# In Association

A Newsletter from

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This newsletter has been prepared to provide readers with information concerning the law of condominiums and community associations in Connecticut. It is not meant to be a substitute for competent professional advice. Readers are urged to consult with competent legal counsel before taking action.

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## DOCUMENT OVERLAYS: YOUR GUIDE TO CHANGES IN THE LAW

*Significant changes to the Common Interest Ownership Act will become effective on July 1, 2010. The governing documents of virtually every community in Connecticut contain provisions that will be supplemented or completely superseded by these changes. Associations need to know how these changes impact the requirements of their documents.*

There are two ways in which community associations can respond to the changes to the Act:

- Amend the governing documents to make them consistent with the Act; or
- Read documents against the Act to determine which provisions have been supplemented or superseded.

Amending the documents is the preferred method for addressing this issue. By going through the amendment process, the association will educate the unit owners about the changes. Once the association adopts the amendments, they become part of the documents. They will also be included in resale packages given to new unit owners.

Unfortunately, adopting the amendments may be an expensive and time-consuming task.

Reading the existing documents against the Act is less expensive, at least in the short term, than adopting amendments. However, it is also very inconvenient and likely to result in overlooking some requirements, leaving association actions vulnerable to challenges. In the end, fending off challenges may be more expensive than amending the documents.

With these concerns in mind, our office has devised another option for responding to the changes in the Act. We are now offering what we call a “document overlay” for our client associations.

The overlay will be based on our evaluation of the changes to the Act and a detailed review of the documents. The overlay identifies each section of the documents effected by the changes to the Act. It then specifies actions that must be taken or requirements that must be met either instead of or in addition to those contained in the documents. Where the documents are silent on a subject addressed by the Act, the overlay will state what the Act requires.

The association will then use the overlay in conjunction with the governing documents, in the operation and governance of the community.

Please contact us if your association would like us to prepare an overlay for its use.

## GOING RETRO: THE SECTIONS OF THE COMMON INTEREST OWNERSHIP ACT THAT APPLY TO OLDER COMMUNITIES

*On July 8, 2009, Governor Rell signed Public Act 09-225, which contains a number of amendments to the Common Interest Ownership Act. For a detailed summary of these amendments, please see the Summer, 2009, issue of this Newsletter.*

*In addition to many other amendments, Public Act 09-225 makes several provisions of the Common Interest Ownership Act retroactively applicable to older communities for the first time.*

...the Connecticut General Assembly may adopt additional amendments to the Act before July 1, 2010

These amendments could make more provisions of the Act retroactive

Section 47-216 of the Common Interest Ownership Act lists those sections of the Act that apply to all communities in Connecticut, regardless of when created. Public Act 09-225 expands this list to include the following sections, which will apply to communities created before 1984 for the first time:

47-202 - Definitions

47-218 - Applicability to amendments to governing instruments

47-221 - Unit boundaries

47-236(b), (d), and (i) - Amendment of declaration (selected subsections)

47-237 - Termination of common interest community

47-250 - Meetings. Rules

47-255 - Insurance

47-257 - Assessments for common expenses. Assessments due to wilful misconduct, failure to comply with standards or gross negligence

These sections only apply to older communities with regard to facts or circumstances arising after July 1, 2010. For example, Subsection 47-236(b) provides that declaration amendments may not be challenged more than one year after they are recorded. This provision only applies to amendments that are adopted after July 1, 2010. It does not apply to any amendments adopted before July 1, 2010.

The remaining sections of the Common Interest Ownership Act apply only to communities created on or after January 1, 1984.

However, the Connecticut General Assembly may adopt additional amendments to the Act before July 1, 2010. These amendments could make more provisions of the Act retroactive. We will inform our association clients of any additional amendments adopted by the General Assembly.

## DOES YOUR ASSOCIATION KNOW WHERE ITS REAL DOCUMENTS ARE?

*If your association does not have a complete set of its documents, including copies of all of the documents recorded on the land records, you may be in for some uncomfortable surprises.*

### What are the real documents?

If your association is like most, it has lots of copies of its documents. Many of the unit owners have a set of documents they were given when they bought their units, whether from the original developer or from previous owners. The management company has a set that it copies each time it produces a resale certificate. There may be a set in the association's original minute book. Look closely at these copies. Are they all the same? Do they describe all of the units in the community? Are they even signed?

Under Connecticut law, the declaration of a community does not take effect until it is recorded on the town land records. Amendments to the declaration, whether prepared by the developer to add units to the community or adopted by the unit owners to change how the community is maintained or insured, also don't take effect until recorded. Under Connecticut laws governing condominiums created before 1984, as well as the documents of some communities created after 1984, the bylaws must be recorded as well. In a few communities, even the rules must be recorded.

