

Not Reported in A.2d, 1984 WL 478418 (Del.Ch.)
(Cite as: **1984 WL 478418 (Del.Ch.)**)

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UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Court of Chancery of Delaware.
COUNCIL OF UNIT OWNERS, etc.

v.

REALTY GROWTH INVESTORS,
No. CIV. A. 733, CIV. A. 820.

May 16, 1984.

Richard P. Beck, Esquire, Morris, James, Hitchens
& Williams, Wilmington.

John Terence Jaywork, Esquire, Hudson, Jones,
Jaywork & Williams, Dover.

*1 Gentlemen:

I offer my apologies for the delay in finalizing this matter. I have now had the opportunity to take a few hours to review the decision rendered in this Court, the decision reached by the Supreme Court on appeal, the correspondence that followed from you as well as from certain unit owners in Pilot Point, and your correspondence and proposed forms of orders submitted with regard to the final order to be entered following the affirmance and modification of this Court's decision by the Supreme Court. Having done so, I find it unnecessary to convene a conference between counsel as requested by Mr. Beck. I find the positions of the parties to be adequately set forth in the correspondence and I offer this as my decision on the remaining unresolved points.

As I see it, the matters to be resolved are twofold. First, there is the suggestion that the Court should make some effort in the final order to redefine the

proportionate interest of the unit owners in the common elements in keeping with a current appraisal of the value of the units. This is specifically opposed by certain unit owners, in particular Mr. Sullivan and Mr. Burke (who are receiving copies of this letter). Second, there is the question of whether the final order should prevent and enjoin future development at Pilot Point altogether or whether the door should be left open to permit possible future development by Realty Growth pursuant to the recorded Declaration and Plan in the event that Phase II should hereafter be reduced to either one or two buildings prior to the expiration of the term of the 99-year lease.

As a result of the decision reached by the Supreme Court I am persuaded that the position taken by Mr. Beck in his letter of June 24, 1983 is the correct one. In the decision in this Court I had determined that the power of attorney relied upon by Realty Growth deriving from the recorded Declaration was void and of no effect because of the lack of the formal execution required for powers of attorney to be given for the purpose of transferring interests in real property. In its decision, the Supreme Court agreed with me that the three-building limitation set forth in the Declaration was effective to prevent Realty Growth from constructing additional buildings proposed by it at the time. But the Supreme Court differed with me concerning the power of attorney issue, choosing to assume, without deciding, the validity of the power of attorney purportedly created by Paragraph 6 of the Declaration. In its mandate the Supreme Court directed that the final order previously entered in this Court be modified to reflect the assumed, but not determined, validity of the power of attorney.

Since the power of attorney purportedly created by the Declaration is "presumed" to be valid, then it must be presumed for present purposes that Realty Growth has the authority to use it in the future. The

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mandate of the Supreme Court thus directs that the final order in this Court be modified to reflect that authority in Realty Growth.

*2 Since Realty Growth can use the power of attorney contained in the Declaration for the purpose of reallocating the proportionate interests of the unit owners in the common elements in keeping with the development plan, I deem it both unnecessary and inappropriate for this Court now to attempt to resolve a present disagreement among the unit owners concerning whether the common element interests should be reapportioned between the unit owners on the basis being recommended by the plaintiff Council of Unit Owners. Had all concerned been in agreement, perhaps it would have done no harm to include appropriate provisions to that effect in the final order. Had the Supreme Court agreed with me that the power of attorney was invalid, it might have been necessary to take such action. Since neither of these situations prevails, however, I think that the form of order proposed by Realty Growth properly reflects the modification directed by the Supreme Court.

As to the second point, I also agree with Realty Growth. For present purposes it has exhausted its post-Phase I right to construct three additional buildings. It did so by constructing four additional buildings in Phase II-one over the limit. However, Realty Growth takes the position that this does not mean that it should be prevented in the future from the development of one or two additional buildings in the unlikely event that through a natural catastrophe or deliberate action by the unit owners two or more of the present Phase II buildings were to disappear from the premises.

I think that the potential for two or more of the present Phase II buildings to “disappear” is remote. Even if all units in a building were to be destroyed by fire (as was the case with several units during the winter) it would be arguable that the building (with its units subject to reconstruction as is being

done with the units destroyed over the winter) has not disappeared to the extent that it no longer forms a part of the condominium development. I suppose that it is also technically possible for someone to purchase all units in two of the Phase II buildings and to dismantle the buildings *in toto* and haul the remnants away. But again, this does not seem to be a realistic prospect.

