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October 20, 2008

Mr. Lawrence Carr
New Seabury on Cape Cod
20 Red Brook Road
Mashpee MA 02649

RE: Office Easement Units

Dear Mr. Carr:

This letter comments is in response to yours dated March 5, 2008. The matter presents certain complexities. Some comments on the legal framework within which it would be necessary for us to work are as follows:

Key Provisions:

The key provisions which would be involved in the development of the “Office Easement” into additional Maushop Condominium 3a Units are found in the Master Deed and in the Condominium Act.

3A Master Deed, Section 7 (vi)

This section reads, in pertinent part, as follows:

“ (vi)... the Sponsor, or its successors, shall have the right and option, exercisable in its sole and absolute discretion, to amend this Master Deed without the consent of any unit owner to add up to a maximum of 50

additional units to the Condominium Such additional units will be located substantially within the Subsequent Phases areas and shall be added by means of up to two amendments to this Master Deed so that the Condominium shall consist of not more than three phases.”

The 3a Master Deed created Phase I, which consisted of three cottage units in three buildings. The First Amendment to the 3A Master Deed later created Phase II, adding four units in one building.

Finally, the Second Amendment to the 3A Master Deed created Phase III, adding thirty-three units in eight buildings. This Second Amendment to the 3a Master Deed was recorded on June 12, 1981. At that point, New Seabury’s development rights in Condominium 3a expired.

In order to proceed in the direction your letter suggests, it would be necessary to revive those rights.

M. G. L. Chapter 183A, § 5 (b) (2) (iii)

This statute provides a method whereby a developer’s rights, once expired, may be revived. The specific section reads, in pertinent part, as follows. ¹

(b) (2) The organization of unit owners, acting by and through its governing body, ² shall have the power and authority, as attorney in fact on behalf of all unit owners from time to time owning units in the condominium, , to:

¹ I have added a series of footnotes as to the operation of the statute in this situation.

² This “governing body” would be the 3a Condominium Trustees and, in view of Maushop’s structure, the Village Trustees.

(iii) Extend, revive or grant rights to develop the condominium, including the right to add additional units or land to the condominium; provided, however, that the rights to add additional units are set forth in or specifically authorized by the master deed,³ Any action taken pursuant to this subparagraph shall be taken upon such terms and conditions as the organization of unit owners may deem appropriate⁴, including the method or formula by which the percentage interest of each unit is to be set⁵ in accordance with subsection (a) of section 5, or in accordance with another method which the organization of unit owners reasonably determines is fair and equitable under the circumstances, following such extension, revival, grant, addition or withdrawal if not specified in the master deed ; provided further, that the consent thereto, including the terms and conditions thereof, of not less than 75 per cent of owners of units within the condominium, or such lower percentage, if any, as the master deed may provide⁶ and 51 per cent of the number of all mortgagees holding first mortgages on units within the condominium who have given notice of their desire to be notified thereof as provided in

³ The right to add additional units - to a maximum of 50 - is “specifically authorized” in Section 7 (vi) of the Master Deed. Where Condominium 3a now has a total of only 40 units, the addition of 3 more units would also be “specifically authorized.”

⁴ This clause requires the Condominium and Village Trustees to control the “terms and conditions” of a revival of the developers’ rights. This would include such matters as architectural control over the new units and payment of Maushop’s legal fees. It would also include related matters such as rights for beach nourishment in Clamshell Drive and the sewer hookup for the entire village.

⁵ Setting the percentage interests of the new units may become a bit complicated, and further commentary follows in a separate section, *infra*.

⁶ The Master Deed provides requires consent by “seventy-five (75%) or more in interest of Undivided Interests”. This may or may not work out to be a “lower percentage” than the “75 per cent of owners of units” referred to in this clause.

subsection (5) of section 4⁷ is obtained for such extension, revival, grant, addition or withdrawal. Any action taken pursuant to this subparagraph may be taken even if the time period for adding land, units or common facilities, or for withdrawal has expired. Such extension, revival, grant, addition or withdrawal shall be effective 30 days after the recording, within the chain of title of the master deed or of the declaration of trust or bylaws, of an instrument duly executed by the organization of unit owners setting forth accurately the extension, revival, grant, addition or withdrawal, and. reciting compliance with the requirements of this subsection; ... ”

Setting the Percentage Interests of the New Units:

The statute quoted above does not provide a particularly simple answer to the question of setting the percentage interests of the new units:

“Any action taken pursuant to this subparagraph shall be taken upon such terms and conditions as the organization of unit owners may deem appropriate, including the method or formula by which the percentage interest of each unit is to be set in accordance with subsection (a) of section 5, or in accordance with another method which the organization of unit owners reasonably determines is fair and equitable under the circumstances, following such extension, revival, grant, addition or withdrawal if not specified in the master deed”

⁷ Getting the appropriate mortgagee consents can be time-consuming. Once a mortgage has been bundled and sold, tracking it down is usually not a simple matter of making a call or two.

