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FHA Under Pressure to Give Condo Market Extra Boost

In recent years, as more people have moved away from rural and suburban communities and into cities, demand for condos has surged. In most major metropolitan areas, prices for condos are increasing faster than single-family home prices, according to real estate website Trulia, and condo sales are gaining market share at the expense of other types of home sales.

The condo market could be doing even better, developers and association advocates say, if the Federal Housing Administration (FHA) would loosen its restrictions on approving low down payment loans for units in condo associations. Certain restrictions that were put in place to deal with the housing crisis should now be removed to reflect the improved economy, they argue. Doing so would bring first-time homebuyers, who have traditionally looked to the FHA for financing, back to the condo market in droves, they predict.

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FEATURE

Target Key Issues When Amending Governing Documents

Eventually, a community association will face the question of whether to update its governing documents. Laws change, and with that, governing documents are superseded. Should your declaration be changed with every new law? When is the right time to address previously unforeseen quality-of-life issues? How do you update your governing documents so that they provide the framework for your association's current and future needs, without creating unexpected problems?

Your Declaration of Covenants, Conditions, and Restrictions (CC&Rs) is in place to protect the community association and its property values, and allow all owners to use and enjoy their investment in harmony with their neighbors. Clearly stating the restrictions and guidelines is a critical part of ensuring your association is running smoothly and that your members understand the privileges and obligations of everyday life in the community.

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RISK MANAGEMENT

Know Your Rights When Sued for Speaking Out

By Andrea Brescia

At some point, you or a member or a director of your community association may be on the receiving end of a lawsuit that's intended to silence your opposition to a project or issue. It might be that a board member or homeowner is speaking out against a developer of a nearby proposed project, a member is campaigning while running for board election, or a board member's opinion is received unfavorably by the membership. A developer, or any entity that's unhappy with the speech of another, might threaten or file a lawsuit against the individual or association, which is known as a S.L.A.P.P. (Strategic Lawsuit Against Public Participation).

S.L.A.P.P. suits are filed to intimidate the person speaking out. They're intended to silence the opposition by burdening the recipi-

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Governing Documents (continued from p. 1)

We'll explain when to amend your governing documents, the approach you should take, and how you can clarify your CC&Rs to align with the law without bringing the entire document to a membership vote.

Identify What's Not Working

Associations that are 20 or more years old and have never amended their CC&Rs often have concerns about bringing them up to current standards and laws, says California attorney Stanley Feldsott. "When these clients ask me what to do, I tell them, 'I can do a brand new set of laws for you that will comply, and it may correct some problems, but it may also create a host of new problems,'" he says.

Feldsott usually asks the association to first focus on the things that aren't working for the members in their community, and then he works to bring those areas in line with the association's needs and the current law. That's because updating your governing documents solely based on changing law isn't always recommended. Laws are always changing, and any language in your governing documents that's in violation of current legislation is automatically null and void. The law always supersedes the language in your covenants.

"The first thing that I look at is whether the documents already incorporate changes in the law. Some governing documents already have that concept built in—they are written to incorporate the law as it changes," says Florida attorney Helio De La Torre. But some documents are more static, so he advises focusing on the key amendments that need to be changed first by looking at legislation changes for the last two years—areas like right of first refusal and enforcement uses. "What are the issues in your community?" he asks, "Look at what is important to your association and work to amend those key concepts first. Take a targeted approach."

Then, after you've chosen to amend a provision, check to see if that provision appears elsewhere in your documents. You don't want to amend a provision in one document, only to have it appear unchanged in another document. This kind of inconsistency creates problems and can even invalidate the amendment.

FHA Under Pressure (continued from p. 1)

Hope for such changes is on the horizon: Industry insiders recently told the *Boston Herald* that the agency is under pressure from real estate and financial lobbies and "is drafting a major condo proposal for 2015 that could bring back FHA financing to greater numbers of buyers and existing unit owners." (The full story can be found at *www.bostonherald.com/business/real_estate/2014/11/condo_demand_red_hot_but_fha_policies_chill_buyers*.) ♦

"Amendments create more problems down the road if they are inconsistent with other sections of the bylaws, or change the intent," says De La Torre. "Then you have ambiguities that have to be litigated. It's a messy situation and happens quite often if the amendments are done poorly."

