

**COMMONWEALTH OF MASSACHUSETTS
LAND COURT DEPARTMENT
OF THE TRIAL COURT**

WORCESTER, ss.

CASE NO. 22 MISC 000373(DRR)

MICHELE V. BERIO,

Plaintiff,

v.

TOWN OF CLINTON, and JOHN P.
KITTRIDGE, JR., in his capacity as duly
appointed Tax Title Custodian for the Town of
Clinton

Defendants

DECISION AND ORDER ON A CASE STATED

The Plaintiff Michele V. Berio (the “Plaintiff”), the high bidder at a tax title auction, brings this action for breach of contract, seeking return of a \$210,000.00 deposit from the Town of Clinton and its duly appointed tax title custodian John P. Kittridge (collectively, the “Town”). After entering into an agreement to purchase phasing and other rights reserved by the declarant of the River’s Edge Condominium (these reserved rights being the “Auction Property”), 525 Water Street, Clinton (the “Property”), Plaintiff became concerned that the Town was unable to deliver good title to the Auction Property and sought the return of her deposit. Specifically, Plaintiff questioned whether the declarant’s reserved rights terminated prior to auction, thus creating a material defect in title. The Town refused to return the deposit, contending that Plaintiff was simply experiencing buyer’s remorse. For the reasons discussed below, I concur with the Plaintiff.

PROCEDURAL HISTORY

Plaintiff commenced this action on July 19, 2022, with the filing of a Complaint against the Town, stating a single Count for breach of contract. Therein, the Plaintiff sought return of a \$210,000.00 deposit advanced for the purchase of real estate, as well as damages and attorneys' fees. On July 22, 2022, Plaintiff submitted a request to the Chief of the Trial Court, pursuant to G.L. c. 211B, § 9(xi), to appoint this judge to act as a Superior Court justice to hear the Complaint. The Chief Justice of the Trial Court took no action on that request, explaining a long-standing practice to accept requests of this nature only from Justices of the Trial Court, and not from litigants, citing *Konstantopoulos v. Whately*, 384 Mass. 123, 130 (1981). Thereafter, the Plaintiff filed a motion asking this court to request interdepartmental assignment. The Town opposed that motion and, instead, filed a motion to dismiss the Complaint or transfer the case to Superior Court. On September 21, 2022, after hearing at an initial case management conference and supplemental briefing on the jurisdictional issue, this court made a Request for Transfer of Pending Land Court Action to the Superior Court. On October 24, 2022, the Chief Justice of the Trial Court issued an Order of Transfer and Assignment, transferring this case to the Superior Court and authorizing and allowing this justice to sit as a Justice of the Superior Court Department to preside over this matter.

At a subsequent status conference on January 13, 2023, counsel jointly advised that discovery was not necessary and, following colloquy, agreed to proceed with motions for judgment on a case stated. Thereafter the parties a Joint Statement of Agreed-Upon Facts, together with Memorandum in Support of Plaintiff's Motion for Judgment on a Case Stated, Defendants' Brief in Support of Judgment on a Case Stated, and a Joint Appendix (as well as a copy of the Declaration of Trust of the River's Edge Condominium). A hearing was held on

August 23, 2023, with the court requesting the parties file supplemental briefs and/or a supplemental statement of agreed-upon facts, to clarify three issues raised during the hearing, specifically: (1) What property and/or reserved rights were retained by the declarant of the River's Edge Condominium after the expiration of the phasing rights, together with an explanation of the basis for such retention; (2) What real estate was included in the Memorandum of Sale for 525 Water Street, Clinton, MA, Exhibit Q to the Joint Appendix, together with an explanation of the basis for inclusion; and (3) Assuming the Town is correct that the declarant retained property and/or rights after the expiration of the phasing rights, what is the nature and extent of those property rights or interests? In response, the Town filed Defendants' Supplemental Brief in Support of Judgment on a Case Stated, and Plaintiff filed a Supplemental Memorandum in Support of Plaintiff's Motion for Judgment on a Case Stated. The court then took this case under advisement on October 13, 2023.

FACTS

Based on the parties' agreed-upon statement of facts and the reasonable inferences drawn therefrom, I make the following findings of fact.

The Parties & the Property

1. The plaintiff, Michele V. Berio, is an individual with a residential address of 7 Rochelle Street, Worcester. Joint Statement of Facts ("SOF") ¶ 1.
2. The defendant, Town of Clinton, is a political subdivision of the Commonwealth incorporated in 1850, with a principal place of business located at 242 Church Street, Clinton. SOF ¶ 2.

3. The defendant, John P. Kittredge, Jr., is the Tax Title Custodian and Collector/Treasurer of the Town, with a principal place of business located at 242 Church Street, Clinton. SOF ¶ 3.
4. On May 24, 2005, Rivers Edge Clinton, LLC (“Declarant”) obtained title to 525 Water Street, Clinton from 525 Water Street, LLC pursuant to a Quitclaim Deed recorded with the Worcester Registry of Deeds (“Registry”) in Book 36391, Page 171 (the “Water Street Deed”). SOF ¶ 4; Ex. A.
5. As set forth in the Water Street Deed, 525 Water Street is described as follow:

A certain parcel of land with the improvements thereon, situated on the southerly side of Water Street, in Clinton, Worcester County, Massachusetts, being shown as Lot # 86 on Plan in Subdivision of the Dwellings and Land of the Lancaster Mills at Clinton, Mass. made by William I. Thompson, C.E., dated October 22, 1928, and recorded with the Worcester Registry of Deeds in Plan Book 55, Plan 47, bounded and described as follows:

BEGINNING at a point in said southerly line of Water Street at the other land now or formerly of the Lancaster Mills near the high water line of the Nashua River;

THENCE Southerly and Westerly by said other land of said Lancaster Mills, Ten Hundred Fifty (1050) feet to the New York, New Haven & Hartford Railroad (Lancaster Mills Branch);

THENCE Northerly Four Hundred Fifty-seven (457) feet by the side line of the Railroad to angle in said side line;

THENCE Westerly Four and 75/100 (4.75) feet still by said line of the Railroad to a point;

THENCE Northerly Four Hundred (418) feet [sic] still by said line of said Railroad to said Southerly line of Water Street;

THENCE Easterly One Hundred Sixty-three (163) feet by said street line to the place of beginning.

CONTAINING according to said Plan, Two and 3/10 (2.3) acres, more or less.

SOF ¶ 5, Ex. A.

Submitting the Property to the Condominium Statute

6. On March 17, 2006, the Declarant created the River's Edge Condominium (the "Condominium") by recording a Master Deed with the Registry in Book 38575, Page 338.

SOF ¶ 6; Ex. B.

7. The introductory paragraph of the Master Deed states, in its entirety, as follows:

[The Declarant] being the sole owner of that certain realty located at 525 Water Street, Clinton, Worcester County, Massachusetts, as more fully described hereinafter, by duly executing and recording this Master Deed, does hereby submit said land, together with the buildings and improvements now or to be hereafter erected thereon, and all easements, rights and appurtenances belonging thereto, except such rights and interests reserved by and to the Declarant hereunder (hereinafter collectively called the "Property"), to the provisions of Massachusetts General Laws, Chapter 183A, as now and as may be hereinafter amended (hereinafter referred to as "Chapter 183A"), and do hereby state that the Declarant proposes to, and does hereby, create, with respect to the Property, a condominium governed by and subject to the provisions of Chapter 183A; and, to that end, the Declarant does hereby declare and provide as follows:

SOF ¶ 7; Ex. B.