The reference here is to M. G. L Chapter 183A § 5 (a), which contains the familiar principle:

“ 5 (a) Each unit owner shall be entitled to an undivided interest in the common areas and facilities in the percentage set forth in the master deed. Such percentage shall be in the approximate relation that the fair value of the unit on the date of the master deed bears to the then aggregate fair value of all the units. ”

The two sections, read together, appear to say that the 5(a) formula should be used unless another formula is found to be more fair and equitable. In my opinion the 5 (a) formula - involving judgment calls over real estate values as it does - provides sufficient latitude to achieve a fair and equitable result. This is not to say that the issue of how these judgment calls are to be made will be free from controversy: undoubtedly there will be a great deal of it.

Your footnote 1 addresses the issue of setting the percentage interests of the new units. As factors to be considered, you mention full basements, central air and the sewer connection. These factors would tend to make the value of the units higher, resulting in higher percentage interests and higher common charges.

You also mention that the newer units would logically be on a different schedule for routine maintenance and capital improvements. Although the logic of this proposition is evident, I do not think it would be lawful to put the new units on a different budgetary footing from the older units. The statute (M. G. L. Chapter 183A § 6) mandates that “ ... all common expenses must be assessed against all units in accordance with their respective percentages of undivided interest in the common areas and facilities.”

There is an obverse consideration here, however. Where these new units would have to contribute to routine maintenance and capital improvements - for the older units - this could arguably support a downward adjustment of the percentage interests.

This illustrates how the judgment calls over real estate values inherent in the 5 (a) formula could be applied to create a fair and equitable result. It also illustrates that there will likely be fertile ground for disagreements over how these judgment calls are to be made.

Ownership of Office Easement in Fee

Your footnote 2 states: “As an interim step, it may be necessary that NSP own the laundry site in fee in order to build on the property and not assume unacceptable liability.”

This would be a legal boondoggle. It would involve subtracting the “Office Easement” land from the Condominium 3a common elements, creating a separate lot from it, and then putting the lot back into the condominium common areas once the new units are completed. Certainly it will require both a petition to the Land Court **and** consent of 100% of the unit owners and mortgagees. Where one unit owner may veto the entire scheme, it is safe to assume that the alteration of the common areas in this manner will not happen.

Accordingly, it appears that New Seabury will have to assume some degree of liability here.

Conclusion:

As I see it, your plan is not impossible, but does involve quite a few legal hurdles.

As a threshold matter, the 3a Condominium Trustees and the Village Trustees will have to get on board and approve your plans and specifications. The Trustees will be concerned with the scale of the new units in relation to the rest of Maushop Village. The Trustees may also be concerned with issues of precedent with respect to the air conditioners and basements. On the other hand, the beach access and sewer hookup are obviously definite plus factors in favor of the project. The Trustees would like to discuss both the Clamshell Drive access easement and a permanent beach nourishment access easement from the Dean's Pond staging area.

Assuming that Trustee support for the plan can be garnered, it will then be necessary to get the 75% consent from the unit owners in Condominium 3a. In Maushop, it can sometimes seem that nothing ever goes down easily. Obtaining the 75% unit owner consent may - or may not - be feasible. I can tell you from my own experience that getting 75% unit owner consent for the construction of the revetment was no mean feat, and that it almost did not happen.

There is also some possibility that one or more disgruntled unit owners from Condominiums 3b, 3c, 3d or 3e might challenge the loss of their recreational easement rights over this segment of Condominium 3a. Although this scenario may seem far-fetched, it has happened before. This occurred in connection with the cottage reconstruction which took place in the early phases of Maushop's development, resulting in years of litigation. See: *Enegren and Bucci v. Heinstejn, et. als.*, Land Court Miscellaneous Case Number 119210.

Obtaining the requisite mortgagee consents may prove to be time consuming and expensive. One need not only to find out who owns the mortgage, but also to get to someone within the organization who has - and will exercise - the authority to make a decision.

There is also the issue of the payment of Maushop's legal fees in connection with the project. Where New Seabury Properties stands to profit from this project, it would seem reasonable that it pay all of Maushop's legal fees. This would include all of the legal fees

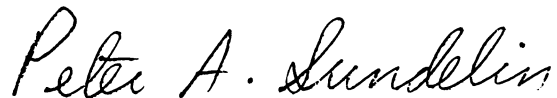
incident to trying to gain the requisite unit owner and mortgagee consents and all other legal fees incurred in connection with this project. It will not be possible to give a realistic estimate as to the total cost of an open-ended project of this nature. It will be necessary to see how time-consuming the project proves to be, and then the customary hourly rate will be applied to the time expended.

The matter of the developer's liability, and of an appropriate agreement to indemnify Maushop for its own liability, will have to be addressed as well.

The Trustees are certainly willing to work with you on this project, and to further discuss the mutual advantages which may accrue to both parties.

Please advise. Thank you.

Sincerely,

A handwritten signature in cursive script that reads "Peter A. Sundelin".

Peter Sundelin

cc: Maushop Village Trustees