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THE QUARTERLY ASSESSMENT

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Contracting Essentials: Protecting Your Association Before You Sign

By Bruce H. Easmunt

Many directors and managing agents are familiar with the following scenario: a board of directors (with the assistance of its managing agent) drafts a detailed and thorough request for proposal concerning a common area or common element construction project. After seeking multiple bids and proposals, the board selects the contractor it feels will best serve the association's needs. The contractor informs the board that work can begin as soon as the board executes the submitted proposal. For purposes of expediency, the board wants to sign the proposal as soon as possible to get the project underway.

Before signing a proposal, directors and agents should be aware that proposals often lack important provisions that could minimize contractual disputes and an association's potential exposure to liability. This article seeks to provide board members and their managing agents with certain "essential" contract provisions that can often be negotiated prior to the execution of an agreement in order to protect an association's interests. It is important to note that the provisions of a contract will be different for each particular project or service to be performed. As such, the suggested contract terms of this article are not exhaustive and should not be used as a substitute for legal counsel.

First, all association contracts should be in writing and should be executed by individuals who have the appropriate authority to do so.

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Evergreen And First Refusal Clauses: Common Contracting Pitfalls

By Sara Ross, Esquire

There comes a time in many relationships when one party feels that it is time to move on. And though that party may have every intention of making a clean and amicable break, the other party may not be so agreeable. As a result, the terminating party may find itself on the receiving end of an attorney's letter advising that even though the relationship is not due to expire for another 30 days, it had already automatically renewed and the parties were legally bound for another full contract term.

Welcome to the wonderful world of contracts!!

Associations are run by their Boards of Directors, but with the assistance of a stable of vendors, contractors, and other service providers who perform their services for the association under a contract.

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"Especially in today's tough economic climate, owner-controlled boards may find themselves taking over a community where the development is left incomplete, construction quality may be inferior or the scheduling of future phases of development may be uncertain."

Tips to Guarantee An Easy Transition To Owner Control

By Robert McClain, Esquire

There comes a time in the life of every community association when the developer turns over control of the community to the owners. This time can be challenging and potentially overwhelming to a novice board of directors. Many times, the developer drops a stack of documents, invoices, reports, etc. on the doorstep, arranged without any particular order or identification.

The Board is then left to determine the significance of those papers, to ascertain whether all documents important to the association's future have been included in the turnover, and to organize all of that material in a useful and coherent manner.

While every situation is a little different, and this article can't address all of the issues a board may encounter as they begin the transition process, this checklist will help to identify some of the essential information a board should look for and provide a starting point for a successful transition to owner control.

The checklist is divided into three main sections-governing documents, financial and management records and property information. Within each section, there is a list of the documents and records the board should make sure that they have, questions and issues that they should be looking for, and any red flags that the board should recognize.

GOVERNING DOCUMENTS

1. Master Deed or Declaration
2. Articles of Incorporation
3. By-laws
4. Rules and regulations

Potential Issues

- Watch out for any unreasonable or undesirable restrictions, such as a "poison pill" provision that limits the association's rights to sue the developer. If such provisions are found, are they enforceable or can they be amended or removed?
- Check the covenants and rules and regulations against local, state and federal laws to make sure that none of the provisions are in violation.
- Does the developer maintain any interest in, control over or right to income from amenities, parking areas, or other association facilities? If so, does the developer share in the cost of maintenance for those areas?
- Make sure that the documents accurately reflect the interests of community residents. For example, do they: Bar commercial use of residences? Prohibit or limit pets? Limit an owner's ability to rent the residence?

