Winter 2023

COMMON SENSE

CONDO AND HOA NEWS FROM SANDLER & HANSEN, LLC, COMMUNITY ASSOCIATION LAWYERS

A NEWSLETTER FROM

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CONTENTS

RECORDED AGREEMENTS: A MUST-HAVE FOR APPROVING UNIT OWNER REQUESTS FOR MODIFICATIONS

Associations often receive requests from unit owners who wish to modify their units or limited common elements in some fashion. It could be a request for new windows, an awning, enclosing a deck, etc. When granting such a request, the association must clearly memorialize its requirements and expectations.

The Need for a Written, Recorded Agreement

Associations typically consider many factors when deciding whether to approve an owner's request to modify his or her unit or the limited common elements serving that unit. For example:

- Is the scope of the request reasonable?
- If granted, will the modification have any impact on other unit owners and residents?
- Who will maintain the modification in the future, the association or the unit owner?
- Will there come a time when the modification may need to be removed?
- What can the association do if the unit owner fails to maintain the modification?
- How will the modification be installed and does installation require a licensed and insured contractor?
- What can the association do if the owner fails to complete the installation of the modification?

- What can the association do if the installation of the modification does not conform with the owner's original request or the association's conditions of approval?

- What will the association expect from future owners of the unit, and how will future owners know of those expectations?

The easiest and best way to address these issues, and others related to the modification, is to create a written agreement between the association and the unit owner. A thoughtful agreement will thoroughly and expressly set out any requirements for installing the modification, for maintaining the modification, and any additional conditions of the association's approval. For example:

The relatively simple act of having the association's attorney prepare and record an agreement can easily avoid disputes with owners both now and years in the future.

- Requiring that all installation work take place during business hours on weekdays, thus avoiding disturbances during nights, weekends, and holidays.

- Setting the minimum insurance coverages that must be carried by the contractor performing the work.

- Requiring the unit owner to indemnify and hold harmless the association, the board members, and other unit owners from any claims arising from the installation and future maintenance of the modification.

Furthermore, by recording the agreement on the land records, future owners of the unit are deemed to have received notice of the agreement and it becomes binding on them. Therefore, if the agreement requires the owner to maintain the modification, and the agreement is recorded, then the future owner assumes that obligation.

Thus, the relatively simple act of having the association's attorney prepare and record an agreement can easily avoid disputes with owners both now and years in the future.

HIGH FINANCE AND LOW INTEREST: LOAN REPAYMENT AND ASSESSMENTS

Many associations fund expensive capital projects by borrowing money from commercial lenders. These loans are typically offered at favorable interest rates and can be repaid over long periods of time. Nevertheless, some owners have no interest in paying interest.

The Special Assessment Option

Associations have options for raising the funds needed to make monthly loan payments:

- The association can adjust its budget to account for the loan, often by increasing the common charges that everyone pays.

- The association can levy a special assessment for the specific purpose of paying down the loan.

Many associations choose the special assessment option. As a separate assessment, owners may pay off their share of the capital project in advance. Those owners are then not responsible for paying interest on the loan. If the loan is incorporated into the operating budget and paid from regular common charges, then the owners cannot pay off their share in advance.

Furthermore, as special assessment, owners may pay off their share of the loan at any time during the term of the loan, thus avoiding the interest that has not yet accrued. This may be a particularly attractive option when an owner is marketing the unit for sale. The owner and the buyer may negotiate whether the portion of the loan attributable to the unit will be paid at closing, or if the buyer will assume responsibility for paying the special assessment going forward.

Impact of Prepayment

People are often confused by the concept of allowing a group of owners prepay their share of a capital project and what impact that has on other owners. They sometimes assume that, because the association is borrowing less money, the other owners will pay less. That is not the case. In actuality, prepayment by any one owner or groups of owners has absolutely no impact on the other owners.

For example:

- Windy Hills consists of 100 units which share equally in paying association common expenses.
- Windy Hills Association, Inc., needs to raise $500,000 to pay for a roofing project. The cost to the owners, before interest, is $5,000 per unit.
- The association is approved for a loan of $500,000, plus interest.
- Ten unit owners each pay their $5,000 share up front, totaling $50,000.
- The association borrows $450,000, and the remaining 90 owners make monthly payments on the assessment of their share of the principal plus interest. Their share of the principal, $5,000 per unit, has not changed. The total loan amount decreased, but so did the number of owners paying into the loan. The association still borrowed $5,000 per unit, but only 90 units are participating rather than 100.