8. Section 3 of the Master Deed, "Description of the Land," sets forth, in its entirety, as follows:

The Land portion of the Property comprising the Condominium (the "Land") is that certain parcel of land situated in Clinton, Worcester County, Massachusetts, being described on Schedule A attached hereto. The Land is further subject to such rights, easements, restrictions and encumbrances as are of record and in force and the rights and easements established herein. The Land is additionally subject to such rights, interests and easements as may be hereinafter reserved to the Declarant, which rights, interests and easements shall, in all instances, be exercisable by the Declarant and its successors or assigns, whether so stated or not. The Land, together with the Buildings and other improvements, are shown on the Site Plan recorded herewith (the "Site Plan"), Plan Book 839, Page 110.

SOF ¶ 8; Ex. B.

9. Schedule A to the Master Deed, "Description of Land," provides a metes and bounds

description of the property submitted to the condominium statute, in its entirety, as follows:

A certain parcel of land with improvements thereon, situated on the southerly side of Water Street in Clinton, Worcester County, Massachusetts, being shown as Lot #86 on Plan is Subdivision of the Dwellings and Land of the Lancaster Mills at Clinton, Mass., made by William I. Thompson, C.E., dated October 22, 1928, and recorded with the

Worcester District Registry of Deeds in Plan Book 55, Plan 47, bounded and described as follows:

BEGINNING at a point in said southerly line of Water Street at the other land now or formerly of the Lancaster Mills near the high water line of the Nashua River;

THENCE Southerly and Westerly by said other land of said Lancaster Mills, Ten Hundred Fifty (1050) feet to the New York, New Haven & Hartford Railroad (Lancaster Mills Branch);

THENCE Northerly Four Hundred Fifty-seven (457) feet by the side line of the Railroad to angle in said side line;

THENCE Westerly Four and 75/100 (4.75) feet still by said line of said Railroad to a point;

THENCE Northerly Four Hundred Eighteen (418) feet still by said line of said Railroad to said Southerly line of Water Street;

THENCE Easterly One Hundred Sixty-three (163) feet by said street line to the place of beginning.

CONTAINING according to said Plan, Two and 3/10 (2.3) acres, more or less.

SOF ¶ 10; Ex. B, Schedule A.

10. On March 17, 2006, contemporaneous with the recording of the Master Deed, a “Plan of Rivers Edge Condominium Phase I,” identified in Sections 3 and 8 of the Master Deed as the “Site Plan,” was recorded with the Registry in Plan Book 839, Plan 110. The Site Plan depicts two buildings running adjacent to the shore of the Nashua River, labeled Buildings 2 and 3 (partitioned into five and five spaces, respectively), as well as third structure labelled “Existing Conc. Foundation.” SOF ¶ 11; Ex. C.

The Declarant’s Phasing Rights

11. Section 4 of the Master Deed, “Description of Buildings,” states that the Condominium will be developed in phases, to ultimately consist of thirteen (13) townhouse-style Units, located

in three (3) separate buildings, with Phase One to consist of two Units (Nos. 12 and 13). Ex. B, p. 2.

12. Section 6 of the Master Deed, "Description of the Common Areas and Facilities," states, in its entirety, as follows:

The Common Areas and Facilities of the Condominium (sometimes also referred to as the "Common Elements") consist of the entire Land exclusive of the Units, all as hereinbefore described and defined (and exclusive of any and all rights, interests and/or easements reserved by the Declarant), and an other property which is herein expressly included in the Common Area and Facilities, including without limitation, the following:

A. The Land together with the benefit of, and subject to, all rights, easements, reservations, conditions and restrictions of record as the same may be in force and applicable;

B. As to the Phase One Building, the foundations, structural columns, girders, beams, supports, trusses, interior structural or bearing walls, exterior stairs, decks, porches, all portions of the exterior and interior walls, ceilings, floors and roofs not included as part of the Units, and common walls, and the like, if any within the Building;

C. As to the Phase One Building, installations for central and/or common services such as power, light, oil, gas, hot and cold water, heating, air condition, waste disposal and cable, fiberoptics, coaxial cables, including all equipment attendant thereto (but not including equipment solely serving a single Unit, whether or not contained therein).

D. As to the Phase One Building, conduits, chutes, ducts, shafts, plumbing, wiring, flues, and other facilities for the furnishing of utility services and waster removal which are contained in portions of the Building contributing to the structure or support hereof or for common usage, and all such facilities contained within any Unit, which serve parts of the Building other than the Unit within which such facilities are contained;

E. Any and all common equipment wherever located in, on, or around the Building(s) and Land;

F. The yards, lawns, gardens, driveways, exterior parking areas, walkways, passageways, and the improvements thereon and thereof, including fences, walls, railings and steps;

G. The Limited Common Elements located outside the Units' boundaries, subject to the exclusive rights to use thereof and obligations thereon as herein and in the trust and By-Laws provided;

H. As to Phase One, other apparatus and installations existing in the Building(s) for common use, or necessary for convenient to the existence, maintenance or safety of the Building(s);

I. As to Phase One, other items delineated as such in Chapter 183A and located on the Land.

The Common Elements shall be subject to the provisions hereof and of the Declaration of Trust, and to the Rules and Regulations as may be promulgated thereunder with respect to the use and maintenance thereof.

Notwithstanding the foregoing, the Common Elements shall exclude the exclusive rights, interests and easements reserved to the Declarant by law or by the Declarant in the Master Deed.

SOF ¶ 10; Ex. B, p. 4 (emphasis original).

13. Section 7 of the Master Deed, “Undivided Interest,” is lengthy; its first three paragraphs state as follows:

The Unit Owner of each Unit in Phase One shall have an undivided Interest in the Common Areas and Facilities in the percentages set forth in Schedule B. From and after the addition to the Condominium of any subsequent Phase containing additional Units (the “Additional Units”) pursuant to the provisions of the Master Deed, the Beneficial Interest to which Phase One Units . . . are entitled shall be reduced accordingly and the Beneficial Interest to which Phase One Units . . . shall be determined upon the basis of the approximate relation that the fair value of each Unit bears to the aggregate fair value of all Units.

As of the date of the initial recording of this Master Deed, the Declarant intends that there will be thirteen (13) total Units in the Condominium when all phases have been added. It is also the Declarant’s current estimation and belief that, when all thirteen (13) Units have been phased into the Condominium, the percentage interests appurtenant to the Unit will be as set forth in Schedule C.

Notwithstanding the foregoing, in the future, until such time as all thirteen (13) anticipated Units have been phased in, and/or should the number of Units ultimately be less than thirteen (13), and/or in the event that the approximate relative market values of the Units as determined by the Declarant shall materially change, the ultimate percentage interest appurtenant in each Unit shall be determined by the Declarant as per the formula set forth hereinafter.

Ex. B, p. 4-5.

14. As reflected in Schedule C to the Master Deed, the Declarant anticipated the creation of a total of thirteen (13) units to be phased-in to the Condominium, located in three (3) separate buildings, each of which would have approximately 7.6 % interest in the Common Areas.

SOF ¶ 12; Ex. B, Schedule C.

15. As set forth in Schedule B, at the time the Declarant recorded the Master Deed, only two Units were included in the Condominium: Unit 12 with 49.7 % interest in the Common Areas and Unit 13 with 50.3 % interest. Ex. B, Schedule B.

Declarant's Reserved Rights

16. Section 13 of the Master Deed (titled "Rights Reserved to Declarant"), contains thirteen (13) subsections. Ex. B, p. 9-14.