FINANCIAL AND MANAGEMENT RECORDS

1. Association budget
2. Bank records
3. Financial statements: expense/income, accounts payable/receivable, delinquent assessment
4. Insurance policies
5. Any pending insurance claims or litigation
6. Any contracts
7. Warranties
8. Copies of leases
9. Contact information for all owners
10. List of lenders holding mortgages on owners' properties
11. Minutes from all prior board meetings
12. Any sales and marketing material the developer was using to market the community

Potential Issues

After transition to owner control, it is always a good idea for the board to hire a CPA to conduct a post-transition audit of the association's finances. Some of the specific questions an audit should ask include:

- Did the developer collect all revenues owed to the association, including those owed by itself?
- Have the association's bills been paid?
- Did the developer maintain a reserve fund that is being turned over?
- Did the developer use association funds to pay expenses that the developer should have been responsible for?
- Did the developer pay its share of common area expenses on units developed before they were sold?
- Does the operating budget reflect reasonable income and expense projections?
- A review of the minutes of board meetings held under developer control is also a good idea as the board moves forward. In addition, the board will have several management-related decisions to make, including the following:

♦ Should the association engage a professional management company?

♦ Should the association continue to work with vendors contracted by the developer or begin a competitive bidding process on some of those contracts?

♦ Does the association have the proper insurance coverage in place? It is extremely important that the community have the right types and amounts of coverage.

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EASY TRANSITION
Continues from page 2.

PROPERTY INFORMATION

- Copies of Deeds and Community Plats and Plans
- Construction plans
- Design specifications
- Construction-related permits
- Bonds with local permitting authorities

Potential Issues

Especially in today's tough economic climate, owner-controlled boards may find themselves taking over a community where the development is left incomplete, construction quality may be inferior or the scheduling of future phases of development may be uncertain.

If the board encounters a situation where they take control of a community in which phased developments are incomplete or construction is ongoing, the board should have an attorney review the association's documents to identify any potential legal issues concerning the phasing.

The board should also contract with a professional engineering firm to conduct a transition study of the community, evaluating the condition of buildings and common areas to discover any construction or design flaws that may be present. In the event that such problems are found, the study can be used during negotiations with the developer to resolve complaints or, as a last resort, for evidence against the developer in litigation. It is important that such studies be conducted soon after transition takes place, since strict statutes of limitations restrict the time period during which suit may be filed, before filing suit for construction defects.

While construction defects are certainly a major concern for the board during the transition process, other property related issues exist, including:

- Does the community contain any commercial facilities?
- If it is a phased development, what are the construction deadlines?
- Does the community contain major facilities such as sewage treatment facilities that fall under the responsibility of the association?
- What if any easements are on the property and how do they affect the community?
- Are all construction permits for future construction up to date?

Hopefully, the transition from developer control to owner control moves smoothly without any major hiccups. However, to ensure your transition is as smooth as possible, follow these tips and you will be well on your way to a successful, flourishing owner-controlled community.

Rutland Court Owners Inc. v. Taylor: Fair Housing Lessons For Your Association

By Daniel B. Streich

A recent fair housing case in the District of Columbia shows how expansively the DC Superior Court and DC Court of Appeals will apply the Fair Housing Amendments Act ("Act") (Rutland Court Owners, Inc. v. Taylor, decided by the DC Court of Appeals July 8, 2010). Although this particular case involved a housing cooperative (Rutland Court Owners, Inc.), condominium associations in both the District of Columbia and Virginia can take important lessons from the fact pattern and ruling in this litigation.

William Taylor had lived in the housing co-op's building since 1972. In August 2007, the cooperative discovered that his unit was in bad shape—filthy, infested by bedbugs and cockroaches, and stuffed with both personal possessions and other property (which most people would probably regard as trash). Extensive cleaning was necessary prior to any attempts at effective pest control.

Upon learning of the infestation in the unit, the cooperative association acted quickly to have the unit cleaned and exterminated. Its efforts in that regard were thwarted by Taylor. On at least three different occasions, Taylor refused to grant access to his unit to a cleaning company which had been hired by the association. The court noted that Taylor did not have notice of one of the visits, and had only two days' notice of another visit by the cleaning company.

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The Fair Housing Act is violated when:

1. *The resident has a disability;*
2. *The Association knows or should have known about the disability;*
3. *An accommodation is necessary for use and enjoyment of the unit;*
4. *The accommodation is reasonable and was requested; and*
5. *The Association refused to make the accommodation*

FAIR HOUSING LESSONS

Continued from page 3.