When to Amend

According to Feldsott, the right time to amend your governing documents is when a problem has come up that you're not able to deal with anymore under your current CC&Rs. "Let's say the CC&Rs in a view community deal with protecting views only with respect to the landscaping," he says. "What happens when someone wants to add a second story? It's going to block the view, too. This is a case where you'd want to add an amendment that deals with structural changes."

For another example, say you're in a development with single-family homes. You may want to add an amendment if you're having a problem with architectural standards—if, say, the association plans to change the maintenance regarding garage doors on each property, that would require an amendment of the CC&Rs. "I like to deal with problems rather than a wholesale rewrite of the covenants," Feldsott says.

Get Out the Vote—in Stages

If you present the membership with an entirely new document, there may be only one amendment that members don't like, but that will prevent the entire document from getting approved, Feldsott warns.

The solution? "When addressing problems, present solutions to the membership in separate votes. That's because a member who likes the amendment that's going to protect views may not like the one that restricts the colors that the association will approve for exterior painting," he says.

De La Torre agrees. "You have to be strategic; if you put too much on the agenda, then you throw the baby out with the bathwater. That's why I like a more focused approach—even though it might take several stages. If you tier the approach, over time you achieve a more realistic objective," he says.

In California, where Feldsott is based, most of the documents require 75 percent approval of the entire membership. If you don't get the supermajority but you get the majority, you can ask a court to validate the amendment, but that adds costs. Generally, he says, unless there is some real opposition, the courts will approve the amendment. The intent of such rulings is to remedy voter apathy. But note that in the case of real opposition, this approach won't work. Feldsott recalls a case where a board didn't get the 75 percent approval that it needed, coming in at 60 percent instead. In this case, the judge ruled voter opposition.

Avoid Member Votes on Future Amendments

When adding amendments that are necessary to comply with the law, consider using language that allows the board to make further changes without another member vote. When the law changes, it could render an old amendment out of step with the current law—for example, a provision banning all satellite dishes or solar installations probably wouldn't be legal in most states today. There's no legitimate reason to force the board to hold another member vote to conform the prior amendment to the current law. Plus, it would be time consuming and expensive.

You can ask your attorney to include language in all amendments that gives the board the authority to adopt further amendments without a member vote, as necessary to comply with any changes in the law. Here's an example of the type of language to ask your attorney about including in an amendment:

Model Language

The Board of Directors will have the authority, when necessary, to render this [*insert name of document being amended*] in compliance with any applicable law as set forth in a written opinion by the Association's counsel, to further amend this [*insert name of document*] upon the affirmative vote of all members of the Board, without the requirement to hold another member vote. The Board of Directors will have this authority only to the extent necessary to render this [*insert name of document*] compliant with applicable law.

Consider Adding Supplements Instead of Amendments

Instead of amending the governing documents, consider creating a supplement or appendix that goes through the governing documents and explains the current law point by point, says Feldsott. For example, explain that article 3 has now been superseded by statute and

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Governing Documents

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describe what that means to the association.

"You want the members to know the rules of the game," Feldsott says. And you can give the supplements to new buyers as well as existing homeowners. "But you're not changing anything. You're just letting people know that, say, article 3, which discusses how much you can increase the assessment over the prior year, has been superseded by the law." In effect, you're producing a restated set of CC&Rs, which basically embodies all of the amendments but doesn't need to be voted on. ♦

Insider Sources

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RECENT COURT RULINGS

➤ COA Can Change Use of Common Property with Majority Vote

Facts: A condominium owner who enjoyed playing tennis purchased a unit in 1986 that had a tennis court for the common use of all unit owners. Over the years, the tennis court fell into disrepair. In 2013, the condominium's owners' association (COA) proposed removing the tennis court and converting it to a different common use.

The COA's declaration required that any change to the declaration be voted on by all the unit holders. Generally, a majority vote of 75 percent carried an amendment, but a unanimous vote was required if the intended proposal affected an owner's "undivided interest in the common elements." The unit owners approved removing the tennis court by a majority vote.

