IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

N & P PARTNERS, LLC a Delaware Limited Liability Company, Plaintiff, v. COUNCIL OF UNIT OWNERS OF BAYBERRY WOODS CONDOMINIUM, Defendant.	)))))))))))	C.A. No. 2317-S

MEMORANDUM OPINION AND ORDER

Submitted: February 3, 2006
Decided: February 22, 2006

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LAMB, Vice Chancellor.

I.

A. Background

In 1983, Joan S. Neff and Adele S. Paroni were the owners of 8.71 acres of land located in Bethany Beach, Sussex County, Delaware.[1] In 1984, Neff and Paroni joined Ernest Raskauskas (a local developer, builder, and realtor) in forming Route 26 Development Corporation, a Delaware corporation, to construct and sell townhouse condominiums on the land.[2] Specifically, Route 26 was to develop a 52-unit expandable condominium development known as Bayberry Woods Condominium.[3] The parties agreed that as each building was completed, Neff and Paroni would deed the building footprint to Route 26. Route 26 would then amend the Condominium Declaration and Declaration Plan to annex the footprint and improvements thereon to Bayberry Woods Condominium, and sell the individual units.[4]

According to the Condominium Declaration, executed and recorded on September 4, 1984, there would be two development phases for the completion of

[1] Tr. Ex. 14. On October 23, 1983, Frank and Regina Paroni deeded 8.71 acres of land located in Bethany Beach, Sussex County, Delaware, to their daughters, Joan S. Neff and Adele S. Paroni.
[2] Tr. 8-9. Neff and Paroni owned 50% of Route 26 and Ernest Raskauskas and his wife owned the remaining 50% of the corporation.
[3] *Id.*; Tr. Exs. 3, 4.
[4] Tr. 10- 11; 25 *Del. C.* § 2205. The parties were acting in accordance with Section 2205 of the Unit Property Act which states: "The percentage of undivided interest in the common elements assigned to each unit shall be set forth in the declaration, and such percentage shall not be altered except by recording an amended declaration duly executed by all of the unit owners affected thereby."

a total of 13 buildings.[5] In Phase One, Route 26 was to construct two buildings. In connection with Phase One, Neff and Paroni were to deed the 8.71 acres to Route 26, except for the footprints of the 11 additional buildings to be constructed in Phase Two.[6] In Phase Two, Route 26 was to construct the additional 11 buildings, and Neff and Paroni were to deed the footprints of those buildings, as they were completed, for annexation to the condominium development.[7]

The Developer, Route 26 and its successors in title, had seven years to complete the development. Paragraph 5 of the Declaration, entitled "Expansion," contains five subparagraphs: (a) Right to Expand; (b) Adjustments to Common Element Percentages; (c) Execution and Recordation of Amendments; (d) Status Prior to Expansion; and (e) Effect of Expansion. Paragraph 5(a) of the Declaration explicitly limits the Developer's right to expand the condominium to August 29, 1991.[8] Paragraph 5(a) of the Declaration states in pertinent part:

> [T]he *Developer and any successors in title thereto* shall have the absolute right, without consent of the Counsel or any Unit Owner or the holder of any lien on any Unit, at any time and from time to time,

[5] On September 4, 1984, Route 26, Paroni, and Neff executed and recorded in the Office of the Recorder of Deeds in Sussex County the Condominium Declaration, Code of Regulations, First Declaration Plan, and Final Street and Lot Plan for the creation of the Bayberry Woods Condominium; Tr. Exs. 3, 4, 5, and 5a. The Declaration establishing the plan of condominium ownership is recorded in Deed Book 1288, page 333. The Code of Regulations of Bayberry Woods Condominium is recorded in Book 1288, page 360. The Declaration Plan of Bayberry Woods dated August 30, 1984 is recorded in Plot Book 31, page 5, and the Final Street and Lot Plan is recorded in Book 30, page 338.
[6] Tr. Ex. 3.
[7] *Id.*
[8] *Id.*

> *to be exercised prior to the 29th day of August, 1991*, to annex to the land and the improvements constituting the property of Bayberry Woods Condominium, as the same are described and identified by legal description on Schedule A attached hereto.[9]