Approximately two months after the co-op's Board of Directors learned of the conditions in Taylor's unit, and after four failed attempts by the association to clean the unit, the Board notified Taylor that his unit must be cleaned and prepared for extermination by a date certain or he would face a fine of $100. Taylor did not clean his unit or otherwise prepare for the pest control effort.

Shortly thereafter, an extermination company hired by the association entered Taylor's unit and observed "extreme sanitation issues," "garbage in the kitchen," "open cans of food," and a "serious infestation" of roaches and bedbugs. The company noted the obvious by informing the association that the unit must first be cleared of the extreme clutter and mess and thoroughly cleaned before extermination efforts could be effective. Taylor said he needed additional time to prepare his unit for the extermination services, but took no observable action to perform that task.

In response to Taylor's inaction, the Board of Directors approved a resolution revoking Taylor's share in the cooperative corporation. Taylor was requested to vacate his unit; when he failed to do so, suit was brought by the housing cooperative for possession of the unit.

Of note is that Taylor's fellow co-op residents apparently believed him to have a mental impairment of some sort. Nevertheless, the association did not have any record of a formal confirmation from a medical professional as to Taylor's mental impairment. The court's opinion noted only that witnesses from the association suspected that Taylor had a mental impairment, and that the property manager occasionally interacted with Taylor's caseworker and psychiatrist.

The Act

The Fair Housing Amendments Act of 1988 (which expanded the scope of the original Fair Housing Act of the 1960's) prohibits discrimination against a resident of a community association in "the provision of services or facilities" of a residential dwelling based on the tenant's "handicap." 42 U.S.C. §§3602(h) – 3604(b). A "handicap" may include a mental impairment. *Id.* Discrimination includes failing to make "reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary [for the individual] to use and enjoy a dwelling." 42 U.S.C. §3604(f)(3)(B).

In order to establish that the Act was violated, a complaining party must show (1) that he has a disability, (2) that the community association knew or should have known of the disability, (3) that an accommodation is necessary for the use and enjoyment of the dwelling unit, (4) that the accommodation is reasonable and was requested of the association, and (5) that the association refused to make the accommodation.

Actions that were deemed discriminatory

The DC Circuit Court of Appeals held in this case that the cooperative association knew or should have known that Taylor suffered from a mental disability, in view of the fact that the housing cooperative's management agent communicated periodically with Taylor's case worker and psychiatrist. Taylor was thus a member of one of the "protected classes" specified in the Act (handicap). When Taylor requested (either orally or in writing) a reasonable accommodation, that request triggered the requirement under the Act for a reasonable accommodation, or at least an attempt at such an accommodation. Instead, the cooperative association responded as follows:

1. Failed or refused to provide a reasonable accommodation by not providing additional cleaning services requested by the disabled resident;

2. Imposed fines on the disabled resident for non-compliance with the Association's rules three months after Taylor's request for reasonable accommodation; and

3. Proposed to revoke the resident's share in the cooperative association, thereby initiating eviction of the resident before making a reasonable effort to accommodate the protected class member.

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FAIR HOUSING LESSONS

Continued from page 4.

The trial court and the appellate court found the foregoing actions to be in contravention of the Act and therefore in violation of federal law. Note that the courts came to this decision even though Taylor had actually been subjected to court orders requiring him to clean and exterminate his unit during the 3-year course of the litigation, and that he had also been subjected to court sanctions for failing to do so.

Thus, even though the courts acknowledged Taylor's obdurate refusal to fulfill his obligations as a member of the housing cooperation with respect to maintaining the unit in a clean and sanitary condition, the courts still found the cooperative association to have engaged in prohibited discriminatory conduct.

Interesting aspects of the court's decision

- The court's opinion does not reveal whether Taylor's requests for reasonable accommodation were made orally or in writing. It appears that Taylor made these requests orally.

- Taylor's requests seemed vague, based on the court's written opinion: the court states he "raised various concerns about the exterminator selection and about the chemicals that would be used in the extermination process." The court concluded that Taylor's "need for additional time and professional assistance to clean and exterminate his unit" was a reasonable accommodation request which was not provided by the association. According to the court's opinion, the association appeared to ignore these concerns about chemicals and the selection of exterminator companies.

