

Lender Surveys are Tricky

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Today's column continues our look at laws affecting community associations adopted by the 2004 Florida Legislature. In the first five parts of the series, we looked at the new laws applicable to homeowners' associations. Today's topic, amendments to the condominium statute, involving the so-called "lender questionnaire."

As anyone familiar with condominium operations knows, associations frequently receive questionnaires that the association is asked to fill out with information about the condominium. The typical questionnaire will ask for insurance information, the pendency of litigation, information about reserves, the number of rental/investor-owned units, the status of completion of the condo, and a variety of other information. Sometimes, answering these questions involves legal interpretations (such as whether the project is a phase project). Often, the questionnaires also ask for information that the association simply has no way of knowing, such as how many units are used as second/vacation homes.

Typically, these questionnaires are required by underwriters who buy condo mortgages on what is known as the "secondary mortgage market," which includes a number of different companies and agencies that buy up mortgages from the banks and the other institutions that actually make the loans. These secondary mortgage market entities have various guidelines that enable them to gauge

whether a particular project is a good risk or not, and this is why they ask for the questionnaires to be filled out.

Whether or not to respond to these requests for information (which are often received days or hours before closing, accompanied by pressure and even threats from an anxious real estate agent or title company) has always been a topic of debate. This column has addressed the issue twice (Certain Paperwork Should be Refused, March 4, 2001; Don't Fill Out Lender Questionnaire, June 3, 2003).

As mentioned in my latter column on the topic (past columns of this column are available on-line), the law was amended in 2003 to provide some answers to the problem. Specifically, as discussed in that column, the law was amended in 2003 to specifically state that an association is not obligated to fill out lender questionnaires, and when it chooses to do so, it may charge a fee (not to exceed \$150.00 plus any attorneys' fees incurred). As also noted, the 2003 amendment to the law did not include a proposal which would have provided an association with immunity from liability if it chose to respond to lender questionnaires.

Fortunately, the new law (which becomes effective October 1, 2004) incorporates the immunity clause that was eschewed by the 2003 Legislature. Specifically, the law will provide as of October 1 that an

association and its authorized agent are not liable for providing information in response to lender questionnaires, provided that the response is made in good faith and pursuant to a written request. Further, the person providing the information must include a written statement in substantially the following form: “The responses herein are made in good faith and to the best of my ability as to their accuracy.”

In my view, it remains a choice for an association as to whether lender questionnaires should be filled out. However, the new good faith exception to liability certainly eliminates many of the reasons for previously not addressing these requests, although the law still specifically states that an association is not required to respond to lender information requests.

It is my belief that every association should specifically adopt a written policy regarding response to lender questionnaires. For example, if an association is otherwise inclined to respond to a request, I believe it would be appropriate to require such questionnaires to be provided a reasonable time before closing (such as ten or fifteen days), and not several hours before. The association, if it is going to adopt a policy of responding to questionnaires, should also establish a fee schedule.

If a management company is involved, there should be a clear understanding between the association and the manager, in the management agreement, as to who is entitled to the fee. ⚖️

Leniency Varies Regarding ‘55 and Over’ Regulations

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Question: We live in an over-55 community and also own two apartments that we rent. On occasion, our children come to visit us and because we do not have space in our unit to accommodate them, we “rent” our vacant apartments to them as our guests. Do you see any problem with this procedure? Does someone have to stay in the apartment with them who is over-55 years of age? (M.W. via e-mail)

Answer: In order to qualify as a “55 and over” community, eighty percent of the units must be occupied by at least one person age 55 and older. The other twenty percent, and the persons who make up that twenty percent, is a subject of great confusion and debate. The rules issued by the Department of Housing and Urban Development (HUD) indicate that HUD does not care what an association does with the twenty percent, as that is a decision for the association. Therefore, you should review your association’s governing documents to see how that twenty percent is addressed. Most documents would probably prohibit what you are doing. I do see some problems in allowing under-55 guests to

reside in a unit that would otherwise be considered vacant. A vacant unit is not counted when determining whether a unit is occupied by at least one person 55 years of age or older. Therefore, if a unit is occupied by your guests, that unit could lose its vacant status and count against the Association’s eighty percent threshold. Nevertheless, some communities are fairly lenient with the twenty percent cushion, while others are quite strict.

Question: Is there an office where I can send a complaint about my homeowners’ association? Is there an organization or state agency that makes sure that homeowners’ associations are complying with statutory provisions regarding homeowners’ associations? (N.L. via e-mail).

Answer: No, there is no state agency or organization which regulates homeowners’ associations. There were attempts during the 2004 legislative session to include homeowners’ associations within the regulatory authority of the Department of Business and Professional Regulation (“Department”). However, those legislative initiatives failed. The

Legislature did adopt amendments to the homeowners' association statutes (Chapter 720, Florida Statutes) which will require certain disputes between a homeowners' association and its members to be mediated through a program administered by the Department.

Question: We recently purchased a villa (it is not yet completed) and were told that no changes would be made to increase the size of the lanai. We recently discovered that one of the models now has a screened, extended lanai that is twice the original size. We were told by the builder that this was a "perk" for one of its employees. We do not think this is fair because the "rules" should apply to everyone. Also, when you move into a new development, should you be paying the full amount of dues even before any of the amenities are completed? (B.S. via e-mail)

Answer: It is not unusual for a developer to include certain provisions in the governing documents that will allow it to be treated differently with respect to architectural changes and use restrictions. The purpose of these provisions is to allow the developer flexibility when selling units. The answer to your question may depend on what your governing documents say with respect to the developer's rights. Also, it is important to know whether the area behind your home is part of your lot or part of the common areas. If the lanai extension were to encroach on the common areas, it would likely be considered illegal, based on a number of different legal theories. If the lanai extension would not encroach on the common areas, you could seek permission to have the lanai extended yourself, after your unit is completed and you have moved into the unit. However, you would likely need permis-

sion from the Association. The Association may continue to deny the extension. It is possible that if many owners extend their lanais, it could have a detrimental effect on drainage and the surface water management system because of the increase in impervious surfaces. There may also be setback and other zoning laws involved.

Regarding the dues that you are paying, there is probably not much that you can do regarding the dues that are imposed prior to turnover. There is nothing in the law which requires a developer to reduce the assessments until such time that the amenities are completed. After turnover, the owner controlled board of directors will adopt the budget and the corresponding level of assessments.

Question: Our Association is considering amending our Declaration of Condominium to restrict rentals. How will the amendment to Section 718.110(13), Florida Statutes, affect this proposed amendment? (G.A. via e-mail)

Answer: Section 718.110(13), Florida Statutes, was created by SB 2984 and SB 1184, both of which were approved by the Governor and signed into law on June 23, 2004. Section 718.110(3) provides as follows: Any amendment restricting unit owners' rights relating to the rental of units applies only to unit owners who consent to the amendment and unit owners who purchase their units after the effective date of that amendment." However, the effective date of Section 718.110(13) is October 1, 2004. Therefore, if the proposed amendment is adopted by the members and recorded in the public records before October 1, 2004, the amendment will apply to all owners regardless of whether they purchased their unit prior to the amendment. ⚖️

Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners' associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm's Naples and Ft. Myers offices.

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