Be that as it may, I do not feel that the issue of whether or not Realty Growth could redevelop the area with one or more additional buildings in the event of such an occurrence has been either presented to the Court or decided by the decision made. The case was not presented to the Court in that context. Since the precise problem has never arisen, and may well never arise, I deem it unnecessary to attempt to deal with it in the modified order.

As Mr. Beck points out, the presumed validity of the power of attorney as found by the Supreme Court would arguably give Realty Growth the power to attempt to amend the Declaration Plan so as to add a new and different type building in the event that two or more of the present Phase II buildings should “disappear.” Should that occur, and should Realty Growth attempt to use the power for that purpose, that would be the time to test the validity of the power of attorney once and for all. The modification ordered by the Supreme Court would seem to afford this possibility, and naturally the decision of the Supreme Court controls.

*3 The form of order proposed by Realty Growth, as I read it and as it is presented by Mr. Beck, simply holds open the potential for Realty Growth to test its position in the future should the occasion ever arise. And there is considerable time remaining on the 99-year base lease. Paragraph 3 of Realty Growth's proposed order simply enjoins it and its successors and assigns from developing the property except in conformance with the limitation on the construction of additional buildings and units as set forth in the original Declaration submitting the

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property to the Unit Property Act. I think that this fairly reflects the injunctive relief sought by the plaintiff at the time and also reflects the decision given.

Since it is my understanding that there were no other points of disagreement in the form of order submitted by Mr. Beck---which order was in turn a proposed modification of the form of order initially submitted by the plaintiff---I am content to sign it in the form submitted by Mr. Beck. I have done so as of this date, and I enclose a copy for each of you.

Again, my apologies to you as well as the unit owners at Pilot Point for the inability of the Court to get to this matter sooner.

ORDER

The Decision of this Court having been appealed to the Supreme Court of the State of Delaware; and

The Supreme Court having issued on December 1, 1982, a Mandate to this Court requiring that the Order of this Court issued January 5, 1982, be modified “to reflect the assumed, but not determined, validity of the power provision contained in paragraph 6 of the” document entitled “Declaration Submitting Real Property to Provisions of Unit Property Act [25 Del.C. § 2201](#), *et seq.*,” all in accordance with the decision of the Supreme Court of October 26, 1982;

Therefore, it is the Order of this Court that:

1. With respect to the “Amendment to Declaration by Asco, Ltd., Submitting Real Property to Provisions of Unit Property Act, [25 Del.C. § 2201](#), *et seq.*,” dated March 31, 1978, as the same is of record in Deed Book 887, Page 60 *et seq.* in the Sussex County Recorder of Deeds Office at Georgetown, Delaware, the following portions thereof are hereby declared to be null and void *ab initio*:

(a) The last sentence of paragraph (E) on page 2 thereof.

(b) Paragraph (F) on pages 2 and 3 thereof.

(c) Paragraphs (G) and (H) on page 3 thereof.

(d) In Section 1 on page 4 thereof, all of the language following the word “Plan” in the fourth line of that Section.

(e) In Section 2 on pages 4, 5 and 6 thereof, all of the first single-spaced paragraph (on page 4) except the first sentence of that paragraph, and all of the third single-spaced paragraph (on pages 5 and 6).

(f) In Section 3 on page 6 thereof, the phrase “, and to be occupied by the Phase III and Phase IV.”

(g) In Section 4 on page 6 thereof, all of the language following the word “Plan” in the second line of the single-spaced paragraph.

*4 (h) The last five lines on page 9, and pages 10 and 11 thereof; subject, nevertheless, to the possible exercise by Defendant, Realty Growth Investors, of its power of attorney (the validity of which is assumed but not decided) to amend the Schedule set forth on page 9 for the purpose of (i) making same conform to the requirements of the Pilot Point Declaration and Unit Property Act, and (ii) admitting such future units, if any, as may rightfully be constructed and admitted to the Pilot Point condominium regime in accordance with such Declaration and Act.

2. The real property of Pilot Point other than that comprising the Units is hereby declared to be common elements. This proportionate undivided interest in the said common elements assigned to each Unit shall be as established from time to time in accordance with Articles 2 and 6 of the Declaration.