- The association's bedbug eradication policy provided that residents may choose alternative treatment plans to those chosen by the association, but residents must submit proof within one week of the policy's publication that the treatment was completed by a professional. Taylor never submitted a formal plan for alternative treatment. This policy and lack of adherence thereto by Taylor were unsuccessful as defenses for the cooperative association.

- The trial court noted that a specific diagnosis from expert testimony was not needed to establish the mental disability of Taylor. The court also did not require that Taylor provide proof of his mental impairment to the association during the time of the alleged discrimination. Interaction between the cooperative's manager, Taylor and Taylor's caseworker was held by the court to be sufficient to put the association on notice that he was a member of a protected class under the Act.

- The court found that giving Taylor only a day or two of notice of extermination efforts was insufficient to provide the accommodation sought by Taylor.

- The court dispensed with the association's argument that Taylor's unit presented a health and safety threat to the building and other units by noting that "the health and safety exception to reasonable accommodation does not apply until after the trial court has evaluated the landlord's response to a requested accommodation." Also, the association did not assert the existence of an actual threat to the health and safety of other residents from the delay.

Conclusion and lessons learned

The facts of this case should make its outcome alarming to all community associations and managers. A housing cooperative association was determined to have discriminated against a resident who (i) had an undocumented, unconfirmed mental impairment; (ii) made vague and perhaps unwritten accommodation requests; (iii) refused to provide access to his unit for the purpose of cleaning it; and (iv) lived in deplorable, unsanitary and pest-infested conditions.

In order to avoid a similar result in your association, we suggest the following preventive measures:

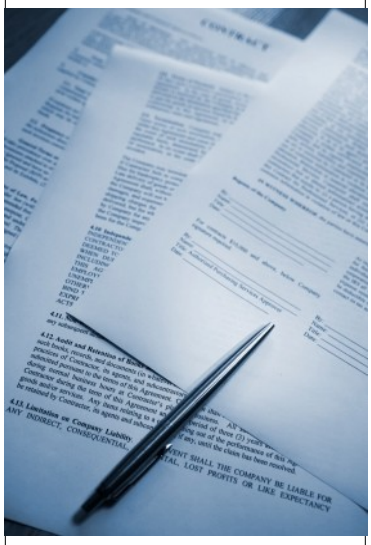
1. Obtain in writing exactly what the resident/owner is requesting in the form of an accommodation.

2. Document all efforts to provide reasonable accommodation to those who seek it.

3. Ensure that reasonable advance written notice of necessary access is provided to the relevant unit.

4. Document all threats that exist to the health and safety of persons and property as a result of the condition about which a resident/owner is seeking a reasonable accommodation.

CONTRACTING ESSENTIALS
Continued from Page 1.



"Before signing a proposal, directors and agents should be aware that proposals often lack important provisions that could minimize contractual disputes and an association's potential exposure to liability."

In most instances, the President (or other duly authorized officer) should execute contracts on behalf of the association, and his or her title as an officer of the Association should be included along with his or her signature. If an association's managing agent has been authorized by the board to execute an agreement, the contract should expressly state that the agent is signing on behalf of the association.

Association contracts should contain a provision for termination of the contract, with or without cause, upon reasonable notice to the other party. What constitutes reasonable notice will depend on the specific circumstances of each particular contract. The contract should also contain a starting and completion date by which all work is to be completed, or all services rendered. Where specific dates are important for the completion of a project, the phrase "time is of the essence" can be included in the agreement.

Associations typically base their decision to hire a contractor or company on the representations of that particular company. It is therefore important to include a non-assignment provision in the agreement in order to ensure that the project is completed by the contractor that the board selected. A non-assignment provision could provide that the agreement may not be assigned by either party, or in the alternative, that the agreement may not be assigned without the prior written consent of the other party.

Associations should also be wary of paying a lump sum to a contractor prior to its performance under the agreement. A payment schedule should be negotiated and included in the agreement allowing the association to withhold funds based on deficient performance or non-performance of the contractor. Additionally, an association may require a contractor to obtain a performance bond and/or payment bond to protect the association's assets and the integrity of a project.