The owner sued the association, asking the court to rule without a trial that the proposed alteration required a unanimous vote. She argued that "undivided interest in the common elements" related to a fixed interest in the common property as of the date of a unit's purchase. Removing the tennis court was a change that altered the use of the common property from when she purchased her unit and so required unanimous consent.

The COA argued that a majority vote was appropriate, disagreeing with the owner that "undivided interest" meant that the uses of common property were fixed as of the date she purchased her unit. Rather, it contended that an owner's undivided interest was affected only if the change reduced the owner's overall ownership share of the common property.

The trial court ruled in favor of the COA and its argument that removing the tennis court didn't require unanimous consent. The owner appealed the decision.

Decision: The Ohio appeals court agreed with the trial court and ruled in favor of the COA.

Reasoning: The court agreed with the COA, finding that removing the tennis court didn't affect the owner's "undivided interest in the common elements" because it didn't diminish her overall ownership percentage share or interest in the common property. It added that if the declaration was intended to require a unanimous vote whenever a proposal would convert common property from one use to another, it could have done so in plain terms. The court concluded that removing the tennis court didn't result in the "taking of property" that normally triggers the unanimous consent vote protection.

To clarify its point, the court discussed a prior decision where the court held that a unanimous vote was required because the association built a fence on common property to install air-conditioning equipment. This constituted a taking of property because the association reduced the amount of common property shared by all the unit owners. In contrast, the removal of the tennis court didn't result in the taking of property from the owners; it merely changed the character of the common property. Because there was no change in the unit owners' undivided interest in the common elements, a unanimous vote was not required.

- Hoffman v. Maisons Lafayette Condominium Block A Owners' Association, Inc., October 2014

➤ Board Waited Too Long to Reject Owner's Fence

Facts: A homeowner asked her HOA for permission to build a fence for her German shepherd puppy. Under its restrictive covenants, the HOA was required to answer an application for architectural changes within 30 days of submission. The HOA rejected her application.

The owner sued the HOA. She asked the court for a declaratory judgment, specifically that the court issue a ruling that the HOA's restrictive covenants authorized the proposed fence. She also asked the court to issue an injunction, ordering that the HOA couldn't prevent the fence's construction.

The court ruled that the owner had permission to build the fence but not for the reason the owner requested. Instead of finding that the HOA's restrictive covenants permitted the fence to be built, the court ruled that the HOA gave permission to the owner to build the fence by failing to respond to the owner's application within the mandated 30 days.

Despite the ruling in her favor, the owner appealed. She argued that the lower court was wrong to deny her request to affirmatively declare that the fence was authorized under the HOA's restrictive covenants. She noted that the HOA had supposedly placed a "moratorium" on all new fence construction and contended that, short of a more definitive ruling, she was not fully protected.

Decision: A Michigan appeals court upheld the lower court's decision, holding that the issue was decided and, thus, moot.

Reasoning: The court held that by ruling that the owner had the right to build the fence because the HOA failed to reject her application in the time period allotted by the restrictive covenants, the lower court disposed of the issue. It said that it's well established that a court won't decide moot issues. An issue becomes moot when an event occurs that renders it impossible for the reviewing court to grant relief. The court stated that it cannot grant the owner relief that she already possesses. It observed that, even if the HOA had changed its restrictive covenants to bar new fence construction, the owner's fence wouldn't be subject to that restriction, as the trial court already granted her the right to build the fence.

The court further explained that the principle duty of a court is to decide actual cases and controversies and that a court won't review a controversy that has been resolved because doing so "would be a purposeless proceeding."

- Levine v. Briarwood Homeowners Association of Okemos, October 2014

➤ Snow Removal Contractor Not Liable in Slip and Fall

Facts: On Jan. 17, 2010, a pedestrian, while walking his dog, slipped and fell on patch of black ice in the roadway owned by the condominium homeowners association (COA). The COA had contracted out snow removal for the roadways and walkways to a landscape company for the 2009 and 2010 winter season. If a weather event met certain conditions, the contractor would automatically perform the snow removal. Otherwise, the COA would call the contractor for any additional services. The contractor last plowed the roadway on Jan. 2 and 4. At that time, sand and salt were applied.