3. Defendant, Realty Growth Investors, its suc-

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cessors and assigns, are hereby forever and permanently enjoined from developing, improving or exercising any right of possession in and to the real property of Pilot Point except in conformance with the limitation on the construction of additional buildings and additional units as set forth in Section 2 of the Declaration dated May 14, 1973, submitting real property to provisions of the Unit Property Act, unless the Council of Unit Owners of Pilot Point Condominium otherwise consents in writing.

4. All claims, counterclaims, crossclaims, and third-party claims filed by Defendant Realty Growth Investors against the Council of Unit Owners of Pilot Point Condominium, against the Pilot Point Condominium Association of Owners or against each or any of the Phase I Unit Owners or their successors or assigns, are hereby denied.

5. The court costs of this action shall be paid by Defendant Realty Growth Investors.

6. A certified copy of this Order is to be duly recorded and indexed in the Office of the Recorder of Deeds, in and for Sussex County, at Georgetown, Delaware, indexed under:

Court of Chancery

Pilot Point Condominium

Realty Growth Investors

Council of Unit Owners of Pilot Point Condominium

Mary Lou Baldwin, successor-in-interest to A. Dean Alpine, D.M.D., P.A. (Unit 17-A)

Jose Ma H. Austria and Mary K. Austria (Unit 10-B)

Mark Ballesteros and Jill G. Ballesteros (Unit 2-B)

Robert S. Bell and Norman S. Salus (Unit 22-A)

Lawrence H. Berlin and Harriett G. Berlin (Unit 28-A)

Howard W. Bramhall and Roberta A. Bramhall (Unit 15-A)

John F. Bruce and Carl L. Vacketta (Unit 30-A)

Robert D. Burris and Susan R. Burris (Unit 24-A)

Mary Lou Baldwin, successor-in-interest to Harold A. Dewey and M. Evelyn Dewey (Unit 23-A)

Ralph C. Schilly, Jr. and Theresa G. Schilly, successors-in-interest to Edward C. Donahue, Catherine Donahue, William E. Ehrmantraut and Barbara J. Ehrmantraut (Unit 32-A)

Russell H. Henk and Alice M. Henk, successors-in-interest to Nick J. Fisfis and Kathleen A. Fisfis (Unit 5-B)

*5 Abid Mohiuddin, successor-in-interest to Stephen J. Harris and Rania L. Harris (Unit 1-B)

Luther M. Hearn, III and Barbara W. Hearn (Unit 26-A)

Herbert E. Hoffman and Beth S. Hoffman (Unit 11-B)

Stanton Joseph and Susan C. Joseph (Unit 29-A)

Reto W. Kaufman (Unit 12-A)

Robert W. Kidd, III, D.M.D., P.A. (Unit 31-A)

Edward R. Kingman and Margaret H. Kingman (Unit 25-A)

Gordon Andrew McKay and Janet Holmgren McKay (Unit 8-B)

Ronald P. Lee and Rita C. Lee, successors-in-interest to Joseph A. McVicker and Elizabeth W. McVicker (Unit 21-A)

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Dennis C. Baldwin and Carol Lou Baldwin, successors-in-interest to Harold E. Mesriow, Diane B. Mesriow, Paul A. Roth and Janet B. Roth (Unit 9-B)

Forest E. Roark and Joyce F. Roark, successors-in-interest to William R. Naylor and Margaret H. Naylor (Unit 4-B)

Jose C. Pamintuan and Elvira L. Pamintuan (Unit 3-B)

Timothy F. Wozniak and Mary Ann Wozniak, successors-in-interest to Donald E. Posner and Roma Lee Posner (Unit 14-A)

Mary Jean Evans, successor-in-interest to Paul J. Posner and Doris M. Posner (Unit 20-A)

Warren Price and Linda J. Price (Unit 13-A)

Melvin D. Reuber (Unit 19-A)

Jay H. King, Jr. and Linda R. King, successors-in-interest to Leonard L. Richens and Nancy L. Richens (Unit 7-B)

William L. Slover and Dorothy Slover (Unit 27-A)

Robert E. Wenz (Unit 6-B)

Grover M. Yowell, Jr. and Billie G. Yowell (Unit 16-A)

Grga Zlatoper and Renita J. Zlatoper (Unit 18-A)

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