Under paragraphs 18 and 5(c) of the Declaration, Neff and Paroni, the owners of the land, reserved the right to execute and record amendments to the Declaration for the purpose of constructing the additional units in the event Route 26 failed to complete the development.[10] Paragraph 18 of the Declaration, entitled "Amendment of Declaration," states that Route 26, its successors and assigns, or Neff and Paroni, their heirs, or assigns, in the event of the failure of Route 26 to complete the development, shall have an irrevocable power of attorney, coupled with an interest, for the purpose of amending the Declaration.[11] Paragraph 5(c) of the Declaration, states in pertinent part:

> [T]here is reserved unto Route 26 Development Corp., the Developer, its successors or assigns, or Joan Scott Neff and Adele Scott Paroni, their heirs, or assigns, in the event of the failure of the Developer to complete the development, an irrevocable power of attorney, coupled with an interest, for the purpose of reallocating the common element percentage interests and voting rights appurtenant to each of the condominium units in accordance with this Section.[12]

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[9] *Id.* (emphasis added). Schedule A describes the 6.71 acres of land devoted for Phase One and the two acres of land for the additional 11 buildings to be constructed in Phase Two.
[10] *Id.*
[11] *Id.* Paragraph 18 of the Declaration stated in pertinent part: "Notwithstanding the foregoing provisions for the amendment of the Declaration, the Developer, Route 26 Development Corp., its successors and assigns, or Joan Scott Neff and Adele Scott Paroni, their heirs, or assigns, in the event of the failure of the Developer to complete the development, shall have an irrevocable power of attorney, coupled with an interest, for the purpose of amending the Declaration and Schedules 'A' and 'B' attached thereto."
[12] *Id.*

Pursuant to paragraphs 18 and 5(c) of the Declaration, each unit purchaser executed an irrevocable power of attorney, coupled with an interest.[13] In addition, prior to the recording of the original condominium documents, Route 26 granted Neff and Paroni a perpetual easement that allowed them to build the condominium units in the event that Route 26 did not complete the development.[14]

Between 1984 and June 1990, Route 26 constructed a total of 11 buildings containing four units each for a total of 44 units.[15] As buildings were constructed within Bayberry Woods, Neff and Paroni deeded each building footprint to Route 26. Upon receiving a certificate of occupancy for the building, Route 26 then executed and recorded amendments to the Declaration and Declaration Plan to annex the footprint and improvements thereon into Bayberry Woods Condominium and offer the units for sale.[16] By June 4, 1990, Route 26 had filed eight

[13] Pretrial Stipulation and Order 10; Tr. Ex. 7. The irrevocable power of attorney, coupled with an interest, granted Neff and Paroni the perpetual right to amend the condominium documents to add additional units in the event that Route 26 failed to complete the 52 units set forth in the original Declaration.

[14] Tr. 20-21; Tr. Ex. 8. The Deed of Easement is recorded in Deed Book 1288, page 326. The Deed of Easement was again recorded as Schedule D to the Condominium Declaration. At the time, the parties were in the process of constructing two buildings. The Deed of Easement provided for the construction of the 11 additional buildings. It stated: "Grantor does hereby reserve unto itself, and hereby grants and conveys to Joan Scott Neff and Adele Scott Paroni, a perpetual easement to construct some or all of the said eleven (11) buildings on the common elements as delineated on said Declaration Plan, and all of necessary parking lots, walks and other appurtenances requisite to service some or all of the said eleven (11) buildings and to provide for the necessary permanent ingress and egress to said eleven (11) buildings. This grant of easement to Neff and Paroni shall become effecti[ve] only in the event that the Developer does not complete the development due to either a default by the Developer or the non-exercise of the option to purchase additional building sites."

[15] Pretrial Stipulation and Order 8.