17. Section 13.1 provides:

As stated above, the Declarant intends to develop the Condominium in stages herein referred to as "Phases." The Land described in Schedule A, together with those portions of the Building in which Units 12 and 13 are located, shall initially comprise the Condominium. Said Phase One consists of two (2) Units, as well as the adjacent and/or appurtenant areas limited in use to said Units or abutting same. The Condominium may consist of additional Phases constructed and to be constructed on the Land described in Schedule A. Until such time as additional Phases are added to the Condominium by the recording of "Phasing Amendments" as described below, any building or portions thereof existing on the Land described in Schedule A (other than Phase One), any other portions of the building(s) shown on the Site Plan, and any land not described in Schedule A shall not be part of the Condominium or subject to the Act, and shall be exclusively owned by, and shall be the exclusive responsibility of, the Declarant or other owner thereof.

SOF ¶ 13; Ex. B, p. 9-10.

18. Section 13.4 of the Master Deed provides:

As described above, with respect to any portion of a Building not comprising Phase One or a later Phase expressly made subject to the Master Deed and part of the Condominium pursuant to a "Phasing Amendment" (as described above and below), the Declarant reserves for the benefit of itself and its successors and assigns exclusive ownership of such Building(s) or portions of Building(s), as well as the right to fully construct, develop and finish same. Thus, the Buildings and portion of Buildings, as well as the other areas shown on the Site Plan located beyond the Phase One area, may be exclusively utilized

by the Declarant and its successors and assigns for whatever lawful use of purpose may be deemed desirable by the Declarant in its sole discretion. Noting contained in this Master Deed or in future Amendments shall be held to limit or restrict said reserved rights of Declarant for the benefit of itself and its successors and assigns.

SOF ¶ 17; Ex. B, p. 10.

19. Section 13.6 provides, in pertinent part:

The Declarant expressly reserves for itself and its successors and assigns, and shall have the right, without the further consent of any Unit owner or mortgagee, to amend this Master Deed so as to include in this Condominium the later Phases thereof as set forth above (hereinafter, the “Phasing Amendment(s)”), pursuant to and in accordance with the provisions of this Section 13.

....

(c) Except as otherwise provided herein, if the Declarant has not so amended this Master Deed so as to include any or all of said later Phases or Sub-Phases in the Condominium within ten (10) years after the date of recording of this Master Deed, or such later date as may be otherwise specifically allowed in writing by the Federal National Mortgage Association (“FNMA”), then the foregoing reserved rights shall terminate and be of no effect with respect to any such later Phases not yet created;

SOF ¶¶ 30, 31; Ex. B, p. 10, 11.

20. Section 13.7 provides:

Upon the happening of any of the events described in (a), (b) or (c) below in this Section 13.7, certain portions of the Building(s) as described in the Phasing Amendment(s) . . . may become part of the general Common Areas . . . : (a) as to an area designated by Declarant as an area relating to a specific Phase of Sub-Phased, when the Declarant records an Amendment to this Master Deed to create such later Phase or Sub-Phase on such area . . . ; (b) when the time limit to record such Phasing Amendment(s) expires as set forth in 13.6 above; or (c) as to any specific area(s) designated by the Declarant, when the Declarant abandons its rights to develop later Phases or Sub-Phases by recording an instrument(s) to that effect as described in Section 13.6 above. Until such time as any such areas become part of the general Common Areas as described in this Section 13.7, the Declarant and its successors and assigns will have the exclusive right to use and develop said areas, and to rent, lease, occupy and enjoy any revenues derived from said areas.

Ex. B, p. 11, 12.

Layout of the Property & Sale of Units

21. Today, there are three (3) buildings constructed on the Property. SOF ¶ 14.

22. Buildings 2 and 3 were already constructed on the Property on March 17, 2006, on the date that the Master Deed was recorded with the Registry as shown on the Site Plan. The Site Plan also depicts a third structure labelled “Existing Conc. Foundation.” SOF ¶ 15; Ex. B, Ex. C.
23. On the date of recording of the Master Deed, March 17, 2006, the Declarant conveyed Unit No. 13 of the Condominium to George B. Farrington, III pursuant to a Unit Deed recorded with the Registry in Book 38576, Page 60, together with the exclusive right to two outdoor parking spaces. Unit No. 13 is located in Building 3. SOF ¶ 18; Ex. C, Ex. D.
24. Also on March 17, 2006, the Declarant conveyed Unit No. 12 of the Condominium to Oscar R. Castillo pursuant to a Unit Deed recorded with the Registry in Book 38576, Page 104, together with the exclusive right to use two outdoor parking spaces. Unit No. 12 is located in Building 3. SOF ¶ 19; Ex. C, Ex. E.
25. On January 30, 2007, the Declarant recorded a First Phasing Amendment to the Master Deed of the Condominium with the Registry in Book 40589, Page 191, which phased-in Unit No. 9 (located in Building 2) of the Condominium.¹ SOF ¶ 20; Ex. F.
26. On January 26, 2007, the Declarant conveyed Unit No. 9 of the Condominium to Paul and Anna Jaillet pursuant to a Unit Deed recorded on January 30, 2007, with the Registry in Book 40589, Page 201, together with the exclusive right to use two outdoor parking spaces. SOF ¶ 21, Ex. G.
27. On April 27, 2007, the Declarant recorded a Second Phasing Amendment to the Master Deed of the Condominium with the Registry in Book 41062, Page 223, which phased-in Unit No. 8 (located in Building 2) of the Condominium. SOF ¶ 22; Ex. H.

¹ As the parties’ SOF and record appendix does not contain the location for all of the phased-in Units, the court relies on the parties’ filings.

28. On April 27, 2007, the Declarant conveyed Unit No. 8 of the Condominium to John J. McNulty, Trustee of Unit 8 Rivers Edge Realty Trust, pursuant to a Unit Deed recorded with the Registry in Book 41062, Page 238, together with the exclusive right to use two outdoor parking spaces. SOF ¶ 23; Ex. I.
29. On June 1, 2007, the Declarant recorded a Third Phasing Amendment to the Master Deed of the Condominium with the Registry in Book 41311, Page 44, which phased-in Unit No. 7 (also located in Building 2) of the Condominium. SOF ¶ 24; Ex. J.
30. On June 12, 2007, the Declarant conveyed Unit No. 7 to Kimberly A. Christman pursuant to a Unit Deed recorded on June 13, 2007, with the Registry in Book 41311, Page 49, together with the exclusive right to use two outdoor parking spaces. SOF ¶ 25; Ex. K.
31. Prior to the end of 2008, the Declarant constructed Building 1 on 525 Water Street. SOF ¶ 16.
32. No additional units were submitted to the condominium status by way of a further amendment to the Master Deed. SOF ¶ 26.
33. Ten (10) years from the date of the recording of the Master Deed was March 17, 2016. SOF ¶ 32.

The Tax Taking & Sale

34. On April 15, 2009, the Town, by and through its Collector of Taxes, recorded an Instrument of Taking with the Registry in Book 440091, Page 223 (the "Taking Instrument"). SOF ¶ 27; Ex. L
35. The "Description of Land" set forth in the Taking Instrument provides as follows:

A condominium located and known as 525 WATER ST shown on the Town of Clinton Assessors Records as Parcel Identifier 45-1352 and being part of the premises recorded in book 36391 on page 171 in the Worcester Registry of Deeds.
Assessed to RIVERS EDGE CLINTON LLC

That instrument was record with the Registry in Book 44091, Page 223. SOF ¶ 28; Ex. L.

36. On October 20, 2015, the Town filed a complaint against the Declarant with the Land Court to foreclose the tax lien under the tax deed and recorded notice of same with the Registry in Book 54521, Page 17, as amended by subsequent notice recorded with the Registry in Book 62035, Page 376 (the “Tax Lien Action”). The tax taking complaint described the taking parcel (or Property) as follows:

A parcel of land with the buildings thereon located and known as 525 Water St shown on the Town of Clinton Assessors Records as Parcel Identifier 45-1352 and being part of the premises recorded in book 36391 on page 171 in the Worcester Registry of Deeds. *Said property consists of the property reserved by the developer of River’s Edge Condominium that has not been phased as a condominium unit(s) or common area(s) or facilities;*

Excluding Unit 12 and Unit 13 of the River’s Edge Condominium created through a master deed recorded on March 17, 2006 in Book 38575, Page 338.

