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Law in Hand

KEYS TO THE CITY, PART TWO: AMENDING CONDOMINIUM DOCUMENTS AFTER TRANSITION

[This is the second of a two part series discussing important issues that arise during the transfer of control from the developer to the homeowners of a recently constructed common interest development. Part one focused on common problems and solutions involving this transition period. Part two focuses on how governing documents can be amended or modified to allow for a smoother transfer of control from developer to the new owners of a common interest development.]

Here's the scenario: you've just accepted control of your homeowner's association from the developer. You've done your due diligence—met with the management company, reviewed the construction and insurance documents, performed your financial audit, and walked the property with licensed consultants. What next?

The Governing Documents

If you haven't done so yet, have an attorney review your "governing documents." If a homeowner's association can be likened to a small city, these important documents are certainly comparable the city's Constitution, Bill of Rights and municipal codes. They include the Declaration of Covenants, Conditions & Restrictions, or "CC&Rs", Articles of Incorporation, Bylaws, and in some instances, the Condominium Plan, and they determine the manner in which the association will be run. They are drafted by the developer, or "declarant," and often contain provisions that don't necessarily pertain to or benefit the homeowners. Provisions and language to watch out for include:

- Mandatory arbitration clauses
- Limitations on the Association's ability to sue the Developer (usually the "Declarant")
- Continuing developer control of the Association

- Unclear definitions of Association's maintenance responsibilities
- Occupancy restrictions that may discriminate unfairly
- Lack of enforcement mechanisms for the Board of Directors

It is not as uncommon as you might think to find this type of language in CC&Rs upon transfer of control from the developer. If that is the case in your association, something should be done to modify the language of these documents to protect the interests of the homeowners. How can this language be modified? By amending the CC&Rs.

Amending the CC&Rs

California Code of Civil Procedure ("CCP") §4270 authorizes association members to amend CC&Rs as provided by statute or in the CC&Rs themselves. Amendments under typical CC&R provisions are only effective after the following has occurred:

1) The appropriate percentage of owners under the governing documents have given their approval;
2) Either a duly designated officer or the President of the HOA has certified in writing that the appropriate percentage was reached; and,
3) The writing has been recorded in the county where the association is located.

(Note that some CC&Rs require a "super-majority" of approvals—66%, 75%, sometimes even 100%!)

Allowing one officer to certify that enough owners approved the amendment saves a tremendous amount of time over the bother of obtaining written approvals from each homeowner. Unfortunately, some CC&Rs contain these provisions. Our advice: obtain each of those signatures one last time to amend this particular provision to follow §4270!

If your association's CC&Rs do **not** contain a procedure that allows you to amend at any time, you may still do so by petitioning under §4275, under the following conditions:

1) The proposed amendment must be distributed to all of the owners by first class postage prepaid mail or personal delivery at least 15 days prior to seeking approval of the amendment;
2) Over 50 percent approval of the separate interest owners is given (unless a higher percentage is required by the CC&Rs), which has been certified in writing by an officer on a notarized certificate; and
3) The amendment and certified statement is recorded in the county(ies) where the project is located and a copy distributed to all owners (1st class postage prepaid or personal delivery) "within a reasonable time after the amendment is recorded."

Developer Provisions

Very common to CC&Rs is language that pertains solely to developers, including provisions intended to help complete construction of the project or market the units for sale. CCP §4230 provides a method for deleting developer provisions that no longer apply once the homeowners have assumed control of the association.

The new Board of Directors has the power to delete these provisions by a simple majority vote. At least 30 days prior to acting, the board must send a copy of the proposed amendment to all members by first class mail, along with notice of the time, date, and location of the meeting. All members must be permitted a chance to comment on the proposed amendment, and all deliberations must be in open session.

By statute, the board may then obtain approval from a majority of those members casting votes at a meeting or election where a quorum is present or voting. However, if your CC&Rs allow for a simple majority vote of the membership, use this procedure instead—it is easier, and a majority will need to confirm any action the board has taken anyway.

Bylaws and Articles of Incorporation

Bylaws and Articles of Incorporation contain provisions separate and apart from the CC&Rs that help govern common interest communities. A bylaw amendment usually requires membership approval, but sometimes the board is afforded this power. If, however, a proposed amendment could adversely affect the voting rights of members, membership approval is always required. There is no need to record bylaw amendments, but it is a good idea to have your attorney review your amendments—some of them are more appropriate when added to the CC&Rs.

Articles of Incorporation are filed with the Secretary of State and serve one useful purpose-to create a legal nonprofit corporation. They don't usually contain limitations on the powers of the association and rarely need to be revised, unless they contain inconsistencies with the bylaws and CC&Rs that should be corrected.

Special Circumstances

Finally, there are a few special circumstances that tend to arise in specific cases which further complicate the amendment process. The most common are when governing documents require lenders or government agencies to give their approval before an amendment may pass.

Lender approval is usually required when a lender is given the right to protect a security interest the lender has in an owner's property and is usually limited to basic legal characteristics of ownership (such as change in owner's percentage interest or right of first refusal on a sale). Rarely is lender approval required when an amendment concerns only day-to-day operations.

Government agencies sometimes require approval power when the governing documents grant a local, city or county agency the authority to oversee the use of a certain property over time. If the agency feels it would be a mistake to allow owners to convert some portion of a property to another use (say, from residential to small commercial), or perhaps the VA or FHA/HUD wishes to protect an initial financing deal in place, they will add language requiring their approval in the original CC&Rs.

If you think you have potential construction defects, contact Burdman & Ward for a free, no obligation inspection with a licensed contractor.

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