[16] Tr. 8-9, 24.

amendments to the Declaration and Declaration Plan.[17] With each amendment, the land beneath the building was added to Bayberry Woods Condominium, and the respective common element percentage of each unit owner was reduced to reflect the new unit being added.[18]

In 1991, Route 26 learned that its lender would not provide the financing needed to complete the construction of the project.[19] Thus, Route 26 failed to complete the last two buildings (or eight units) by August 29, 1991. On or about August 10, 1993, Neff, Paroni, Ernest Raskauskas and his wife, Route 26, East Coast Resorts, Inc., and East Coast Construction Company executed a Mutual General Release and thereafter liquidated Route 26.[20] Since Neff and Paroni had not submitted the land comprising the remaining two footprints to Bayberry Woods Condominium as of the date of the Mutual Release, they continued as the sole owners of the two parcels of land.[21]

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[17] Tr. 13-14; Pretrial Stipulation and Order 7, 8. The eight filed amendments to the Declaration included the following: First Amendment recorded in Deed Book 1301, page 209; Second Amendment recorded in Deed Book 1338, page 264; Third Amendment recorded in Deed Book 1351, page 194; Fourth Amendment recorded in Deed Book 1361, page 24; Fifth Amendment recorded in Deed Book 1494, page 220; Sixth Amendment recorded in Deed Book 1640, page 213; Seventh Amendment recorded in Deed Book 1702, page 70; and Eight Amendment recorded in Deed Book 1720, page 100.

[18] *Id.*

[19] Tr. 27.

[20] Pretrial Stipulation and Order 12.

[21] Tr. Ex. 9; Pretrial Stipulation and Order 12. The two parcels of land were shown on the original Declaration Plan as the location of Condominium Units 709 through 712 and Units 749 through 752. Said parcels were also identified on the Sussex County Tax Map as Tax Parcel 1-34-13-163.2.

On February 11, 2002, Joseph T. Healy, Jr., then Secretary/Treasurer of Bayberry Woods Condominium Association, sent a letter on behalf of the Association offering to purchase the two footprints of land for, among other things, $10,000 each.[22] The letter stated that the current board did not favor any further development of the two plots, but if a future board would move to build on either or both of the plots within the next 25 years the Association would pay 50% of the profits realized from such action to Neff and Paroni or their designees.[23] On April 15, 2002, counsel for Neff and Paroni sent a counteroffer to sell one of the two footprints to the Association for $150,000.[24] The Association did not respond to this counteroffer, and, on August 19, 2002, counsel for Neff and Paroni wrote a letter to the Association withdrawing it.[25] The same letter also informed the Association that at some point in the future, Neff and Paroni might decide to construct additional units on one or both of the underdeveloped parcels or might decide to sell them at fair market value, and that, in either event, any additional units constructed would conform in size and appearance to the other units in the development.[26]

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[22] Pretrial Stipulation and Order 13; Tr. 36-37, 105-107; Tr. Ex. 10. The board also offered to name the pool after the Neff/Paroni families and to give the families a lifetime membership to the pool and tennis court facilities. In addition, the board proposed to establish a park area on one parcel as a memorial to the Neff/Paroni families.
[23] *Id.*
[24] Pretrial Stipulation and Order 14; Tr. Ex. 11.
[25] Tr. Ex. 11.
[26] *Id.*

In January of 2003, Neff and Paroni decided to build the remaining eight condominium units.[27] They obtained a building permit from the Town of Bethany Beach to construct a four-unit building on one of the two remaining footprints.[28] The four units, units 709 through 712, were constructed in a manner comparable to the architectural plans prepared by the original architect for the condominium project.[29] On July 7, 2003, the Town of Bethany Beach granted certificates of occupancy for the units.[30]

Neff and Paroni formed a Delaware limited liability company, N & P Partners LLC, and, on September 3, 2003, they conveyed to it by deed properly recorded their interests in the two parcels, which included the parcel where units 709 through 712 were built and the remaining footprint of building 13.[31] On September 17, 2003, N & P Partners executed and recorded the Ninth Amendment to the Declaration and Declaration Plan submitting units 709 through 712 to Bayberry Woods Condominium. This increased the total number of units from 44 to 48, and reallocated the percentage interests in the common elements among the 48 owners.[32]

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[27] Tr. 39.
[28] Pretrial Stipulation and Order 15.
[29] *Id.* at 16.
[30] *Id.* at 17, Tr. Ex. 13.
[31] Pretrial Stipulation and Order 1; Tr. Exs. 1, 14. This conveyance was recorded in Deed Book 2884, page 324.
[32] Pretrial Stipulation and Order 19, 20; Tr. Ex. 15, 16.

