Condo stuck with 100% approval rule on leasing

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Q. Our association would like to change the declaration and bylaws pertaining to leasing. The developer created a requirement of 100 percent approval to make any changes. He owns and rents units in this development.

We have discovered a state law that seems to preclude the 100 percent requirement in any declaration. Our declaration was recorded in 1997.

Yet our association attorneys feel that because the 100 percent requirement is referenced in both the declaration and bylaws, this point overrides any law. Who is right?

A. I agree with your counsel that the owners will not be able to prohibit leasing under the current documents.

Section 17 of the Illinois Condominium Property Act states that for documents recorded after 1984, the bylaws of an association cannot prohibit an amendment by more than a three-quarters vote. Provisions regarding leasing are contained generally in the declaration, and less frequently in the bylaws. Section 4.1(b) of the Condominium Act states that if there is a conflict between the declaration and bylaws of an association, the declaration will control. For this reason, I agree that the association is burdened with the 100 percent requirement for a leasing amendment.

The board may attempt to persuade the developer to favor certain alternatives that will allow him to lease, including exemption for existing owners, or an exemption for current tenants. Either alternative may prevent an increase in leased units and phase out leasing.

Q. Last month at our board meeting, we were informed that a mechanic's lien had been filed against our association by the company that installed our windows. The project started a couple of years ago, and this firm expected full payment by December 2004. Our board did not think that the company had fulfilled its contractual obligation to correct certain problems and is withholding the last payment of over $1 million.

What is the obligation of the board of directors and management? What should the board tell us about this claim and the possibility of the association being liable for attorneys' fees if the window company wins the lawsuit? What happens if I want to sell my unit before the case is settled?

A. You will be able to sell your unit even with the pending lien, because the maximum responsibility of the owners is their percentage obligation for the entire contract. You could pay your share of the full contract at closing and obtain a release to sell the unit. If you chose to pay only the uncontested portion, the association can indemnify the title company for the balance and enable you to close.

The board and management should advise the owners of the claim. Under most construction contracts, the supervising architect or engineer has the authority to decide disputes between owner and contractor. If the architect/engineer cannot resolve the dispute, the parties should submit to binding arbitration and resolve this matter. I do not expect the association to be responsible for the attorneys' fees of the contractor, but the board will incur substantial fees to defend this claim.

Q. Last November, I bought a condo in a four-unit building. Another owner closed on her unit the same day. The developer has not been able to sell the last two units. Because two units are unsold, we are not able to become an association, and we are not required to pay monthly assessments.

Does the developer have to repair the items on my punch list that was provided at closing for my unit? It has been six months, and the developer has not responded to either the other owner or me. What can we do to push the developer to respond to these open items? We are also paying for the maintenance of the common property. Should we be doing that?

A. You became an association when the declaration was recorded before your closings. All unit owners, including the developer, should be paying assessments, starting with the date of the closings. Either one of you owners may record a lien against the unsold units of the developer for the share of unpaid assessments relating to these units.

The fact that the developer has not turned over control of the association to the owners does not mean that he can ignore the obligation to remedy punch list items. The punch list is a commitment arising from your sales contract.

Consult an attorney and contact the Building Department or your alderman to address these problems. One of the difficulties with a small association is the lack of force in numbers to cover unpaid assessments or generate sufficient funds to pursue aggressive legal action.

See how responsive your public servants are to this dilemma.

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