As a separate assessment, owners may pay off their share of the capital project in advance.

Paying Off During the Term of the Loan

This part is no fun because it requires math. Lots of math. And fractions. Ugh.

If, during the term of the loan, an owner wishes to pay off his or her remaining share, saving themselves the future interest that has not yet accrued, we calculate the payoff amount as follows:

- The prepayment is calculated by multiplying the then outstanding principal balance remaining due on the loan, less any sums collected by the association for the repayment of the loan under the assessment but not yet paid to the lender, by a fraction, the numerator of which is the undivided interest in the common expenses attributed to the unit for which the prepayment is being made, and the denominator of which is the sum of the undivided interest in the common expenses attributed to all units which have not yet prepaid their share of the assessment, including the unit for which the prepayment is being made, plus their share of the accrued interest as of the date payment will be received.

- As an algebraic formula, it looks like this:

  Outstanding principal = P
  Sums collected by association on assessment, but not yet paid to bank = S
  Undivided interest in the common expenses attributed to the unit = U
  The sum of the undivided interest in the common expenses attributed to all units which have not yet prepaid their share of the assessment = A
  The unit's share of the accrued interest as of the date payment will be received = I

  Payoff Amount = (P minus S) times (U divided by A) plus I.

The association must ask the lender to reamortize the loan to account for the payment while keeping the maturity date the same.

Receipt of Payoff Amount

When an owner pays off the remaining balance, two very important things must happen:

1. The association must submit the owner's payment immediately to the lender; and

2. The association must ask the lender to reamortize the loan to account for the payment while keeping the maturity date the same.

Reamortization is necessary to reduce the amount of the association's monthly loan payment to account for the fact that fewer unit owners are now paying into the loan. It also ensures that no other unit owner is paying too much or too little for their share of the loan.

Most of the lenders that routinely make loans to associations will reamortize the loan on request, but they may charge a nominal fee for doing so. The owner's payoff figure should include reimbursement for this fee, plus any additional charges that the association or its manager may impose for calculating the payoff figure. After all, dealing with this kind of math should not be free of charge.

YOUR GOVERNING DOCUMENTS: DO YOU HAVE THE COMPLETE SET?

Many associations are not working off of a complete, official set of their own governing documents. As a result, they don't know what they don't know.

The All-Too-Common Problem

An association contacts our office looking for legal advice. We request a copy of the governing documents. What we receive are unsigned, unrecorded drafts of documents, often taken from, or still part of, the developer's original public offering statement ("POS").

The POS is a disclosure document that developers are required to provide to the initial purchasers of units in a new common interest community. The POS describes the community and its unique characteristics, and discloses rights retained by the developer.

If your association does not have a complete set of the governing documents, then it does not have all of the information it needs to properly conduct the affairs of the community.

The POS is not a governing document of the association. The governing documents are supposed to be included with the POS, along with an initial budget for the association, a sample deed to the unit, the management agreement, if any, and other similar documents. However, the POS itself is not a document that is binding on the association. Once the developer exits the community, the POS is nothing more than a historical document. Its only remaining value is it is an expression of the developer's original intentions, regardless of what may have happened later.

When a lawyer is asked to render an opinion, or a judge is asked to make a ruling, he or she would base that opinion or ruling on a review of the governing documents.

However, the governing documents are not just guidance for judges and lawyers. Most importantly, they provide guidance for the association and the unit owners. If your association does not have a complete set of the governing documents, then it does not have all of the information it needs to properly conduct the affairs of the community.

What are the "governing documents?"

In most Connecticut communities, the governing documents consist of the following (the descriptions of which are intentionally over-simplified), as amended to date:

- **The Declaration**. This document legally establishes the community. It's essentially a statement by the developer that says "I own this piece of real estate. I'm breaking it up into individual sections or units that I will sell to others. By virtue of owning one of these sections or units, the owners will be obligated to contribute to the maintenance of other portions of the community."

- **The Bylaws**. This document explains how the association is governed by the unit owners.

- **The Rules and Regulations**. This document contains requirements for the everyday operation of the community and regulates the behavior of the members of the community.

Where do we find the governing documents?

The declaration, and any amendments thereto, are always recorded on the land records of the town in which the community is located. If the community crosses a town line and is located in two towns, then the declaration and amendments must be recorded in both towns' land records.