Before the closing on the sale of those units, the Council of Unit Owners of Bayberry Woods Condominium contested N & P Partners's right to add units to Bayberry Woods without first obtaining the Council's consent.[33] The Council argued that paragraph 5(a) of the Declaration prohibited N & P Partners from expanding the condominium after August 29, 1991. Therefore, the Council asserts, N & P Partners should compensate it for its permission to expand the condominium.

On October 3, 2003, N & P Partners filed this action seeking a declaratory judgment that it had the right to expand the condominium from 11 buildings containing 44 units to 13 buildings containing 52 units. N & P Partners also sought a preliminary injunction ordering the Council to "maintain the status quo and allow it to sell the 8 units it built with acceptance or membership in the Bayberry Woods Condominium." The Council filed an answer to the complaint that included a counterclaim seeking a declaratory judgment that Bayberry Woods Condominium could not be expanded after August 29, 1991 without its consent. The parties addressed the preliminary injunctive relief sought by the plaintiff by entering into a stipulation, approved by this court on October 15, 2003, whereby

[33] Pretrial Stipulation and Order 3. The defendant is a Council of condominium unit owners pursuant to 25 *Del. C.* § 2202(5) of the Delaware Unit Property Act, defining "council" as "a board of natural individuals of the number stated in the Code of Regulations all of whom shall be either residents of this State or unit owners . . . who shall manage the business operation and affairs of the property in behalf of the unit owners and in compliance with and subject to the provisions of this chapter."

they agreed that the plaintiff could sell the eight condominium units and the buyers would be accepted as members of the Condominium Association. Following the execution and entry of the Stipulation, the parties completed an arrangement under the terms of which N & P Partners deposited an agreed upon sum of money in escrow and the Bayberry Woods Council executed a consent to the expansion of Bayberry Woods Condominium.

On November 22, 2003, units 709 through 712 were sold.[34] In September of 2004, the plaintiff obtained a permit to construct building 13, containing condominium units 749 through 752.[35] The units were constructed in a manner comparable to the architectural plans prepared by the original architect for the condominium project.[36] On May 27, 2005, the plaintiff executed and recorded the Tenth Amendment to the Declaration and the Declaration Plan, submitting units 749 through 752 to Bayberry Woods Condominium.[37]

Trial in this matter occurred in Georgetown, Delaware, on October 24, 2005, and all post-trial briefing was completed by February 3, 2006. At trial, Neff testified as to the intentions of the original signatories when they executed the

[34] Pretrial Stipulation and Order 21, 22; Tr. Ex. 17.
[35] Pretrial Stipulation and Order 15. The court notes that the condominium unit numbers of the final eight units are not sequential, due to the fact that the last two building footprints are not contiguous. Instead, they "fill in" gaps in the building locations.
[36] Pretrial Stipulation and Order 16; Ex. 13. On April 26, 2005, the Town of Bethany Beach issued Certificates of Occupancy for condominium units 749 through 752.
[37] Pretrial Stipulation and Order 24; Tr. Exs. 20, 21. The Tenth Amendment Declaration was recorded on July 18, 2005 in Deed Book 3172, page 142. Simultaneously therewith, the plaintiffs recorded the Tenth Amendment Declaration Plan in Plot Book 94, page 189.

condominium documents. The defendant called Healy, and a real estate appraiser, Glen Piper, to testify as to the value of the consent to expand.

II.

The fundamental question presented is whether, based on the original condominium documents, the plaintiff needed permission from the defendant Council of Unit Owners to expand Bayberry Woods Condominium from 11 buildings containing 44 units to 13 buildings containing 52 units. N & P Partners claims that Neff and Paroni reserved the right under paragraphs 18 and 5(c) to complete the project even after August 29, 1991 in the event that Route 26 failed to finish the development. According to N & P Partners, paragraph 5(c) of the Declaration reserved to Neff and Paroni an irrevocable power of attorney to execute documents to amend the Declaration and Declaration Plan to add additional units. This paragraph, the plaintiff argues, did not contain any time limitation. In effect, N & P Partners claims that (as Neff and Paroni's transferee), it had the right in perpetuity to complete the construction of the 13 buildings described in the Declaration.

