

# Poison Pill Provision Backfires Once Again

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For years, condominium developers have been placing a “poison pill” provision in the governing documents of the condominium they were creating. These poison pill provisions are designed to protect the developer from unit owner lawsuits by making it difficult or impossible to bring an action. For example, a poison pill provision may provide that before bringing a lawsuit against a developer, the association must obtain a vote of at least eighty percent of the unit owners. However, in several recent cases, the courts of the Commonwealth have been hitting back against such provisions.

The first hit against developers occurred earlier this year in Trustees of the Cambridge Point Condominium Trust v. Cambridge Point, LLC, et als. In that case the state’s highest court, the Supreme Judicial Court, held that the developer’s poison pill provision was void because the circumstances of the case coupled with the poison pill provision contravened public policy. In Trustees of the Cambridge Point Condominium Trust, the poison pill provision required approval from 80 percent of unit owners before suit could be filed. The Court however stated that not all poison pill provisions are void.

The Land Court recently overruled a similar provision in Seville Condo Trust v. Seville on Boston Harbor, LLC. The facts of this case were substantially similar to the Trustees of the Cambridge Point Condominium Trust facts except that the poison pill provision required 80 percent consent of all unit owners before bringing any litigation whatsoever and not just against the developer. Unfortunately, the Land Court did not even get to an analysis of whether applying a poison pill against all litigation would be void as a matter of public policy.

In Seville Condo Trust, the Land Court recognized the recent precedent set by the Supreme Judicial Court in Trustees of the Cambridge Point Condominium Trust. Despite this fact, the Land Court looked to the poison pill provision and the exceptions to the provision which were provided in the Master Deed. The Land Court focused on one of the exceptions to the consent requirement which was “to enforce any of the provisions of the Master Deed or the Declaration of Trust of the Trust or these By-Laws or Rules and Regulations thereto...” Since the action before the Land Court was for declaratory relief to enforce the condominium documents as a result of excessive noise and vibration the Land Court held that the action fell within the exception and the eighty percent consent requirement did not apply.

The Seville Condo Trust case illustrates a few things. First, courts will not automatically deem a poison pill provision void in its entirety without reviewing the language of the actual provision. Second, it appears that if the court can resolve a case without having to make a determination as to whether the provision is void as a matter of public policy it will likely do so. Third, the case leaves open what types of poison pill provisions are acceptable and which will violate public policy. Therefore, poison pill provisions in condominium documents remain an unsettled area of the law and great care should be taken if you intend to include one in the Master Deed or use it as a defense in current litigation.