The pedestrian sued the COA, as the roadway owner, and the contractor, because of the snow removal contract, claiming they were each responsible for his injuries because they failed to keep the roadway free of ice.

The COA argued that the snow removal contract shifted its primary responsibility to keep the roadway safe to the contractor. The contractor argued that its limited contractual obligation didn't alter the COA's primary responsibility. Furthermore, he said that the COA never called to complain about the snow removal job last performed on Jan. 4, almost two weeks before the pedestrian's accident.

Both the contractor and the COA asked the court to dismiss the pedestrian's claims against them without a trial. The COA further asked the court to rule that if any liability is ultimately proved, that the contractor, rather than the COA, is the responsible party.

Decision: The court granted the contractor's request to be dismissed from the case but denied the COA's requests.

Reasoning: The court dismissed the contractor from the action, relying upon the general rule that a limited contractual obligation to provide snow remov-

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Recent Court Rulings (continued from p. 5)

al services does not render the contractor liable in negligence for the personal injuries of third parties. Accordingly, the pedestrian, a third party who wasn't a party to the snow removal contract, cannot sue the contractor for negligence.

Both the pedestrian and the COA argued that the facts fell under one of the exceptions to the general rule that were carved out in *Espinal v. Melville Snow Contrs.,* a famous N.Y. Court of Appeals decision. For instance, the contractor could be held liable for creating or exacerbating the dangerous condition that led to the pedestrian's fall. The court disagreed, finding that it would be unreasonable to find the contractor liable for the icy patch in the roadway given that it had been almost two weeks between the last snow storm, when the contractor plowed the property, and the pedestrian's accident.

The COA further argued that the contractor entirely assumed the COA's primary duty to ensure that the condominium's roadways were safe, falling under another *Espinal* exception that would hold the contractor liable. The court disagreed, finding that the contractor's limited contractual undertaking to provide snow removal services wasn't a comprehensive and exclusive property maintenance obligation needed to entirely displace the COA's duty to maintain the premises in a safe condition.

The court stated that the remaining questions of fact—such as whether a dangerous condition existed on the roadway, whether the COA had actual or constructive notice of it, whether the COA made reasonable inspections of the premises prior to the accident, and whether the pedestrian was comparatively negligent—were for a jury to decide. ♦

- Solazzo v. Calverton Hills Homeowners Association, Inc. and Modern Landscape & Design, Inc., October 2014

Risk Management (continued from p. 1)

ent with costly legal fees. In other words, S.L.A.P.P. suits work by trying to put a major damper on a person's freedom of speech when she is faced with defending herself through the legal system.

So what do you do if a developer, outside entity, or individual files a S.L.A.P.P. suit against you or your association? How can you preserve your right to free speech while also ensuring that you don't incur costly legal bills?

We'll give you some insight into the nature of these lawsuits, tell you which states have laws that help to protect you against these suits, and share the advice of attorneys who will help explain your rights.

Basics of a S.L.A.P.P. Suit

According to the California Anti-S.L.A.P.P. Project, each year individuals, community groups, and organizations are sued for speaking against issues of public interest. Corporations, real estate developers, or government officials may file S.L.A.P.P. suits against those who oppose them on public issues. Defendants spend money, time, and legal resources to fight the suit, and the suit itself may dissuade those served from continuing to speak.

"The nature of a S.L.A.P.P. suit is not about winning or losing," says New Jersey attorney Ronald Perl. "It's about burying someone in the defense. It's designed to overwhelm the opposition and litigate them into the ground." A S.L.A.P.P. lawsuit isn't filed to resolve anything. It's filed for the purpose of chilling a person's right to participate in a public discussion.

The good news is that for those on the receiving end of a lawsuit that punishes them for speaking out against or opposing a project, there is an option in many states. "They do have resources. They should seek competent legal advice with attorneys that understand the legal statutes and who enforce these statutes vigorously," says Perl.

Is This a S.L.A.P.P.?