The Council argues that paragraph 5(a) of the Declaration gave the "developer and any successors in title thereto" only until August 29, 1991 to expand the Condominium without the consent of the Council or any unit owners. Because, the Council contends, N & P Partners is a "successor in title" to Route 26,

it must pay compensation for expanding Bayberry Woods Condominium without the Council's consent long after the right to expand expired.

It is well settled that "a condominium declaration and its accompanying code of regulations together form no more than an ordinary contract between the unit owners (and, initially, the developer), created under the statutory framework of the Unit Properties Act."[38] As with any other contract, if the terms of a contract are clear, the court must accord the language its ordinary meaning.[39] "If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract, or to create an ambiguity."[40] However, if the contract terms are ambiguous on its face, the court may consider parol evidence to determine the true meaning of the parties' intent when they entered into the contract.[41] "To demonstrate ambiguity, a party must show that the instruments in question can be reasonably read to have two or more meanings."[42] Contractual

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[38] *Council of the Dorset Condo. Apts. v. Gordon*, 801 A.2d 1, 5 (Del. 2002); *Cove on Herring Creek Homeowners' Ass'n v. Riggs*, 2003 Del. Ch. LEXIS 36, 9-10 (Del. Ch. Apr. 9, 2003) (holding that general principles of contract interpretation are employed in construing the Declaration).

[39] *Council of the Dorset Condo. Apts.*, 801 A.2d at 5 (holding that if the contract language is clear and unambiguous, the court will accord that language its ordinary meaning); *Eagle Indus. v. DeVilbiss Health Care*, 702 A.2d 1228, 1232 (Del. 1997) (holding that "contract terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language").

[40] *Eagle Indus.*, 702 A.2d at 1232; *see also Capital Mgmt. v. Brown*, 813 A.2d 1094, 1097 (Del. 2002); *Haliburton v. Highlands Ins. Group*, 811 A.2d 277, 279-80 (Del. 2002).

[41] *Id.*; *Peden v. Gray*, 2005 Del. LEXIS 389 at *6-7 (Del. Oct. 14, 2005) (holding that parol evidence is admissible to resolve a contractual term that is ambiguous).

[42] *Harrah's Entm't v. JCC Holding*, 802 A.2d 294, 309 (Del. Ch. 2002).

language is not ambiguous in a legal sense merely because the parties disagree upon its meaning.[43]

Here, paragraph 5 of the Declaration unambiguously describes the developer's right to add buildings and expand the condominium. Pursuant to the plain language of paragraph 5(a), the "Developer and any successors in title thereto," had an absolute right between the filing of the Declaration and August 29, 1991 to expand the condominium. The Declaration is clear that at the expiration of the seven year period, "the Developer and any successors in title thereto" had to obtain consent from the Council or the unit owners to amend the Declaration and add units to the condominium. Therefore, the determinative question is whether the plaintiff, N & P Partners, falls within the language of "the Developer and any successor in title thereto." The court finds that it does.

The Declaration defines "Developer" as "Route 26 Development Corp., a Delaware corporation, and its successors and assigns."[44] Applying this definition, paragraph 5(a) pertains to "Route 26, its successors and assigns," and "any successors in title thereto." This awkward contractual language must be strictly construed against the drafters of the Declaration. As this court held in *Council of Unit Owners of Pilot Point Condominium v. Realty Growth Investors*:

[43] *Id.*
[44] Tr. Ex. 3.

> It seems that the public interest should require a unit property developer with such intentions to clearly state them of record in order that those considering the acquisition of a property interest in a potential condominium regime may know in advance that the entire scheme, architectural design and density of the project may be changed at any time without their consent. The failure to make this clear should be construed against the party who places the documents of record and those who succeed to his interests.[45]

Resolving any doubt in favor of the defendant unit owners who relied on these recorded condominium documents when they purchased their units, the court finds that the phrase "the Developer and successors in title thereto" refers to any person or entity who acts as the developer. This interpretation is consistent with the language of paragraph 5(c) of the Declaration, which repeatedly refers to "the Developer, its successors or assigns," and not "the Developer and any successors in title thereto."[46] If the parties intended paragraph 5(a) of the Declaration to apply only to Route 26 and *its* successors or assigns, then it could have used the former, rather than the latter, terminology.[47] Instead, the drafters chose to use language with no established meaning in the case law.[48]

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[45] 436 A.2d 1268, 1277 (Del. Ch. 1981), *aff'd in part* 453 A.2d 450, 457 (Del. 1982) ("the innocent parties here are the Phase I owners who only seek to enforce the terms the developer voluntarily placed in the declaration which created their statutory rights.").