Excluding Unit 9 of the River’s Edge Condominium created through the first amendment to the master deed recorded on January 30, 2007 in Book 40589, Page 191. Said Unit having been redeemed as evidenced by an instrument of redemption recorded on January 30, 2013 in book 50368, page 341;

Excluding Unit 8 of River’s Edge Condominium created through the second amendment to the master deed recorded on April 27, 2007 in Book 41062, Page 223. Said Unit having been redeemed as evidenced by an instrument of partial redemption recorded on July 22, 2020 in book 62854, page 387; and

Excluding Unit 7 of the River’s Edge Condominium created through the third amendment to the master deed recorded on June 12, 2007, in Book 41311, Page 44. Said Unit having been redeemed as evidenced by an instrument of partial redemption recorded on July 22, 2020 in book 62854, page 386.

SOF ¶ 29; Exs. M and N (emphasis supplied).

37. On September 21, 2021, Final Judgment entered in the Tax Lien Action as follows:

A parcel of land with the buildings thereon located and known as 525 Water St shown on the Town of Clinton Assessors Records as Parcel Identifier 45-1352 and being part of the premises recorded in book 36391 on page 171 in the Worcester Registry of Deeds. Said property consists of the property reserved by the developer of River’s Edge Condominium that has not been phased as a condominium unit(s) or common area(s) or facilities.; [sic] Excluding Unit 12 and Unit 13 of the River’s Edge Condominium created

through a master deed recorded on March 17, 2006 in Book 38575, Page 338. Said Unit having been redeemed as evidenced by instrument of redemption recorded on January 30, 2013 in book 50368, page 341. Excluding Unit 8 of River's Edge Condominium created through the second amendment to the master deed recorded on April 27, 2007 in Book 41062, Page 223. Said Unit having been redeemed as evidenced by an instrument of partial redemption recorded on July 22, 2020 in book 62854, page 387. Excluding Unit 7 of the River's Edge Condominium created through the third amendment to the master deed recorded on June 12, 2007, in Book 41311, Page 44. Said Unit having been redeemed as evidenced by an instrument of partial redemption recorded on July 22, 2020 in book 62854, page 386.. [sic].

SOF ¶ 33; Exs. O and P (a copy of the Tax Lien Case Docket and Recorded Final Judgment).

38. On February 17, 2022, the Town held a real estate auction, at which the Plaintiff was the high bidder for the Property. SOF ¶ 34.

39. On February 1, 2022, the Plaintiff and the Town executed a Memorandum of Sale ("Purchase Agreement"), reflecting that the Plaintiff agreed to purchase the real estate described as follows for Two Million One Hundred Thousand Dollars (\$2,100,000.00):

Land in said Clinton, with the buildings thereon, located and known as 525 Water Street, shown on the Town of Clinton's Assessors' records as Parcel Identified 45-1352 and being part of the premises recorded in book 36931 on page 171 in the Worcester District Registry of Deeds. *Said property consists of the property reserved by the developer of River's Edge Condominium that has not been phased as condominium units or common area(s); excluding Unit 7, Unit 8, Unit 12 and Unit 1 in the River's Edge Condominium.*

SOF ¶ 35; Ex. Q (emphasis supplied).

40. Pursuant to the Purchase Agreement, the Plaintiff was required to deliver a total of Two Hundred and Ten Thousand Dollars (\$210,000.00) to the Town as a deposit or before February 18, 2022 (the "Deposit"). SOF ¶ 36.

41. On or before February 18, 2022, the Buyer delivered the Deposit to the Town in accordance with the Purchase Agreement. SOF ¶ 37.

42. The Purchase Agreement provides in part:

If the Seller shall fail to fulfill for any reason the agreement contained herein the deposit shall be returned to the Buyer and all other obligations of all parties hereto shall cease and this agreement shall be void without recourse to the parties hereto.

SOF ¶ 38; Ex Q.

43. The Purchase Agreement addresses title beginning on the bottom of page 2, as follows:

If a material defect in the recorded title shall be claimed by the Buyer, the Buyer shall notify the Seller in writing at least ten (10) days prior to the date for the delivery of the deed stated above and the Seller shall be entitled to elect to either terminate this agreement or use thirty (30) days from the date of notice thereof to perfect said title. If the Seller elects to perfect title, but is unable to clear the record title or to make conveyance as above stipulated, the deposit made here under shall be refunded to the Buyer and all obligations of all parties hereto shall cease and be null and void. Buyer's sole recourse in the event of the Seller's failure to deliver title as required herein is the return of the deposit.

SOF ¶ 39; Ex. Q.

44. Pursuant to the Purchase Agreement, the conveyance contemplated by the Purchase

Agreement was to take place no later than March 18, 2022. SOF ¶ 40.

45. Due to concerns raised by the Buyer relative to the Town's title, the Buyer and Town mutually agreed to extend the closing date ultimately setting the closing for April 29, 2022.

SOF ¶ 41.

46. On April 18, 2022, the Plaintiff, by and through counsel, provided notice to the Town claiming a material defect in the recorded title to the land, property and/or improvements under the Purchase Agreement. The Plaintiff advised the Town that she would not be proceeding with the purchase contemplated by the Purchase Agreement, and she requested return of the Deposit. SOF ¶ 42.

47. The Town disputed the Plaintiff's claim of material defect in the recorded title to the land, property and/or improvements, and the Town declined to return the deposit. SOF ¶ 43.

48. The Plaintiff filed this action on July 19, 2022, seeking return of the Deposit and damages.
SOF ¶ 44.

DISCUSSION

Standard of Review.

The parties have agreed that this matter should be decided through a case stated trial, and they have “agree[d] upon all the material ultimate facts, on which the rights of the parties are to be determined by the law.” *Frati v. Jannini*, 226 Mass. 430, 431 (1917). The submitted agreement of facts in a “case stated” contains “all pertinent facts from which the judge might draw inferences.” *Reilly v. Local 589, Amalgamated Transit Union*, 22 Mass. App. Ct. 558, 568 (1986). Thus, a judge must apply the law to the facts stated, and may make inferences based upon the facts, in the process of reaching a final judgment. *Caissie v. Cambridge*, 317 Mass. 346, 347 (1944); see *Godfrey v. Mutual Finance Corp.*, 242 Mass. 197, 199 (1922).

Issue Before the Court.

As Plaintiff points out, the Complaint does not ask the court to adjudicate title, rather the claim before the court is one for breach of contract, seeking return of the Deposit. A claim for breach of contract requires the Plaintiff to establish four elements: that there was an agreement between the parties, supported by valid consideration; that the parties were prepared to perform; that the Town breached the contract, and that the Plaintiff sustained damages. *477 Harrison Ave., LLC v. JACE Boston, LLC*, 483 Mass. 514, 523 (2019), citing *Singarella v. Boston*, 342 Mass. 385, 387 (1961). Here, the parties do not dispute that there is a valid contract or that the Town was prepared to perform. Rather, parties' dispute centers on whether the Town breached the terms of the Purchase Agreement, as discussed below.