In addition to the surety bonds referenced above, associations should require any firm or individual hired to deal directly with association funds to purchase a fidelity bond. A fidelity bond will insure the association in the event that the individual dealing with the funds (or agents thereof) misappropriates association funds.

In any agreement, an association can seek to include an indemnification clause whereby a contractor or firm agrees to indemnify the association for any personal injury or property loss that may occur as a result of the contractor's performance (or the performance of its agents and employees) under the agreement. Similarly, associations should require contractors to obtain liability insurance to fund the above indemnification obligation and to maintain such insurance throughout the duration of the agreement. In addition to liability insurance, contractors should be required to obtain and maintain workman's compensation insurance. As with all insurance policies, the association should require that a contractor provide a certificate evidencing such insurance prior to any performance.

An association can also seek to protect itself from the liability associated with the wrongful actions of a contractor by including a provision in the agreement stating that the contractor is an independent contractor, and not an employee of the association. While the inclusion of this provision will not be solely determinative as to the contractor's relationship with the association, it may contribute to a court's finding that an association is not liable for the actions of such a contractor.

Even the most well drafted and negotiated contracts may ultimately result in litigation based on the performance (or lack thereof) of the parties. In order to better protect its interests should litigation occur, associations should require the contract to be interpreted by the laws of the association's jurisdiction (county and state) and require that any suit or claim with regard to the agreement be filed in that same jurisdiction. By controlling the venue and choice of law, the costs of litigation may be lessened for the association. Further, associations should require a provision stating that the prevailing party to any claim filed under the agreement be entitled to its attorney's fees and costs. If such a provision is not included in an agreement, attorney's fees typically will not be awarded unless authorized by statute.

In addition to all of the above, the following two provisions will help to ensure that the other provisions of the negotiated contract remain valid. First, every contract should include a provision requiring that all amendments to the agreement be in writing and signed by both parties. This will avoid unilateral changes made by one party which seek only to benefit that party. In addition, every contract should contain a provision stating that if any other provision of the agreement is deemed valid or illegal, then all other terms of the contract will remain valid and enforceable. This will ensure that an entire agreement is not deemed unenforceable due to the invalidity or illegality of a single provision of the agreement.

As stated above, these suggested provisions are by no means inclusive of all the terms that should be negotiated into a particular contract. Prior to entering into any agreement, an association should seek the advice of legal counsel to ensure that the association's interests are adequately protected and that the association has the authority to enter into such an agreement.

EVERGREEN AND FIRST REFUSAL CLAUSES

Continued from Page 1.

More often than not the contract is one that is provided by the vendor or contractor, and its terms and provisions tend to be more favorable to that vendor or contractor than the association. Two such provisions that tend to favor the vendor are self-renewal or "evergreen" clauses, and "right-of-first-refusal" clauses.

"Evergreen" provisions are clauses within contracts that require the parties to provide written notice of intent not to renew the agreement a certain number of days prior to the end of the current contract term. Pursuant to these clauses, if written notice is not received by the other party in a timely manner (often 90 days), then the contract will automatically renew for an additional term. In the case of laundry or telecommunications contracts, that could mean an automatic renewal of a five year term.

Self-renewal provisions are problematic because, although proper and timely notice will prevent the automatic renewal, the frequent turn-over of Board members and managers may result in the contract self-renewing interminably because no one is keeping track of renewal deadlines. That is why these provisions are called "evergreen," as they could potentially persist without end.

Another contract provision that benefits vendors, but encumbers associations is a "right-of-first-refusal" clause. These are not as common as the self-renewal provisions, but are equally burdensome. Right-of-first-refusal provisions grant the current vendor the option to match the material terms of any offer submitted by a competing vendor at the end of the current contract. For example, if an association bids out its current pool service contract, so long as Pool Company A can match the major terms of the proposal submitted by Pool Company B (e.g. price, products, services), even if the Association would prefer to work with Pool Company B, it is legally required to award the contract to Pool Company A. Depending on how the contract was drafted, Pool Company A may be able to exercise this right years after the initial contract expired.

