

# Massachusetts' Highest Court Defines Statute of Repose Accrual Period for Multi-Building Condominium Construction Claims

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On November 3, 2020, the Massachusetts Supreme Judicial Court (SJC) concluded that the 6-year statute of repose period for multi-building construction claims accrues at the time of substantial completion of each individual building or improvement. In *D'Allessandro v. Lennar Hingham Holdings, LLC*, the SJC rejected the condominium trustees' argument



that the relevant period begins upon issuance of the final certificate of occupancy for an integrated phased condominium project and clarified the critical calculation dates. The *D'Allessandro* decision will have significant ramifications on multi-building and phased condominium construction litigation.

The *D'Allessandro* case is pending in the United States District Court for the District of Massachusetts (the Federal Court). Federal courts have the option of “certifying a question” to the highest state court for the purpose of deciding a state law question, which the Federal Court did in this matter. Since the statute of repose is a state (Massachusetts) law, the Federal Court asked the SJC to determine when the statute of repose period begins for a single condominium project comprised of multiple buildings or phases. The Federal Court previously held in favor of the condominium association and determined that the statute of repose did not expire until the occupancy permit issued for all 28 buildings.

The SJC decision overruled the Federal Court's prior decision. The condominium association was built in various phases between 2008 and 2015. The developer argued that the 6-year statute of repose had expired for a number of the individual buildings by the time that the association trustees had filed suit. The trustees argued that the statute of repose should not expire until such time as a certificate of occupancy issued for all buildings.

Massachusetts' statute of repose, Massachusetts General Laws c. 260, §2B, prohibits the commencement of actions arising from deficiencies in the design, planning, construction or general administration of an “improvement” to real

property “more than six years after the earlier of the dates of: (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner.” The word “improvement” is not defined in the statute. The lack of definition has created ambiguity in its application to multi-building and phased construction projects. The *D’Alessandro* plaintiffs argued that a single condominium construction project comprised of 28 buildings built over a 7-year period constituted a single improvement for purposes of the statute. Since it was a “single” improvement, the condominium argued that the statute for all buildings would not start until the last building was completed. The SJC rejected this interpretation and found that it “would stray too far from the statutory language and the legislative intent behind it.”

Rather, the court focused on the original intent of the statute of repose, which was to provide a hard stop for construction liability claims. The SJC concluded that adoption of the trustees’ position “would contravene legislative intent by exposing the defendants in this action to liability with respect to discrete improvements . . . that were indisputably open to use more than six years before the commencement of this action.” Accordingly, the court found that “the issuance of a certificate (or certificates) of occupancy for each individual building (or for all the units in a building) triggered the statute of repose for the common elements and limited common elements pertaining to that building.”

In conclusion, the SJC responded specifically to the certified question concerning the issue as follows:

“Where a condominium development is comprised of multiple buildings, regardless of how many phases of the development there may be or how many buildings are within each phase, each building constitutes a discrete ‘improvement’ for purposes of § 2B, such that the opening of each individual building to its intended use, or the substantial completion of the individual building and the taking of possession for occupancy by the owner or owners, triggers the statute of repose under § 2B with respect to the common areas and the limited common areas of that building. In addition, where a particular improvement is integral to, and intended to serve, multiple buildings (or the condominium development as a whole), the statute of repose begins to run when that discrete improvement is substantially complete and open to its intended use.”

This decision means that it is imperative for condominium associations to conduct timely evaluations of construction claims. Waiting until the entire project is completed may result in the association's inability to recover all damages. Deficiency claims discovered more than 6 years from the issuance of a certificate of occupancy for a single building or integral part of the development will be barred regardless of the date that the development is fully completed. In the condominium context, the *D'Allessandro* decision may result in situations where an association loses claims concerning major common area amenities such as sewerage treatment plants, common area buildings, and other improvements.

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