[46] *See* Tr. Ex. 3 ¶ 5(c).

[47] In addition, the court does not, as the plaintiff contends, construe successors in "title thereto" as those who obtained "legal title" in the property. There is no language in the Declaration that supports this contention. Rather, the court construes "title" to be the person or entity functioning as the developer.

[48] The court notes that the only time the phrase "any successor in title thereto" appears in the Declaration is in the first sentence of paragraph 5(a).

The court recognizes that this is an unusual circumstance in which Neff and Paroni retained ownership rights in the undeveloped land. Typically, property that is not developed into condominiums within the specified time frame becomes part of the condominium. Nevertheless, when N & P Partners undertook to build condominium units on the remaining parcels, it quite clearly acted as the Developer. Therefore, N & P Partners was subject to the seven-year right to expand limitation in the Declaration. Because N & P Partners was not even formed until 2003, its legal right to build condominiums on the two remaining footprints and expand the Bayberry Woods complex necessarily depended on obtaining the consent of the Council or the unit owners.

The plaintiff's contention that paragraphs 5(c) and 18, as well as the irrevocable powers of attorney signed by the unit owners, gave it a separate right to expand the condominium indefinitely is unavailing. First, paragraph 5(c) merely grants the plaintiff an irrevocable power of attorney to amend the Declaration and add buildings to Bayberry Woods Condominium *in accordance with Section 5 of the Declaration*.[49] Therefore, paragraph 5(c) must be read in the context of all of Section 5, including paragraph 5(a). The court cannot reasonably interpret paragraph 5(c) to grant the plaintiff an independent, unexpressed right to expand the condominium for an indefinite period. "A court must interpret contractual

[49] Tr. Ex. 3.

provisions in a way that gives effect to every term of the instrument, and that, if possible, reconciles all of the provisions of the instrument when read as a whole."[50] Simply stated, the court cannot reasonably read paragraph 5(c) as impliedly granting rights not subject to the time constraints found in paragraph 5(a).

Indeed it would be unreasonable for the court to construe paragraph 5(c), and the irrevocable powers of attorney (which are limited to the rights set forth in the Declaration) to broaden the right to expand set forth in paragraph 5(a). The more reasonable interpretation is that paragraph 5(c) provided the plaintiff an irrevocable power of attorney to continue development if the complex was not completed before August 29, 1991. For example, if Route 26 had failed to complete the project in 1989, Neff and Paroni could have stood in the developer's shoes and finish the condominium subject to the 1991 deadline.

Second, if the court adopts the plaintiff's interpretation, N & P Partners would have the right to expand Bayberry Woods Condominium in perpetuity. This result would infringe on the interest of the unit owners to have development of the condominium completed within a defined time frame. In addition, there is a significant possibility that this right could be rendered void as a result of the application of the rule against perpetuities.[51] Accordingly, the court holds that

[50] *Council of the Dorset Condo. Apts.*, 801 A.2d at 7.
[51] *See Stuart Kingston v. Robinson*, 596 A.2d 1378, 1383 (Del. 1991) (explaining that the rule against perpetuities operates to void future interests in land which may not vest within a life in being plus 21 years).

N & P Partners did not have the right to unilaterally expand the condominium after August 29, 1991.

Based on the foregoing, the court also cannot reasonably find that the unit owners knowingly and voluntarily waived the right to object to the expansion of the condominium by executing the powers of attorney. "Waiver is the voluntary and intentional relinquishment of a known right."[52] Since the court finds that the powers of attorney did not expressly grant the plaintiff the right to expand the condominium after August 29, 1991, the unit owners could not possibly have waived this right when they signed those powers.

III.