Plaintiff contends that title to the Property contained a material defect, entitling her to demand a cure of the Town and thereafter relieving her of her obligations under the Purchase Agreement when the Town failed to cure that defect. According to the Plaintiff, title to the Property was uncertain at the time of sale, because Section 13.6 of the Master Deed provides that the rights reserved by the Declarant in the Master Deed terminated on March 17, 2016, such that—arguably—the land and buildings thereon became owned by the unit owners as common area and were not available for sale or purchase in 2022 when the Purchase Agreement was executed. Plaintiff argues that the prospective claims of the Condominium unit owners and/or trustees to some or all of the Property are more than sufficient to cast reasonable doubt upon title. On the other hand, the Town contends that the Declarant’s reserved rights are clearly laid out in the Master Deed, continue in force, and the Plaintiff is simply experiencing buyer’s remorse.

In order to resolve these differing positions, I first consider the Town’s obligation to deliver good title, without material defects. In order to determine whether there was an ambiguity in the Property rising to the level of a material defect I consider what property interests were reserved and retained by the Declarant. Lastly, I consider the clarity of the property description in tax taking instrument and purchase agreement.

What Constitutes a Material Defect in Title.

Based on the terms of the Purchase Agreement, the Plaintiff was entitled to terminate the purchase if the Town delivered title with a material defect. Specifically, the Purchase Agreement provided, in pertinent part:

If a material defect in the recorded title shall be claimed by the Buyer, the Buyer shall notify the Seller in writing at least ten (10) days prior to the date for the delivery of the deed stated above and the Seller shall be entitled to elect to either terminate this agreement or use thirty (30) days from the date of notice thereof to perfect said title.

What then constitutes a material defect? A buyer is “entitled to receive a good marketable title, that is, a title free from encumbrances beyond a reasonable doubt.” *Guleserian v. Pilgrim Trust Co.*, 331 Mass. 431, 435 (1954). “The doubt is ‘such as would cause a prudent man to pause and hesitate before investing his money.’” *Mishara v. Albion*, 341 Mass. 652, 654-655 (1961), quoting *First African Methodist Episcopal Soc. v. Brown*, 147 Mass. 296, 298 (1888). This does not mean the “right to demand a title free from the mere possibility or suspicion of a defect.” *Guleserian v. Pilgrim Trust Co.*, *supra*, at 435. Rather, the title must be “free from obvious defects, and substantial doubts.” *Mishara*, *supra*, at 655, quoting *O’Meara v. Gleason*, 246 Mass. 136, 138 (1923).

In *Jeffries v. Jeffries*, 117 Mass. 184, 187 (1875), the Supreme Judicial Court considered a case where the seller sought specific performance of a contract to sell real estate, explaining:

It is not necessary that [the buyer] should satisfy the court that the title is defective so that he ought to prevail at law; it is enough if it appear to be subject to adverse claims which are of such a nature as may reasonably be expected to expose the purchaser to controversy to maintain his title, or rights incident to it He ought not to be subjected, against his agreement or consent, to the necessity of litigation to remove even that which is only a cloud upon his title.

As aptly summed up by Judge Kass in *Smith v. Allmon*, 17 Mass. App. Ct. 712, 716 (1954): “The buyer did not have to buy a law suit.” See *Mishara*, 341 Mass. at 657-658 (“We assume that the rule is the same for purposes of a suit to recover a deposit as for a suit for specific performance, that is, that the buyer cannot be required to acquire a probable law suit.”)

Here, Plaintiff, as the purchaser seeking return of the Deposit, has the burden to prove that the title to the Auction Property was not good beyond a reasonable doubt. *Mishara*, 341 Mass. at 654, citing *Cleval v. Sullivan*, 258 Mass. 348, 351 (1927).

What Property Interests Were Reserved and Retained by the Declarant.

Chapter 183A and the Governing Caselaw. Consistent with Chapter 183A and settled caselaw, where a master deed submits land to condominium status under Chapter 183A in clear and unequivocal language, that land becomes common area of the condominium. *Kettle Brook Lofts, LLC v. Specht*, 100 Mass. App. Ct. 359, 371-372 (2021); *Trustees of Beachwood Vill. Condo. Trust v. USAlliance Fed. Credit Union*, 95 Mass. App. Ct. 278, 280 (2019). Once submitted, the land is held by the unit owners as tenants in common in proportion to their respective individual interests in those common areas in the percentages set forth in the master deed (typically in an appended schedule). *Beachwood, supra*, at 286-287, citing *Flynn v. Parker*, 80 Mass. App. Ct. 283, 288 (2011); *DiBiase Corp. v. Jacobowitz*, 43 Mass. App. Ct. 361, 366 (1997); see *Beachwood, supra*, at 286 n. 21. As a tenant in common, “[a] condominium unit owner is entitled to the exclusive ownership and possession of [their] unit, G. L. c. 183A, § 4, and to an undivided interest in the common area in the same proportion as the value of [their] unit compared to the aggregate value of all of the units. G.L. c. 183A, § 5.” *Kaplan v. Boudreaux*, 410 Mass. 435, 438 (1991); *Scully v. Tillery*, 456 Mass. 758, 760 n. 7 (2010); *Beaconsfield Towne House Condo. Trust v. Zussman*, 401 Mass. 480, 483 n. 10 (1988); *Tosney v. Chelmsford Village Condo. Ass’n*, 397 Mass. 683, 686 (1986). A unit owner’s percentage of undivided interest in a condominium’s common areas and facilities may not be separated from the unit to which it appertains. G.L. c. 183A, § 5(b)(1).

As part of its development plan, however, the declarant of a condominium may choose to retain or reserve to itself certain rights in the master deed; those retained or reserved rights never become part of the condominium subject to Chapter 183A. *Kettle Brook*, 100 Mass. App. Ct. at 371, citing *Beaconsfield*, 416 Mass. at 508. This is because Chapter 183A is essentially an enabling statute, setting forth a framework of the development of condominiums in the

Commonwealth. Thus, “[s]o long as the statutory minimum is met, . . . the master deed itself provides the ‘rules of the game.’” *Beachwood*, 95 Mass. App. Ct. at 285, quoting *Flynn*, 80 Mass. App. Ct. at 289; *Kettle Brook*, 100 Mass. App. Ct. at 366.

The principles governing interpretation of a master deed are similar to those governing contract interpretation. See *Barclay v. DeVeaux*, 384 Mass. 676, 684 (1981). “Where the language of a contract is clear and unambiguous, . . . the court may interpret the meaning of the contract as a matter of law without resort to extrinsic evidence.” *Beachwood*, 95 Mass. App. Ct. at 284-285, quoting *Sullivan v. Southland Life Ins. Co.*, 67 Mass. App. Ct. 439, 440 (2006). The language of a master deed is construed most strongly against the declarant, as grantor. *Id.* at 289.

The Land Submitted to Condominium Status. On March 17, 2006, the Declarant created the Condominium by recording the Master Deed with the Registry. The land submitted to Chapter 183A is uniformly identified throughout the Master Deed as all of the land of 545 Water Street. That land became the common area of the Condominium, together with the buildings and improvements erected thereon before the recording of the Master Deed or afterwards, subject to the Declarant’s reserved rights. The introductory paragraph of the Master Deed describes the land, as follows:

[The Declarant] being the sole owner of that certain realty located at 525 Water Street, Clinton, Worcester County, Massachusetts, as more full described hereinafter, by duly executing and recording this Master Deed, does hereby submit said land, together with the buildings and improvements now or to be hereafter erected thereon, and all easements, rights and appurtenances belonging thereto, except such rights and interests reserved by and to the Declarant hereunder (hereinafter collectively called the “Property”), to the provisions of Massachusetts General Laws, Chapter 183A, as now and as may be hereinafter amended (hereinafter referred to as “Chapter 183A”), and do hereby state that the Declarants proposes to, and does hereby, create, with respect to the Property, a condominium governed by and subject to the provisions of Chapter 183A; and, to that end, the Declarant does hereby declare and provide as follows:

Schedule A to the Master Deed (titled "Description of Land"), includes a metes and bounds description of the land submitted to Chapter 183A, which is identical to the metes and bounds description in the deed by which the Declarant acquired the 525 Water Street on May 24, 2005. Both include the following metes and bounds description:

A certain parcel of land with improvements thereon, situated on the southerly side of Water Street in Clinton, Worcester County, Massachusetts, being shown as Lot #86 on Plan in Subdivision of the Dwellings and Land of the Lancaster Mills at Clinton, Mass., made by William I. Thompson, C.E., dated October 22, 1928, and recorded with the Worcester District Registry of Deeds in Plan Book 55, Plan 47, bounded and described as follows:

BEGINNING at a point in said southerly line of Water Street at the other land now or formerly of the Lancaster Mills near the high water line of the Nashua River;

THENCE Southerly and Westerly by said other land of said Lancaster Mills, Ten Hundred Fifty (1050) feet to the New York, New Haven & Hartford Railroad (Lancaster Mills Branch);

THENCE Northerly Four Hundred Fifty-seven (457) feet by the side line of the Railroad to angle in said side line;

THENCE Westerly Four and 75/100 (4.75) feet still by said line of the Railroad to a point;

THENCE Northerly Four Hundred Eighteen (418) feet still by said line of said Railroad to said Southerly line of Water Street;

THENCE Easterly One Hundred Sixty-three (163) feet by said street line to the place of beginning.

CONTAINING according to said Plan, Two and 3/10 (2.3) acres, more or less.

Based on these identical property descriptions, I conclude that all of the property acquired by the Declarant in 2005 was submitted to Chapter 183A, with the exception of the Declarant's reserved rights as stated in Section 3 of the Master Deed.²

² Section 3 of the Master Deed (titled "Description of Land"), also identifies the land of the Condominium, and excepts the rights reserved to the Declarant, as follows: "The Land portion of the Property comprising the Condominium (the "Land") is that certain parcel of land situated in Clinton, Worcester County, Massachusetts, being described on Schedule A attached hereto. The Land is further subject to such rights, easements, restrictions

The Common Areas, Phasing and Reserved Rights, and Initial Units. Section 6 of the Master Deed describes the common areas and facilities of the Condominium, which “consist of the entire Land exclusive of the Units, all as hereinbefore described and defined (and exclusive of any and rights, interest and/or easements reserved by the Declarant).” (emphasis original). Thus, as in *Trustees of the Beachwood Village Condo. Trust*, 95 Mass. App. Ct. at 279, all of the land of the Property and the buildings thereon became common area, owned by the unit owners as tenants in common in accordance with their percentage beneficial interests—with the exception of the Declarant’s reserved rights. “The unit owners became the fee simple owners of all of the common areas as tenants in common, including the undeveloped common area.” *Id.*

The Master Deed clearly states the Declarant’s intent to develop the condominium in phases. “In a phased condominium development, groups or stages of units are completed over a period of several years and become part of the condominium by successive amendments to the master deed.” *Id.* at 289, quoting *Podell v. Lahn*, 38 Mass. App. Ct. 688, 689 n. 3 (1995). When a condominium is developed in phases, however, there is a related impact on the rights of the individual unit owners. G.L. c. 183A, § 5(b)(1).³ Specifically, with the addition of new phases, each individual unit owner’s percentage of the undivided interest in the common areas decreases. *Kettle Brook*, 100 Mass. App. Ct. at 367-368. The phasing provisions in a master deed allow purchasers of units to determine their exposure to the reduction of their percentage interest and

and encumbrances as are of record and in force, and the rights and easements established herein. The Land is additionally subject to such rights, interests and easements as may be hereinafter reserved to the Declarant, which rights, interests and easements shall, in all instances, be exercisable by the Declarant and its successors or assigns, whether so stated or not. The Land, together with the Buildings and other improvements, are shown on the Site Plan recorded herewith (the “Site Plan”), Plan Book 839, Page 110.”

³ Section 5(b)(1) states, in pertinent part: “[T]he acceptance and recording of the unit deed shall constitute consent by the grantee to the addition of subsequent units or land or both to the condominium and consent to the reduction of the undivided interest of the unit owner if the master deed at the time of the recording of the unit deed provided for the addition of units or land and made possible an accurate determination of the alteration of each unit's undivided interest that would result therefrom.”

changes to the condominium; those unit owners have a right to rely on the phasing provisions as set forth at the time they acquire their units. *Id.* at 367, citing *Suprenant v. First Trade Union Sav. Bank, FSB*, 40 Mass. App. Ct. 637, 638 (1996) (rejecting declarant’s attempt to unilaterally extend duration of phasing rights). “[T]he master deed fixes the parties expectations not only as to the number of units that the declarant may add, but also as to the duration of the phasing period.” *Id.* at 368.

Initially, although all the land of the Property had been submitted to condominium status, the Condominium was comprised of only two (2) Units, specifically Units 12 and 13 (the so-called “Phase One”) Units. See Ex. B, Section 5, Schedule B. Thus, at inception, each of those two Unit Owners “shall have an Undivided Interest in the Common Areas and Facilities in the percentages set forth in Schedule B,” 49.7% for Unit 12 and 50.3% for Unit 13 at inception. Ex. B, Section 7, Schedule B. The Declarant stated its anticipation in the Master Deed that there would be thirteen (13) total Units when all phases had been added, with Schedule C setting forth the anticipated schedule of beneficial interest for each of those thirteen potential Units. Ex. B, Section 7, Schedule C. As detailed in Section 7, the beneficial interest of the then existing Units would be reduced when new Units were phased into the Condominium in accordance with a specified formula. Section 7 notes that this formula would also apply “should the number of Units ultimately be less than thirteen (13).”

The Declarant also reserved property rights in the Condominium (to itself and its successors and assigns), which reserved rights did not become part of the the common area. Notably, however, the Declarant did not withhold any land from the Property for later submission to the Condominium. Compare *Queler v. Skowron*, 438 Mass. 304, 311-314 (2002) (developer submitted defeasible fee to Chapter 183A, such that undeveloped land did not become

part of the common area, where the master deed provided that any undeveloped land at time phasing rights terminated would revert to the developer), as cited in *Beachwood*, 95 Mass. App. Ct. at 289, and *First Main St. Corp v. Board of Assessors of Acton*, 49 Mass. App. Ct. 25, 25-26 (2000) (declarant only submitted land comprising Phase I to Chapter 183A and not land upon which the developer reserved rights to build subsequent phases), with *Spinnaker Island & Yacht Club Holding Trust v. Board of Assessors of Hull*, 49 Mass. App. Ct. 20, 21-23 (2000) (developer submitted all land to Chapter 183A as common area, including so-called “expansion parcels”). The Declarant’s reserved rights appear in numerous locations throughout the Master Deed, most notably in Section 13 titled “Rights Reserved to the Declarant.”

The Declarant’s Development and Phasing Activities. The parties here disagree about whether the Declarant’s reserved rights were extant at the time of the tax taking and auction. Before considering these differing views, I first review the chronology of the Declarant’s efforts to develop, phase, and sell units at the Condominium. At the time of the recording of the Master Deed on March 17, 2006, Buildings 2 and 3 were already constructed on the Property. The Site Plan recorded contemporaneously with the Master Deed depicts two buildings running roughly parallel to the shore of the Nashua River, labeled Buildings 2 and 3 (partitioned into five and five spaces, respectively), as well as third structure labelled “Existing Conc. Foundation.” perpendicular to the shoreline. There are now three building located on the Property, the Declarant having constructed Building 1 prior to the end of 2008.