Both evergreen and right-of-first-refusal provisions are contracting pitfalls for associations as they have the potential to bind an association perpetually to a vendor relationship that has long since run its course. If your association is advised that a contract it is trying to terminate contains one or both of these provisions, the association has a limited number of options: 1) it can grudgingly ride out the new contract term and make sure to keep close track of the notice deadline; 2) attempt to negotiate with the vendor to either remove or restrict the provisions, likely at a steep price; or 3) ignore the provision and sign with the new vendor, and hope that the vendor does not want to spend the money to fight the association in court.

The best way to work with these undesirable contract provisions is to ensure that they are not included in the contract in the first place. This is where your association's attorney comes in handy as they are trained to identify these provisions, as well as others that may be objectionable or disadvantageous to the association. By using your attorney up front, when entering into a new contract, you may be able to avoid having to use your attorney later to get out of the contract.

If your association's Board of Directors prefers not to utilize the association's legal counsel to review vendor agreements, below are a few pointers the Board can follow to minimize the association's risk of being bound by objectionable contract terms:

- Limit contract terms to one (1) year, with both parties having to agree to any renewal in writing; **especially** if your governing documents prohibit any contracts in excess of one year. For some contracts, such as telecommunications or laundry agreements where the vendor is having to invest in and install equipment on-site, the vendor may not be willing to agree to a one year term as it is not cost-effective. In those circumstances, the Board must use its best business judgment in deciding whether to agree to the longer contract term.

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"Both evergreen and right-of-first-refusal provisions are contracting pitfalls for associations as they have the potential to bind an association perpetually to a vendor relationship that has long since run its course."

EVERGREEN AND FIRST REFUSAL CLAUSES
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- Be sure that the contract provides either party with the right to terminate the agreement, mid-term, without penalty. Ideally, the contract would allow either party to terminate the agreement, with or without cause, upon 30/60/90 days written notice. At a minimum, it should allow a party to terminate the agreement, without penalty, for breach of contract by the other party.
- If the board is willing to accept a self-renewal clause in order to contract with a particular vendor, the contract should state that the vendor is required to provide the Association with a written reminder of the termination requirements at least sixty (60) days before the deadline. The board should also maintain a multi-year calendar with notification deadline dates, which can be passed from board to board, or manager to manager.
- When soliciting proposals or bids from vendors, make it clear that only proposals that do not include self-renewal or right-of-first-refusal provisions will be accepted. Alternatively, the board may want to consider providing a pre-approved sample agreement in the request for proposal package.
- If bypassing the bid process and negotiating directly with a select vendor, request a copy of their standard agreement, up front, before beginning the negotiation process.

Despite what vendors may tell you, all contracts are negotiable. Do not accept a form agreement without carefully reviewing its terms and do not be afraid to strike out any objectionable provisions.

Remember, the contract was drafted by the vendor, to benefit the vendor. The board of director's job is to protect the association from unfavorable agreements.

Firm updates: recent happenings at Chadwick, Washington, Moriarty, Elmore & Bunn, P.C.

- Allen Warren is serving as president of Washington Metropolitan Chapter Community Associations Institute (WMCCAI) for 2011.
- Brendan Bunn and Andrew Elmore will be teaching a seminar at the upcoming Virginia Leadership Retreat sponsored by the three Virginia Chapters of Community Associations Institute on Saturday, July 30. The seminar is titled "Rules: Purpose, Philosophy & Reasonableness."
- Wil Washington has been named as a Washington D.C. Super Lawyer for 2011.
- Jerry Wright and Sara Ross presented a national webinar for Community Associations Institute in May titled "Out of Order: Preventing Disruptive Behavior."
- Bruce Easmunt recently joined the WMCCAI Outreach Committee.
- We are pleased to announce that Sara Tussey, Christopher Chipman, and Michael Sottolano have become associates at Chadwick, Washington, Moriarty, Elmore & Bunn P.C. Ms. Tussey and Mr. Chipman have joined the Fairfax office. Mr. Sottolano has joined the Richmond office.

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