Whenever a court is asked to rule on what a declaration or other recorded document requires, its ruling will be based on copies of the documents taken from the land records. If an association asks its attorneys to prepare an opinion concerning the rights of the unit owners or the duties of the association, the attorneys will need to review copies of the recorded documents before they can give an opinion with some certainty.

Nevertheless, many and perhaps most associations do not have a complete set of their documents copied from the land records. Why?

### Why don't associations always have their real documents?

The developer prepares the original drafts of the documents when it starts its marketing program, usually before building any units. While marketing the units, the developer distributes these unsigned drafts with the public offering statements it gives to its buyers.

Whenever a court is asked to rule on what a declaration or other recorded document requires, its ruling will be based on copies of the documents taken from the land records

When control of the association shifts to the unit owners, the Act requires the developer to provide the association with either original or certified copies of the recorded documents. However, some developers fail to provide these copies.

Ordinarily, the developer does not record the declaration until it is ready to sell units. In the meantime, the draft documents are reviewed by the construction lender, title insurance companies, mortgage companies, buyers, secondary market entities such as Fannie Mae and FHA, and their lawyers. This review process can take a year or more. Any one of these groups can request, or insist on, changes to the documents.

The developer, too, may decide that changes are needed as it builds and markets the units. As a result, the documents that the developer finally signs and records may not be the same as the documents it first handed out.

The Common Interest Ownership Act requires the developer to update its public offering statement whenever it changes the documents. Not all developers do. Many developers go on handing out public offering statements containing unsigned draft documents, even after modifying and recording the documents.

Many communities are declared in phases under what the Act calls "development rights." Each time the developer adds units to the community, it prepares and records an amendment describing the new units. The amendment also changes those portions of the documents that are based on the number of existing units, such as the table showing the units and their percentage interests.

If the developer is adding new types of units, these amendments may also contain differing provisions concerning unit boundaries, limited common elements, and maintenance responsibilities. Sometimes in the early phases of development, the developer may record amendments that change portions of the documents that have nothing to do with the units that are being added.

In some communities, there may be as many as 50 or 100 of these amendments.

When control of the association shifts to the unit owners, the Act requires the developer to provide the association with either original or certified copies of the recorded documents. However, some developers fail to provide these copies. Furthermore, some developers fail to provide copies of additional phasing amendments recorded after control of the association shifts to the unit owners.

Even when the developer does turn over copies of the recorded documents, some associations lose them over the years. When the association elects the board and appoints new officers, or changes management companies, its minute books and other records are sometimes lost.

## What can go wrong?

Any number of problems can develop if the association doesn't have a complete copy of its recorded documents. Some of these problems are relatively minor, even humorous. Others are more serious and can result in litigation. Here are some examples:

**Example 1**. Before the developer recorded the declaration, it decided that it wanted to change the assignment of covered parking spaces under the building. The table of units

attached to the draft declaration in the public offering statement showed the spaces assigned in one way. The documents recorded on the land records showed a different set of assignments. For years, the association and the unit owners all assumed that the allocation in the unrecorded draft was correct. Then one unit owner looked at the recorded documents and discovered that they assigned him a better parking space. He insisted on having the better space. As a result, parking in this association turned into a game of musical chairs.

**Example 2**. In between the time when the developer originally drafted the documents for the public offering statement and when it recorded the documents, the developer changed its mind concerning who should maintain or pay for certain limited common elements. After a number of years, the association asked its attorneys for advice. The attorneys obtained a copy of the documents from the land records. The association then discovered that it had been billing individual unit owners for deck repairs that should have been paid as general common expenses, shared by everyone. Almost a quarter of the unit owners in the community demanded a refund.

**Example 3**. An association thought that it had amended its documents to change the provisions concerning insurance. It had copies of the amendment in its files. Everyone remembered voting on the amendment at a meeting. However, when one unit owner questioned the association's insurance coverage and its attorneys examined the land records, they found that the amendment had never been recorded. Additionally, the association could not find any minutes of a unit owners' meeting that showed that the adoption of the amendment.

Ask your attorneys to search the land records and obtain a complete set of the recorded documents.

**Example 4**. Some associations have discovered amendments on the land records that no one remembered adopting, and that no one, including the association, has followed. In one case, the association didn't realize that it previously amended the provisions in its documents concerning the approval of loans. Years later, when it went to close a loan, it discovered that the votes taken were not sufficient. The association was forced to begin the approval process all over again.

## What can your association do to make sure that it has a complete set of the real documents?

There are several things that every association can do to make sure that it has a complete set of its documents.

- First, assemble all of the documents that the association has and ask its attorneys to review them. The attorneys can also tell you whether your association's bylaws and rules must be recorded on the land records, in addition to your declaration.