At trial, the defendant presented three possible ways to value the consent the plaintiff was required to obtain before it built the eight additional units. First, the defendant's real estate appraisal expert, Glen Piper, used the development cost approach to calculate the amount of money a developer would be willing to pay for the two footprints.[53] He calculated that a developer would have paid $125,000 per unit for a total of $1 million for the two parcels.[54] Second, the defendant presented the testimony of Healy, who calculated the time value of the monies that would have been collected in annual dues and assessments had the eight units been part of

[52] *Council of Unit Owners of Pilot Point Condo.*, 453 A.2d at 456.
[53] Tr. 68. Def. Tr. Ex. 2.
[54] Tr. 72.

the condominium since August 29, 1991.[55] This came to $159,502. Third, the defendant pointed to the letter sent by the plaintiff's counsel to Healy on April 15, 2002 in response to the defendant's offer to purchase the vacant plots. In that letter, Neff and Paroni offered to sell a footprint to the Council for $150,000, or $37,500 per condominium unit.[56]

What is ultimately at issue is the price the parties would have agreed upon if they had engaged in an arms' length negotiation over the right to complete the project, assuming the presence of a motivated buyer and a willing seller. The answer to this question is difficult to discern from the record. First, there was no such negotiation. Second, the record does not contain any evidence of the plaintiff's actual analysis when it undertook to complete the project. For example, the record does not reveal anticipated project costs or projected selling prices at that time. There is also no evidence of the plaintiff's or Neff and Paroni's assessment of the risks involved, the time needed to complete the project or their required return. Neff and Paroni had only a small continuing investment in the footprints and, no doubt, other investment opportunities available to them.

Turning to the evidence of record, there are difficulties in relying on several of the approaches suggested by the Council. Piper's development cost approach identifies the amount someone would pay to buy the footprints and consent to

[55] Def. Tr. Ex. 1.
[56] Tr. Ex. 11.

develop together, not the consent alone. It is also based on the actual selling prices of the units, not reasonable estimations as of 2002 or 2003. Due to the remarkable recent value inflation in Sussex County property he testified to, Piper's work cannot fairly be relied upon as a measure of how the hypothetical negotiation would have proceeded in 2002. Similarly, the court is unwilling to rely on Healy's calculation of the time value of the annual dues and assessments that the eight units would have paid to the condominium association over the years if they had been completed in 1991. This calculation bears no apparent relationship to the amount the plaintiff (or any developer) would have agreed to pay for the Council's consent in 2002. It also fails to take into account the additional maintenance costs the Association would have incurred over the years had the buildings been erected and occupied by 1991 and ignores the fact the expense of erecting the common elements was, in the first instance, borne by the developer.

The best evidence in the record of the value of the consent is the offer to sell one of the footprints to the Council for $150,000 found in a letter of April 20, 2002 from the plaintiff's counsel to Healy. The letter stated, "since the parcel of land is already approved as the location for a building containing 4 condominium units, my clients are not in a position to consider selling that parcel for less than what they consider its reasonable value to be, which is $150,000, or $37,500 for each condominium unit." From this, the court infers that, had Neff and Paroni asked the

Council for permission to expand the condominium and the Council demanded compensation, it is reasonable to conclude that they would have agreed to pay a comparable amount for the right to develop the footprint into four condominium units, adjusted to reflect the fact that they already owned the real estate. This is so because $37,500 per unit is the value that the plaintiff considered to be the reasonable sale price a developer would pay to both purchase the property and build the units.[57]

The record reflects that, according to the original development documents, Neff and Paroni were entitled to receive a payment of $40,000 per footprint as the development proceeded and buildings were added to the condominium. This provides a reasonable proxy for the value of the footprints alone at the time of the hypothetical negotiation in question. Therefore, the court deducts $80,000 to account for the value of the land and concludes that the value of the consent at issue is $220,000.[58]

IV.

For the foregoing reasons, the court finds that the defendant is entitled to compensation from the plaintiff in the amount of $220,000. IT IS SO ORDERED.

[57] *Id.*

[58] Tr. at 10. The $40,000 per footprint is the price paid by Route 26 to Neff and Paroni for the land underlying the condominium units as units were constructed on them.