July 26, 2009

BIG DEAL

Attack of the Fine Print

By JOSH BARBANEL

THE Rushmore, a new 41-story glass and stone condominium tower on Riverside Boulevard at the Hudson River, seemed serene on a recent visit. The flowers in the interior courtyard were in full bloom; the ground-level pool had been filled. Sixteen buyers had already moved in.

And yet an error of a single digit in an arcane document — the densely worded 732-page offering plan — could upset that happy picture, and cost the sponsors, the Extell Development Company and the Carlyle Group, tens of millions of dollars in lost revenue, lawyers say.

The Rushmore, surrounded by parks and with extensive river views, sold well when it went on the market, and 60 percent of the apartments are now in contract. But as the economy soured and the real estate market slid, sponsors were forced to allow new buyers discounts.

Buyers at the Rushmore and at other new condominiums began struggling to get out of their contracts and to repocket their deposits — at the Rushmore, 15 percent of the purchase price. Lawyers pored over the offering plan and pondered obscure state and federal laws looking for ways to invalidate the contracts.

At the Rushmore, they may have found a loophole. Both the buyers and the sponsors agree that there was an error in a date in the offering plan, a document painstakingly prepared by a major New York law firm. Now they are debating whether the mistake was a trivial clerical error that should simply be ignored, or a one-time opportunity for Rushmore buyers to back out and recover their deposits or negotiate a better deal.

Late last month, Richard N. Cohen, a real estate lawyer, filed an application with the New York State attorney general’s office seeking a refund of deposits for a group of buyers in contract at the Rushmore. After several buyers joined the action last week, he now represents 23 who paid about $10 million in deposits on $70 million in apartments, including a four-bedroom apartment with a terrace that is in contract for $7.1 million.

Under state regulations, a sponsor is required to provide an operating budget for the first year of a new condominium, so buyers know what to expect when they move in. If the first closing does not occur by the end of the budget year, the sponsor is required to submit a new budget, and give the buyers a right to rescind their contracts.

At the Rushmore, somebody goofed. The offering plan promised to give buyers a right to back out of the plan if the first closing did not occur before the first day of the budget year, Sept. 1, 2008, rather than Sept. 1, 2009, after the last day. The first closing occurred in February 2009.
At the time the plan was prepared, in 2006, law firms were deluged by developers with plans for new condominiums. In those heady years of rising prices, few buyers paid much attention to the fine print.

Now that the market has turned, Mr. Cohen is arguing that the error in the plan was significant. He said that although Extell had a right to choose a deadline a full year later under state rules, it also had the right to choose an earlier date. Many buyers relied on the 2008 date and statements from sales agents that the project would be completed by the fall of 2008, he said.

The delay, he said, damaged “the very fabric of purchasers’ lives and their financial obligations.” Buyers had leases that were expiring, he said, and at least one timed the purchase to a baby’s arrival.

Extell, in turn, is arguing that the error was insignificant, what lawyers call a “scrivener’s error,” which should be interpreted to reflect the plain meaning of the state regulations. The plan for the Rushmore was prepared by Stroock & Stroock & Lavan, a firm with 750 lawyers, and reviewed by the development team at Extell, but no one caught the mistake.

Michel S. Evanusa, a real estate partner at Stroock, did not return a telephone call or an e-mail message. In an interview, Gary Barnett, the president of Extell, declined to discuss the legal challenge while it is pending.

Other lawyers were divided over whether the challenge would be upheld. One condominium lawyer noted that the error was an easy one to make in boilerplate paragraphs, but should be enough to give buyers a chance to back out of the contract. The lawyer, who is not involved in the case, declined to give his name because he is a colleague of some of the parties.

Steven Sladkus, a real estate lawyer at Wolf Haldenstein Adler Freeman & Herz, said that unless other contradictory dates or language appeared in the offering plan or the sales contract, the attorney general was likely to treat the error as a serious one.

Yet another real estate lawyer, Adam Leitman Bailey, was of a different opinion. He said the burden was on the buyers to show that a reasonable buyer would have relied on the 2008 date, or that the error harmed a buyer in some way.

Property records show that in the last few months, buyers have negotiated discounts of as much as 12 percent, and brokers say discounts of as much as 18 percent have been offered to prospective buyers on some units. If all buyers still in contract walk away from the apartments with their deposits, the sponsors will have to resell the units at current market prices and stand to lose perhaps $50 million or more. The building was valued at nearly $800 million under the offering plan prices.

But many buyers at the Rushmore don’t want to walk away. What they want is the chance to buy in at a lower price, Mr. Cohen said.

The complaint before the attorney general does not focus on the construction quality or apartment size discrepancies used in other buyer challenges.

Mr. Barnett of Extell says that buyers who do close won’t be disappointed, no matter what price they pay. He expects the entire Riverside Boulevard development only to increase in value as the neighborhood is
completed over the next few years.

“People who move into the building will be getting a bargain,” Mr. Barnett said. “They will buy into water views, park views and a super high-quality building.”

E-mail: bigdeal@nytimes.com