleging this element, the complaint of a residential builder/plaintiff fails to state a cause of action upon which relief can be granted. 237 NW2d at 311. See also Brummel v Whelpley, 46 Mich App 93; 207 NW2d 399 (1973), where a seller who constructed a home on a lot and offered the entirety for sale was barred from bringing the action because the seller, who was a licensed real estate broker, nonetheless was not a builder licensed under the then applicable provisions of the Occupational Code.

57 M.C.L. § 565.803 et seq.