Just after recording of the Master Deed on March 17, 2006, the Declarant conveyed two Units, Units 12 and 13 (the original two Units included in the Condominium, per Section 13.1). The Declarant thereafter recorded three phasing amendments, each phasing in a single unit: (1) on January 30, 2007, the Declarant recorded both the First Phasing Amendment, phasing in Unit

9 (located in Building 2), and the deed that conveyed Unit 9; (2) on April 27, 2007, the Declarant recorded the Second Phasing Amendment, phasing in Unit 8 (located in Building 2), and conveyed Unit 8 that same day; and (3) on June 13, 2007, the Declarant recorded both the Third Phasing Amendment, phasing in Unit 7 (located in Building 2), and the deed that conveyed Unit 7. In total, the Declarant recorded three phasing amendments and added three additional units (Units 7, 8, and 9). Although the Master Deed anticipated a possible total of thirteen Units, only five Units were phased in and each of those was conveyed to a unit owner. The Declarant recorded no addition phasing amendments after June 13, 2007, and conveyed no additional units.

The Declarant's Reserved and Retained Rights. In support of its argument that the Declarant's reserved rights continued in effect at the time of the tax taking and auction, the Town relies on the provisions of Sections 3, 6 and 13 of the Master Deed (the latter, titled "Rights Reserved to Declarant").⁴ Section 13.1 states as follows, with the Town relying on the underlined portion below:

As stated above, the Declarant intends to develop the Condominium in stages herein referred to as "Phases." The Land described in Schedule A, together with those portions of the Building in which Units 12 and 13 are located, shall initially comprise the Condominium. Said Phase One consists of two (2) Units, as well as the adjacent and/or appurtenant areas limited in use to said Units or abutting same. The Condominium may consist of additional Phases constructed and to be constructed on the Land described in Schedule A. Until such time as additional Phases are added to the Condominium by the recording of "Phasing Amendment" as described below, any buildings or portion thereof existing on the Land described in Schedule A (other than Phase One), any other portions of the building(s) shown on the Site Plan, and any land not described in Schedule A shall not be part of the Condominium or subject to the Act, and shall be exclusively owned by, and shall be the exclusive responsibility of, the Declarant or other owner thereof.

Three other provisions and the portions relied upon by the Town are as highlighted below:

13.4. As described above, with respect to any portions of a Building not comprising Phase One or a later Phase expressly made subject to the Master Deed and part of the Condominium pursuant to a "Phasing Amendment" (as described above and below), the

⁴ The Declarant's reserved and retained rights are also mentioned in the introductory paragraph to the Master Deed, as well as Section 5(C) (last paragraph), Section 7, and Section 18

Declarant reserves for benefit of itself and its successors and assigns exclusive ownership of such Building(s) or portions of Building(s), as well as the right to fully construct, develop and finish same. Thus, the Building and portions of Buildings, as well as the other areas shown on the Site Plan located beyond the Phase One area, may be exclusively utilized by the Declarant and its successors and assigns for whatever lawful use or purpose may be deemed desirable by Declarant in its sole discretion. Nothing contained in this Master Deed or in future Amendments shall be held to limit or restrict said reserved rights of Declarant for the benefit of itself and its successors and assigns.

....

13.10. The rights and easements reserved the Declarant in this Section 13 shall be in addition to and not in limitation of, the rights and easements reserved by the Declarant in other sections of this Master Deed, or in any prior-recorded instrument.

....

13.11. The rights and easements reserved by the Declarant for itself and its successors and assigns in the Master Deed shall survive the sale of all of the units in Phase One or Future Phases or Sub-Phases by the Declarant, and are to be deemed to be fully transferable, running with the land.

Based on these provisions, the Town, which succeeded to the rights of the Declarant following the tax taking, contends that it owns the eight units which were never phased into the Condominium.⁵ The Town also contends that the Declarant also retained, and it now holds, an alleged “ownership interest” in the common areas of Building 1, since no units in Building 1 were ever phased into the Condominium and, pursuant to Section 13.9, the “right of access, ingress over and upon the Land and the common areas and facilities of the Condominium.”

In response, the Plaintiff points to Section 13.6(c) of the Master Deed, which established a deadline for the exercise of those reserved rights, ten (10) years after the date of recording of the Master Deed. Section 13.6(c) provides:

Except as otherwise provided herein, if the Declarant has not so amended this Master Deed so as to include any or all of said later Phases or Sub-Phases in the Condominium within ten (10) years after the date of recording of this Master Deed, or such later date as may be otherwise specifically allowed in writing by the Federal National Mortgage Association (“FNMA”), *then the foregoing reserved rights shall terminate and be of no effect with respect to any such later Phases not yet created* (emphasis supplied);

⁵ Those include Units 1 through 4 (in Building 1), Units 5 and 6 (in Building 2), and Units 10 and 11 (in Building 3).

According to the Plaintiff, because the Declarant did not amend the Master Deed to include any later phases to add additional units beyond Phase 3 (for a total of five units) prior to March 17, 2006 (ten years after recording of the Master Deed on March 17, 2006), then its reserved rights terminated and were “of no effect with respect to any such later Phases not yet created.”

The parties particularly disagree about whether the phrase “foregoing reserved rights shall terminate” in Section 13.6(c) applies only to the phasing rights in Section 13.6 or whether that phrase applies to all of the Declarant’s reserved and retained rights. The Town argues for the former reading and the Plaintiff for the latter. Thus, according to the Town, even though the Declarant lost its right to phase in new units, it nonetheless continues to own other reserved rights. The Town focuses on the language in Section 13.11 to support its contention that the Declarant’s reserved rights are independent of the phasing rights (“The rights and easements reserved by the Declarant for itself and its successors and assigns in the Master Deed shall survive the sale of all of the units in Phase One or Future Phases or Sub-Phases by the Declarant, and are to be deemed to be fully transferable, running with the land.”)

This is not the only plausible reading of Section 13.6(c), however. Plaintiff offers several contrary readings and sound arguments in support. She points out that the subsections of Section 13 which precede Subsection 13.6(c) describe both phasing rights and other reserved rights such as easement rights, thus undermining the Town’s above argument only the phasing rights terminated on March 17, 2016. She points out that the term “foregoing” according to the Meriam Webster Dictionary means “listed, mentioned, or occurring before,” thus modifying the term “reserved rights” and because the term “reserved rights” appears in the plural form, it should sensibly should be read to apply to the many reserved rights discussed in the subsections preceding Section 13.6 (and not just phasing rights). She points out that Section 13.7 provides

that the portions of buildings not yet phased-in to the Condominium would become part of the common area “when the time limit to record such Phasing Amendment(s) expires, as set forth in 13.6 above.”⁶ Lastly, relying on the caselaw discussed above, she argues that the owners of Units 7, 8, 9, 12, and 13 now own all of the common areas including the building and units not phased into the Condominium because no reserved rights remained once the ten year period had passed. See, e.g., *Kettle Brook*, 100 Mass. App. Ct. at 371-372; *Flynn*, 80 Mass. App. Ct. at 288; *DiBiase Corp.*, 43 Mass. App. Ct. at 366; cf. *Beachwood*, 95 Mass. App. Ct. 286-287, citing *Berish v. Bornstein*, 437 Mass. 252, 262 (2002) (concluding that the developer retained its phasing rights which were for an unlimited period of time under the master deed, but that its easement to pass and repass over the common area and facilities for the purpose of constructing additional phases had expired seven years after the master deed was recorded).

