

Update

SPRING 2008

New Construction Contract Documents

In November 2007, the American Institute of Architects (AIA) issued revised versions of many key standard form contracts, including its A201 General Conditions.

Key Changes to AIA's Standard Form Contracts

The A201 General Conditions are incorporated by reference into most of the AIA's other form contracts for construction. The AIA form contracts are widely used, and associations that contract for renovation projects using the revised AIA-2007 documents should pay particular attention to the new contract language. The new contract provisions change many of the rights and responsibilities of an association that signs such contracts.

The following are two of a number of changes to the AIA A201:

Initial Decision Maker

Prior to the 2007 edition, the A201 provided that the architect would make initial decisions in the event of disputes between the owner and the contractor. The A201-2007 provides that the parties now have the option to appoint a third party, the Initial Decision Maker (IDM), to make initial decisions on disputed claims. If a third party is not identified in the contract, the default IDM remains the architect.

Dispute Resolution

Arbitration is no longer the primary process of dispute resolution. The AIA's 2007 documents include check-boxes for the parties to choose the form of binding resolution, including arbitration, litigation, or "other." If no box is checked, the default dispute resolution procedure is "litigation in a court of competent jurisdiction."

These are only two of the changes in AIA's newly revised contract documents. Associations that use the new AIA documents for renovation projects should carefully review the rights and obligations of the contracting parties, paying special attention to the new provisions.

New ConsensusDOCS Family of Contract Documents

In September 2007, 20 construction associations published a set of standard contract documents called ConsensusDOCS. The ConsensusDOCS family of contract documents was developed by a collaborative negotiation between design professionals,

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If you have any suggestions about topics you'd like to see addressed in future issues, please contact Joe Douglass at jdouglass@wtplaw.com. We look forward to hearing from you.

owners, contractors, subcontractors, and sureties. These documents are intended to provide balanced contract language for the parties to negotiate and complete a construction project.

The newly revised AIA documents and the newly published ConsensusDOCS offer two options for standard form contracts. Because the architect is often very involved in preparing both its contract with the association and the association's contract with the general contractor, we can expect the A201 to remain a popular contract document form for years to come. During those years, however, we can also expect the ConsensusDOCS to become more familiar to the construction industry.

Martha L. Perkins



Leasing Restrictions: Things to Consider

Many associations have become concerned about the percentage of rental properties in their communities and have explored imposing limits on leasing. Associations seek to limit the percentage of rented units in order to reduce the perceived risk that mortgage loans may be harder to obtain. Secondly, a large percentage of owner-occupied units is thought to foster more of a sense of community within the association and to help maintain the value of the property.

Since the right to rent is one of the owner's property rights, any new rental restrictions would have to take the form of recorded amendments to the governing documents. In a condominium, this typically would mean an amendment to the declaration or bylaws. In a homeowners association, any amendment affecting property rights would have to be an amendment to the declaration of covenants. In order to adequately protect itself, the association should always seek an attorney's assistance before attempting to amend its documents to impose

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Henrico County, Virginia – General District Court December 2007

Stiles v. Stony Run Townhouse Association, Inc.

Whiteford, Taylor & Preston represented the homeowners association in this suit brought against it by a Stony Run homeowner. The townhouse community consists of 147 homes and common areas and is almost thirty years old. Because of its age, some infrastructure is beginning to require replacement. As has already occurred at several other homes, the domestic water line wholly within and serving only the plaintiff's home failed and required replacement.

Language in the Stony Run Declaration makes the association responsible to pay for townhouse roofs, siding and "other exterior improvements" on the individual lots. The plaintiff, herself an attorney, relied on this language to demand that the association pay to replace her underground water line as it is located outside the townhouse. The association maintains the townhouse

roofs, siding, walkways and landscaping. However, it does not budget, reserve or assess its members for the repair or replacement of water lines. Consistent with the position it has always taken that these lines are the individual owners' responsibility, it refused the plaintiff's demand.

The plaintiff filed this case in the lower level trial court of Henrico County as her claim was for less than \$10,000. The association, however, was anxious to put up a strong defense as an adverse ruling would expose it to ruinous claims from the owners of the other townhomes when each of their water lines failed.

At trial, Raymond Diaz of WTP persuaded the trial court that the construction the plaintiff sought to place on the language of the Declaration was erroneous and that only those portions of the townhouse lots that were accessible to be maintained were intended to be the association's responsibility. As a result, a judgment in favor of the association was obtained. That decision will now serve to buttress the association's position on this issue as other owners face the need to replace their domestic water lines in the coming months and years.

rental restrictions. To avoid legal challenges to the amendment, current owners should be “grandfathered,” or given an exemption from any new leasing restrictions.

In order to discourage the purchase of units by strictly investor owners who have no intention of living in the unit, the association may consider an amendment to require a minimum owner occupancy period before a unit may be rented. The association should consider enacting a leasing amendment that limits the percentage of units available for rent in the association at any given time and restricts the length of time an owner may rent his/her unit. To ensure a fair allocation of rental properties, some associations adopt these restrictions in combination, so that there will be turnover in the specific units that may be rented.

In enacting and implementing rental restrictions, the association must be careful to avoid liability for claims contesting the enforceability of the rental restrictions based upon the federal Fair Housing Act and other state and local anti-discrimination laws. The merits of such claims are based upon the individual facts of each case, so an association should consult counsel for guidance as to the mechanisms for enforcement of leasing restrictions.

Is a tenant entitled to copies of association records, such as financial records and minutes of meeting?