- Ask your attorneys to search the land records and obtain a complete set of the recorded documents. Although town land records are open to the public, and some are now accessible on-line, you can't just ask the town clerk for a complete copy of your documents. A trained title searcher will know how to review the search indexes and the recorded documents themselves, to make sure that he or she had obtained all of documents and amendments relating to your community.

At least 14 days prior to entering into the transaction, the association must send notice of the anticipated loan to all unit owners.

The association must give the unit owners a reasonable opportunity to submit written comments regarding the loan to its board.

- For some communities, the association's bylaws and rules do not have to be recorded on the land records. If this is the case for your community, you should review the association's minute books to locate the resolutions adopting the original documents, as well as the resolutions adopting any amendments. If you can't find some or all of these resolutions, you should consider adopting the documents again. That way, you will be able to prove that you validly adopted the bylaws and rules.

From time to time, every association will need to know what the documents "really" say. If you want to avoid embarrassing and costly surprises, assemble a complete set of your documents now, before you need them.

## GIVING NOTICE OF LOAN TRANSACTIONS

*An association entering into a loan transaction must give unit owners advance notice of the transaction, even if the loan does not require a vote of the unit owners.*

Subsection 47-81(b)(2) of the Condominium Act of 1976 and Subsection 47-260(b) of the Common Interest Ownership Act contain identical notice requirements regarding association loans. As of July 1, 2010, the requirements of Subsection 47-260(b) will be moved to Subsection 47-261e(d).

Under these requirements, the association must do the following before it enters into a loan transaction:

- At least 14 days prior to entering into the transaction, the association must send notice of the anticipated loan to all unit owners.

- The notice must disclose the following:

1. The amount of the loan;

2. The terms of the loan; and

3. The estimated effect of the loan on any common expense assessment.

- The association must give the unit owners a reasonable opportunity to submit written comments regarding the loan to its board.

As originally drafted, these requirements applied to all common interest communities, regardless of when created. However, due to an unintended quirk in the legislative process, as of July 1, 2010, these requirements will only apply to condominiums created since January 1, 1977, and to all other kinds of common interest communities created since January 1, 1984. Despite this quirk, we recommend that all associations continue to comply with these requirements.

These requirements apply to any association loan transaction. It does not matter whether the loan is secured or unsecured.

Many association loans are secured by an assignment of the association's right to collect common charges. Under the Common Interest Ownership Act, this assignment must be approved by a vote of the unit owners. In that case, the notice of the meeting to approve the loan can also serve as the notice required by Subsections 47-81(b)(2) and 47-260(b).

However, not every loan transaction requires a vote of the unit owners. Unsecured loans such as a line of credit, and loans secured by collateral other than an assignment of the association's income, do not usually require a vote of the unit owners. In those cases, there may be no meeting of the owners to discuss the loan transaction. Nevertheless, the association must still comply with the requirements of Subsections 47-81(b)(2) and 47-260(b).

If your association is considering a loan transaction, please contact your attorney to discuss how to comply with these requirements.

## NEWS ABOUT OUR PEOPLE

Matt Perlstein chaired a panel of attorneys that gave a seminar on March 11, 2010, for the Connecticut Bar Association. The seminar focused on the recent amendments to the Common Interest Ownership Act. Many Connecticut attorneys, whose practices include the representation of associations, unit owners or developers, attended this seminar.

Matt Perlstein and Greg McCracken were selected as Connecticut Super Lawyers for 2010. Super Lawyers magazine names attorneys in each state who received the highest point totals, as chosen by their peers and through the independent research of Law & Politics. Super Lawyers is a listing of lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. Polling, research and selection are performed by Law & Politics, a publication of Key Professional Media, Inc. Law & Politics has been publishing legal magazines since 1990 and Super Lawyers since 1991.

Matt Perlstein and Scott Sandler attended the 2010 National Law Conference hosted by the Community Associations Institute.

Scott Sandler has been appointed chairman of the Legislative Action Committee of the Connecticut Chapter of the Community Associations Institute. The Committee is responsible for organizing the advancement of legislation to protect the interests of associations and unit owners, and the opposition of any legislation that is harmful to those interests. Scott served as a member of the board of the Chapter from 2004 through 2009, and is a past president of the Chapter.

Greg McCracken continues to serve on the Executive Committee of the Real Property Section of the Connecticut Bar Association. He remains a member of the Section of State and Local Government Law of the American Bar Association, and he is the Reporter for the forthcoming second edition of the *Common Interest Ownership Manual.*

**New Clients**

We are often asked if we are accepting additional clients. We are, and we are always happy to meet with interested parties to discuss our firm and how we may serve them

Perlstein, Sandler & McCracken, LLC

Providing legal services to condominium and community associations including:

Document Amendments

Association Borrowing

Rules Enforcement

Document Interpretation

Transition from Declarant Control

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Other Association Legal Matters

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# 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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