While Plaintiff’s readings are compelling, I need not resolve the meaning of Section 13.6(c) because the Complaint does not ask the court to do so. Rather, the Complaint seeks only to be relieve the Plaintiff of her obligation to purchase the Auction Property. With this request in mind, I conclude there is tension between the termination provisions of Section 13.6(c) and the survival language in Section 3.11. There is tension as well between the termination provisions of Section 13.6(c) and the rights retained by the Declarant in Section 13.1, 13.4, and 13.10 (among others). In light of the ambiguous and potentially contradictory provisions of the Master Deed and the nuanced caselaw regarding reserved and retained rights in phased condominiums, I

⁶ Plaintiff further argues that this language of Section 13.7, together with its concluding sentence below, expressly limits the Declarant’s rights to use and occupy the areas designated for future development to the period prior to the termination date of March 17, 2016. The concluding sentence reads: “Until such time as any such areas become part of the general Common Areas s described in this Section 13.7, the Declarant and its successors and assigns will have the exclusive right to use and develop said areas, and to rent, lease, occupy and enjoy any revenues derived from said areas.”

conclude that the answer to the question of what property rights, if any, were sold at tax action is far from clear.

I thus concur with the Plaintiff that the potential claims of the Condominium trustees, and potentially those of the owners of the phased-in Units, rise to the level of a material defect in title of the Auction Property. As discussed above, the Plaintiff is entitled to receive good marketable title, that is “title free from encumbrances beyond a reasonable doubt.” *Guleserian*, 331 Mass. at 435. Here, there is reasonable doubt about the extent of the Declarant’s reserved rights, doubt sufficient to “cause a prudent man to pause and hesitate before investing his money.” *Mishara*, 341 Mass. at 654-655, quoting *First African Methodist Episcopal Soc.*, 147 Mass. at 298. Query, for instance, whether the Condominium trustees or one of the existing Unit Owners might challenge an attempt by the purchaser of the Declarant’s right to sell the eight Units that were not phased into the Condominium? The answer to that question is a definite “maybe.” See *Jeffries*, 117 Mass. at 187 (the likelihood of a lawsuit need only be of “a nature as may reasonably be expected to expose the purchaser to controversy”). This uncertainty and the risk of exposure is more than sufficient to satisfy the Plaintiff’s burden to prove a title defect. Harkening back to Judge Kass’ commentary in *Smith v. Allmon*, 17 Mass. App. Ct. at 716, the Plaintiff does not have to “buy a law suit.”

Once the Plaintiff made demand upon the Town to cure the material defect discussed above in accordance with the terms of the Purchase Agreement, the Town was required to cure that defect or, failing to do so, return the Deposit. The Town now stands in breach of the Purchase Agreement, having failed to cure the defect or return the Deposit. I conclude that Plaintiff is entitled to the return of her Deposit, that Deposit being her sole evidence of damages occurring as a result of the Town’s breach.

The Tax Lien Instrument and Purchase Agreement.

It is also worth examining the terms of the Instrument of Taking and Purchase Agreement. Those documents, upon which the Town relies, do not provide clarity about what property was sold at auction. The land foreclosed upon by the Town was described in the Instrument of Taking recorded in the Registry in Book 44091, Page 223, is described as follows:

A condominium located and known as 525 WATER ST shown on the Town of Clinton Assessors Records as Parcel Identifier 45-1352 and being part of the premises recorded in book 36391 on page 171 in the Worcester Registry of Deeds.
Assessed to RIVERS EDGE CLINTON LLC

This description, turning on the term “condominium located and known as 525 WATER ST,” is ambiguous since at the time of the taking the Condominium included five Units conveyed to purchasers, as well as common areas and, arguably, the Declarant’s reserved and retained rights. It is not clear which of these elements were intended to be included in the Instrument of Taking.

Nor does Section 14 of G.L. c. 183A, which governs how condominiums are taxed, and how the Town came to auction the Auction Property, provide clarity. Section 14 provides, in part, that “[e]ach unit and its interest in the common areas and facilities shall be considered an individual parcel of real estate for the assessment and collection of real estate taxes but the common areas and facilities, the building and the condominium shall not be deemed to be a taxable parcel.”⁷ Since the “common areas and facilities, the building and the condominium” are not a taxable parcel, the only taxable property acquired by the Town are the Declarant’s reserved

⁷ Further: “Except as provided in section 53E3/4 of Chapter 44 and section 127B1/2 of chapter 111, betterment assessments of portions thereof, annual sewer use charges, water rates and charges and all other assessments, or portions thereof, rates and charges of every nature due to a city, town or district with respect to the condominium or any part thereof, other than real estate taxes, may be charged or assessed to the organization of unit owners; provided, however, that any lien of the city, town or district provided by law therefor shall attach to the units in proportion to the percentages, set forth in the master deed on record, of the undivided interests of the respective units in the common areas and facilities.” G.L. c. 183A, § 14.

rights. As discussed above, the reserved rights are uncertain and subject to competing readings of the Master Deed.

The property description in the Purchase Agreement does not provide any greater clarity about the property under agreement, stating simply:

Land in said Clinton, with the buildings hereon, located and known as 525 Water Street, shown on the Town of Clinton's Assessors' records as Parcel Identified 45-1352 and being part of the premises recorded in book 3691 on page 11 in the Worcester District Registry of Deeds. *Said property consists of the property reserved by the developer of River's Edge Condominium that has not been phased as condominium units or common area(s); excluding Unit 7, Unit 8, Unit 12 and Unit 13 in the River's Edge Condominium.*

(emphasis supplied). Thus, although the Purchase Agreement identifies the Declarant's reserved rights, the extent of those reserved rights (if any) remains unclear, as discussed above.

Lastly, in support of its position that Building 1 and the yet-to-be-phased in "units" were property of the Declarant at the time of tax taking and not common area, the Town cites to *R.I. Seekonk Holdings, LLC v. Board of Assessors of Seekonk*, 91 Mass. App. Ct. 1104 (2017), 2017 Mass. App. Unpub. LEXIS 119 (Rule 1:28 Decision). In that case, the Appeals Court considered a condominium developer's argument that two partially completed structures were exempt from taxation under G.L. c. 183A, § 1 because they were part of the common area. In rejecting the declarant's request for a tax abatement, the Appeals Court reasoned that the two partially completed structures were taxable parcels because the "plain, unambiguous language of the master deed clearly defines [the developer's] intent to exclude the structures from the condominium's common areas." *Id.* at *4. Unlike the Master Deed here at issue, the Seekonk master deed specifically provided that "[u]ntil such time as additional Phases are added to the Condominium by the recording of 'Phasing Amendments' . . . any buildings or portions thereof existing on the Land . . . (other than Phase 1) . . . shall not be part of the Condominium or subject to the Act, and shall be exclusively owned by [the declarant]." *Id.* at *2. at Thus, the Town's

reliance on *R.I. Seekonk LLC* fails because the River's Edge Master Deed does not clearly and unambiguously exclude Building 1 and the yet-to-be phased in units from the common area. See *Spinnaker Island Yacht Club Holding Trust v. Assessors of Hull*, 49 Mass. App. Ct. 20, 23-24 (2000) (taxing authority could not tax certain phasing rights because declarant had submitted all land to condominium status according to the terms of the master deed); cf. *Rauseo v. Bd. of Assessors of Boston*, 94 Mass. App. Ct 517, 520 (2018) (easement in gross for parking reserved by declarant and recorded prior to the recording of the master deed was not part of the common area and therefore was subject to taxation).

CONCLUSION

For all of the reasons discussed above, the court concludes that title to the Auction Property contains a material defect and the Town failed to cure that defect after demand, such that the Plaintiff is entitled to the return of her Deposit. Accordingly, the Plaintiff's Motion for Judgment on a Case Stated is ALLOWED and the Town's Motion for Judgment on a Case Stated is DENIED. No fees or costs or additional damages are warranted. Judgement to issue accordingly.

SO ORDERED

By the Court (Rubin, J.)
/s/ Diane R. Rubin

Attest:

/s/ Deborah J. Patterson
Deborah J. Patterson
Recorder

Dated: May 3, 2024