When someone files a lawsuit again you or your directors, the first thing to do is to speak with you attorney to see if there is an anti-S.L.A.P.P. law in your state. Anti-S.L.A.P.P. laws allow you to file a motion to strike down a complaint against the exercise of free speech. Currently, 28 states, as well as the District of Columbia and the U.S. territory of Guam have anti-S.L.A.P.P. legislation in

place (see "Jurisdictions with Anti-S.L.A.P.P. Statutes," at right). But be careful: a lawsuit that's considered a S.L.A.P.P. suit in one state may not be considered a S.L.A.P.P. suit in another state. Although the protection varies from state to state, these laws are designed to head off abusive, baseless suits and get them dismissed quickly. The key to anti-S.L.A.P.P. legislation is to permit the suit to be dismissed as early as possible.

In states that don't have formal S.L.A.P.P. legislation in place, like New Jersey, there may be other ways to get this type of lawsuit dismissed. Perl says that in New Jersey, the state has a statute in place that protects against frivolous lawsuits, mandating that a lawyer must have a good faith belief in the merit of the lawsuit when he signs the proceedings. If this isn't the case, the lawsuit may be deemed frivolous and attorney's fees may be awarded to the defendant.

According to Florida attorney Helio De La Torre, directors are usually protected from being sued personally when they are doing things on behalf of the association and there is no self-interest. "If someone gets sued in the context of doing things that are best for the community, those lawsuits usually don't go anywhere," he says. "In fact, the lawsuit usually backfires on the person who filed it because there are punitive damages."

Can I S.L.A.P.P. Back?

The Digital Media Law project lists eight states that have statutes allowing "S.L.A.P.P.back" suits, which are filed as counterclaims against a S.L.A.P.P. or in a separate lawsuit. These states are California, Delaware, Hawaii, Minnesota, Nevada, New York, Rhode Island, and Utah. A S.L.A.P.P.back is a lawsuit you can bring against the person who filed the S.L.A.P.P. suit, to recover compensatory and punitive damages for abuse of the legal process. For example, in New York, you may be able to recover costs and attorney's fees, punitive damages, and other compensatory damages. But first you must show that the lawsuit against you wasn't based in facts or law and that the filer was trying silence your freedom of speech.

How to Protect Yourself

To protect yourself from getting S.L.A.P.P.'ed:

Know your rights. The U.S. Constitution protects your right of freedom of speech, but doesn't protect you from speech that defames, threatens, or harasses another.

Stick to the facts. When vocalizing your opinion and making your voice heard, sticking to the truth will help you beat a defamation claim. When speaking out, make fact-based, accurate statements.

Check your insurance. If you are served with a S.L.A.P.P. lawsuit, check your insurance policy to see if you're covered for damages and legal fees if someone sues you under a S.L.A.P.P. suit.

"A lot of lawsuits against individuals accused of libel are S.L.A.P.P. suits," says De La Torre. For example, a developer might claim that it was defamed depending on how someone is vocally opposing its project. "Lawsuits are designed to gain a strategic advantage," he says. "The suit is filed to try to beat the party down, or force him to cave in and stay quiet." ♦

➤ Jurisdictions with Anti-S.L.A.P.P. Statutes

Twenty-eight states, the District of Columbia, and one U.S. territory have enacted anti-S.L.A.P.P. statutes. The U.S. jurisdictions with anti-S.L.A.P.P. statutes are:

- Arizona
- Arkansas
- California
- Delaware
- District of Columbia
- Florida
- Guam
- Georgia
- Hawaii
- Illinois
- Indiana
- Louisiana
- Maine
- Maryland
- Massachusetts
- Minnesota
- Missouri
- Nebraska
- Nevada
- New Mexico
- New York
- Oklahoma
- Oregon
- Pennsylvania
- Rhode Island
- Tennessee
- Texas
- Utah
- Vermont
- Washington

The following eight states permit "S.L.A.P.P.back" suits, allowing a defendant to file a counterclaim against a S.L.A.P.P. suit and seek monetary compensation:

- California
- Delaware
- Hawaii
- Minnesota
- Nevada
- New York
- Rhode Island
- Utah

Source: Digital Media Law Project; *www.dmlp.org*

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