If the community was created prior to 1984, then the bylaws and any amendments thereto are also recorded on the town land records. If the community was created in or after 1984, the bylaws may or may not be recorded. If the bylaws are not recorded, then we rely on the association's meeting minutes and other records to verify the bylaws.

A title search will identify all of the recorded documents.

The rules may or may not be recorded. If the rules are not recorded, then like unrecorded bylaws, we rely on the association's meeting minutes and other records to verify the rules.

The first step to ensuring that you have a complete set of the governing documents is obtaining a search of the land records. A title search will identify all of the recorded documents.

The next step is reviewing the records of the association. Make sure that you have notices, meeting material, and voting records that establish that amendments to the documents were properly adopted.

Please contact us if you would like our assistance in determining whether you have a complete set of your governing documents.

WHAT A DRAG: TOWING IMPROPERLY PARKED VEHICLES

We are often asked whether the association may have an improperly parked vehicle towed away from the community. The answer is: Yes, but proceed with caution.

There are several situations which may warrant having a vehicle towed from the property:

- The vehicle may be unregistered or inoperable.
- The vehicle may be parked in a fire lane.
- The vehicle may be parked in a space reserved for someone other than the vehicle's owner.
- The vehicle owner failed to move the vehicle as needed to clear snow and ice from the parking lot.

However, towing a vehicle could have dire consequences for the vehicle's owner:

- The owner may have to pay the towing company to release the vehicle.
- The owner may miss time at work or school.
- The owner may need to travel someplace to address an emergency and no longer has an available vehicle.

Under the Common Interest Ownership Act, the association cannot so much as assess a fine against a unit owner for violating the governing documents without giving that owner notice and an opportunity to be heard. The purpose of this requirement is to protect the due process rights of the unit owners. Given the potential repercussions for the owner of a towed vehicle, we suggest that the association proceed in a manner that similarly affords the owner some protections. For example:

- Clearly mark all fire lanes and no parking areas.
- Post conspicuous signage stating that improperly parked vehicles will be towed.
- If a vehicle is improperly parked, but there is no impending emergency, follow the notice and hearing procedures prior to towing the vehicle.
- If there is a good reason for why the association cannot take time to conduct a hearing, at least attempt to contact the vehicle owner prior to towing the vehicle.
- If a storm is approaching and vehicles must be moved to clear snow and ice, remind all residents in advance of the storm, and more than once if possible, to move their vehicles.

NEWS ABOUT OUR PEOPLE

Sandler & Hansen, LLC will be an exhibitor at the CAI-CT Annual Expo, which takes place on Saturday, March 18, 2023, at the Aqua Turf in Plantsville, Connecticut. We can be found at booth #59.

Rebecca Sandler has joined our firm as a partner. Rebecca now chairs our collection and foreclosure department.

Scott J. Sandler continues to chair the committee responsible for planning the CAI-CT Legal & Legislative Symposium. Scott was a featured speaker at the Symposium, which took place on October 20, 2022. He was also the featured speaker at CAI-CT's Chat & Chew program on November 30, 2022. Scott spoke about several topics, including unit owner requests for modifications, such as the installation of solar panels and charging stations for electric vehicles. At the upcoming Annual Expo, Scott will give a presentation on preparing, presenting, and implementing large capital plans, and he will participate in the Lunch with the Experts to discuss hearings, fines, and the proper use of executive sessions. Scott continues to serve on the CAI Government & Public Affairs Committee and, after a two year hiatus, Scott has returned to the Connecticut Legislative Action Committee as a delegate.

Christopher E. Hansen has joined the committee responsible for developing and designing the CAI Board Leader Development Program. The purpose of the program is to educate association board members and to provide them with the tools they need to address the challenges facing their communities.

Scott, Rebecca, and Bev LaBombard participated in the CAI Fall Fun and Vendor Fair at the Hops on the Hill Brewery in South Glastonbury this past September. During the event, Scott gave a presentation concerning the use of board discretion when making financial decisions for the association. Additionally, Sandler & Hansen, LLC, sponsored the axe throwing booth.

Scott and Rebecca will be attending the CAI National Law Conference in New Orleans in January 2023. The law conference, which is held over several days, is the only national event that is designed to provide ongoing legal education for attorneys who are specifically focused on the representation of community associations.

HOW TO CONTACT US

If you should call our office and the automated answering system answers, you may use the following extensions to reach us if we are in the office or to leave a message in our individual voice mailboxes. You may also contact us at the following e-mail addresses:

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