

CLIENT ADVISORY

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DIG WE MUST!

The efforts of a restaurant to expand its space downward led to a divided Appellate Division and a significant interpretation of the Condominium Act. In Board of Managers of the Europa Condo v. Orenstein, 281 A.D.2d 354, 722 N.Y.S.2d 527 (1st Dep't 2001), the owner of the only commercial unit in a residential condominium occupied a portion of the lobby and the cellar and a "mezzanine" floor in between. When the restaurant proposed to expand its seating space by extending the concrete mezzanine floor, the Building's Board of Managers claimed their approval was required and sought a preliminary injunction, apparently without obtaining an engineering analysis of the proposed alteration. The restaurateur defeated the Board's preliminary injunction motion, however, on the ground that the proposed extension was entirely within his unit and would not affect the use of the residential units.

It appeared that the extension would increase the building's floor area ratio, in violation of the zoning laws. The owner therefore adjusted his plans to propose the excavation of a new subcellar that would drop the cellar and mezzanine more than fifty percent below grade, where they would not be counted as floors for zoning purposes. When the Board refused to sign the necessary applications, the restaurateur filed them himself and obtained an excavation permit from the Department of Buildings.

The Supreme Court denied the Board's application to enjoin the excavation. That decision was affirmed by a four to one decision of the Appellate Division, which held that (1) the extension of the mezzanine slab in the original plans was not subject to Board approval, since it was entirely within the commercial unit, (2) the excavation contemplated by the revised plan was also permissible without Board approval under the controlling condominium documents because it neither impaired the structural integrity of the building nor physically modified other units or common interests, and (3) §339-k of the Real Property Law, which prohibits a unit owner from excavating an additional basement or cellar without the "consent of all unit owners affected," was not applicable. The Court held that the words "owners affected" in the statute was not intended to mean all owners, but only owners of units "appurtenant" to the common interest that is sought to be altered.

In a lengthy dissent, Justice Saxe argued that the Trial Court should have held a factual hearing on the effect the planned excavation or the vibrations of jackhammers might have on other owners through damage to the structural integrity of the building. The majority of the Court, however, believed Department of Buildings oversight would be sufficient to prevent any such damage.

"... AND THE EARTH BELOW"

The case discussed above involved the unit owner's right to dig into the earth beneath his unit. But does the unit owner also bear the responsibility to repair a problem in those nether regions? In

Teitelbaum v. Woodbury Village Condominium II, (NYLJ, 6/15/02, p.17, col.2), the Nassau County District Court said “yes” to that question on the governing documents of the community involved.

The dispute arose from a crack that had developed in the unit owner’s home, apparently due to the failure of the builder to compact the soil properly before laying the foundation wall and pouring the cement slab. After the community’s managing agent refused responsibility for the damage, the owner filled in an empty space below her unit, replaced the floor and sought reimbursement of her expense from the condominium. The Court found that pursuant to the Declaration of the Condominium, the earth below an individual unit, although not part of the home, was an “irrevocably restricted common element” that was required to be maintained by “the Home Owner to whom such common use is restricted.” Accordingly, the Court granted summary judgment dismissing the owner’s complaint.

THE PRICE OF UNINHABITABILITY

After six years of litigation, the owners of a basement apartment recovered from their cooperative their purchase price with interest and a substantial award of legal fees. In **Measom v. Greenwich and Perry Street Housing Corporation**, (NYLJ, 11/20/02, p. 24, col. 3), the Supreme Court had ordered the tenants to pay for their use and occupancy during the period they occupied the apartment while withholding rent. That decision had been reversed on appeal, however, on the ground that the cooperative had breached the proprietary lease because the basement unit could not be occupied as a dwelling. On remand to determine damages, the Civil Court awarded the tenants their full purchase price for the apartment, plus interest, which the Court deemed a less speculative measure of the premises’ value at the time the tenants learned of the breach than the “hypothetical” market value offered by the tenants’ expert. In addition, it awarded the owners a refund of the maintenance they had paid during periods they neither occupied nor sublet the apartment and, for periods they did occupy it, their maintenance payments to the extent the unit’s condition diminished the value of such use and occupancy below the amount of their payment. The cooperative was awarded possession of the apartment (which had by now been made usable for non-residential purposes) and an offsetting credit for the use and occupancy charges directed by the Supreme Court but not paid before its decision was reversed on appeal. The Court recognized that a landlord cannot normally collect rent or use and occupancy charges absent a valid certificate of occupancy, but ruled that the tenants should not be rewarded for their failure to comply with a court order.

In addition, the Court awarded the tenants more than \$135,000 in attorneys’ fees and expenses for their long battle over this \$77,000 apartment.

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