As a general matter, a tenant is not entitled to demand access to association records. However, the Condominium Acts in Virginia, Maryland, and the District of Columbia allow for the review of financial records by a unit owner or the owner’s authorized agent, and none of the statutes precludes a unit owner from designating his or her tenant as an authorized agent to review financial records. The designation should be accepted only if it is in writing and clearly identifies the terms upon which the tenant will serve as the owner’s agent. However, as in the case of owners, examination of the records may take place only during business hours and after reasonable notice. The association may charge the owner the cost of duplication for providing copies of any of its records.

In regard to association records that are not considered to be financial records, such as meeting minutes, membership lists, addresses, etc., the Virginia and Maryland Condominium Acts allow an association to withhold confidential records, including records pertaining to personnel matters, an individual’s medical or financial records, minutes of closed meetings, written advice of counsel, and records relating to business matters currently under negotiation. The Virginia Condominium Act further restricts access to association documents by requiring the requesting unit owner to be in good standing. In addition, the records request must be in writing and identify a proper purpose relating to the unit owner’s membership in the association. Pecuniary gain or com-



mercial solicitation are not considered proper purposes.

The District of Columbia Condominium Act provides no restrictions to the production of association books and records, but it is less specific than the Virginia and Maryland statutes.

Is an association entitled to charge a move-in/move-out fee to a unit owner who rents his unit?

Generally yes. The Virginia, Maryland, and District of Columbia Condominium Acts provide that the associations may charge a fee for the use of the association’s common elements or for any services provided to the unit owners. Many associations adopt resolutions that impose move-in/move-out fees that are utilized to cover the additional maintenance and repair that is necessitated by the use of the association common elements (elevators, lobbies, parking garages, etc.) while a tenant (or owner) is moving in or moving out of the building.

Can an association collect monthly assessments from a tenant if the owner fails to pay the assessments?

Generally, the only way to do this would be to sue the owner for the unpaid assessments, win a judgment against the owner, and then execute the judgment by formally garnishing the tenant’s rent payments. This can be costly and time-consuming. Some associations require owners and their tenants to sign lease addenda, providing, among other things, for an assignment of rents owed by a tenant if the owner fails to pay the assessments. Under these addenda, the owner and the tenant will agree that, upon written notice to the unit owner and tenant of the delinquent monthly assessments, the association is entitled to collect directly from the tenant all rents owed to the unit owner, until such time as the delinquent assessments are paid in full. The lease addendum should provide that the tenant’s payment to the association of any delinquent assessments shall be considered a discharge of the tenant’s rent responsibility to the unit owner, to the extent of the payments made to the association.

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Can an association withhold or revoke a tenant's right to use association services or facilities because the unit owner is delinquent in payment of the monthly assessments?

A tenant stands in the shoes of the unit owner and may be subject to the revocation or suspension of association privileges as a result of the owner's delinquent payment of monthly assessments. In other words, if the association has the authority to withhold privileges (for example, use of the swimming pool or other recreational amenities) from a delinquent owner, the same privileges may be withheld from the owner's tenant if the owner is delinquent in paying assessments.

It's important to remember, however, that before association privileges may be revoked or suspended, a unit owner must be provided notice of the violation of the governing documents (in this case the failure to pay monthly assessments) and the potential sanctions that may be levied, and also must be given an opportunity to be heard. Any suspension or revocation of privileges cannot preclude access to the unit through common elements or endanger the health or safety of the tenant. Of course, once the unit owner becomes current in his/her

month assessments, all privileges must be restored to the tenant.

These are just some of the issues that may arise for a community association when units are rented by unit owners, but by no means are these issues exhaustive. It's important to review your association's documents in order to confirm the extent and nature of the rights that tenants have been granted. In that way, the association will go a long way in avoiding liability for claims from tenants of discrimination or deprivation of their rights.

Kevin A. Kernan

This article first appeared in the July 2007 edition of Quorum™, a publication of the Washington Metropolitan Chapter of the Community Associations Institute (WMCCAI).

WTP Increases its Number of Falls Church Attorneys and Expands its Northern Virginia Location

Whiteford, Taylor & Preston LLP has expanded its Falls Church office – by increasing the number of attorneys and enlarging its office space. Glenn R. Bonard, Eileen Morgan Johnson, Thomas Mugavero, Christy Richardson, and Andrew J. Terrell have joined Raymond J. Diaz, Michael C. Gartner, Christopher A. Jones, Edward J. O'Connell, and Eric A. Vendt in WTP's offices at 3190 Fairview Park Drive, Suite 300, Falls Church, VA 22042. The main number for the Falls Church office is 703.280.9260.

"We are excited to be growing and adding to our firm's already excellent community association, nonprofit, bankruptcy, corporate, trusts & estates, and litigation practices in Virginia. The addition of these new lawyers provides us with greater resources and our new space provides a convenient location for all of Whiteford's Virginia clients," explained Andrew Terrell, managing partner of the District of Columbia and Virginia offices.



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Whiteford, Taylor & Preston provides comprehensive, responsive legal services to more than 300 different condominiums, cooperatives and homeowner associations in Maryland, Virginia and the District of Columbia. As one of the leaders in the practice and development of community association law, we provide our clients with effective problem-solving approaches and well-informed guidance in this rapidly changing field. Our attorneys regularly write and speak on community association legal issues and are active in the Chesapeake Region, Washington Metropolitan, and Central Virginia chapters of the Community Associations Institute, the D.C. Cooperative Housing Coalition, the College of Community Association Lawyers, and other professional and community organizations. For more information, please contact Joseph D. Douglass at 202.659.6779, Kenneth J. Ingram at 202.659.6770, Andrew J. Terrell at 202.659.6788 or 703.280.9269, or Julianne E. Dymowski at 410.347.8753 or 202.659.6795.

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