

# IN ASSOCIATION

Volume VIII Issue 2

FALL 2006

A Newsletter from  
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## NEWS ABOUT OUR FIRM

We are pleased to announce that Gregory W. McCracken has joined our firm. The name of our firm has changed to Perlstein, Sandler & McCracken, LLC

Under our new name, we will continue to provide legal services to condominium and homeowner associations throughout Connecticut.

## CHANGE MAY NOT BE BAD BUT IT MAY REQUIRE ZONING APPROVAL

*Certain modifications to units or common elements may raise zoning issues and require the approval of the local planning and zoning authority.*

### Zoning of Common Interest Communities

When a developer proposes to build a new common interest community, the local zoning authorities will typically require submission and approval of a site plan. A site plan is a series of plans that show the layout and design of the proposed development, including all buildings, structures, parking areas, and open space and their relation to adjacent uses and roads. It also contains the information required by zoning regulations for the proposed use and should show the compliance of the proposed use with those regulations.

During the approval process, the site plan is often modified to satisfy the requirements of the planning and zoning commission and may attach conditions to the approval.

After the community is completed, the site plan, and the zoning ordinances generally, limit what a unit owner can build or change within the community. The limitations apply to the association as well, but we are emphasizing work by a unit owner.

### Considering and Approving Modifications to the Community by a Unit Owner

Usually, the declaration of the community will provide that modifications, improvements or alterations to units that either impair the structural integrity or mechanical systems of the community or change the exterior appearance of the units or the common elements, require the approval of the association. Additionally, the declaration also may require compliance with all applicable laws, ordinances, regulations, and building and safety codes. These requirements highlight the presence of various laws, ordinances, regulations, and codes that apply to construction work by unit owners (and by the association) in a common interest community. Of course, the town or city may enforce its own laws, ordinances, regulations and the like, regardless of whether the declaration refers to them. As a result, it may not be enough to obtain the association's approval for some modifications. The unit owner may also have to obtain approval from the appropriate city or town agency.

For example, the location of a proposed deck or fence may be too close to the boundaries of the community or too close to another building within the community. Installation of a new patio also could result in having more paved surfaces than the site plan allows.

*Change in Zoning Continued on page 2*

*Zoning Change continued from page 1*

If the town or city enforces design guidelines, the site plan may limit changes to the exterior appearance of buildings.

The site plan may even limit the changes that a unit owner can make to the interior of the unit. Finishing an attic or basement to create an additional bedroom or bathroom may violate a limitation in the site plan on the number of bedrooms or bathrooms that the community may have. Enclosing a patio or converting a garage into a den may increase the amount of habitable living space above what the site plan allows.

When a unit owner requests permission from the association to make a modification, the association should require the unit owner to show that the modification complies with any zoning issues. This may require speaking with the local building and zoning officials and a review of the site plan.

If the modification requires the approval of the local zoning commission or an amendment to the site plan, then the association should not grant its permission until such approval has been obtained. The declarations of many communities require that requests for this approval should be signed by the association, but submitted at the expense of the requesting unit owner. In the event that the town or city allows only the unit owner to sign the request, the association should consider amending its declaration to comply with the requirements of the town or city or adopting a procedure for the executive board to review and approve the request before the unit owner submits it. Additionally, the declarations of many communities state that the association does not incur any liability for signing the request. If the declaration of your community does not contain this provision limiting the association's liability, we recommend amending the declaration to include it.

The range of possible limitations on construction can be extensive. The association should consult with its legal counsel before approving or undertaking modifications that may violate the zoning regulations or the approved site plan. With the assistance of counsel, the association can determine whether approval from the local zoning commission is necessary, and how best to obtain that approval.

## TAXING YOUR COMMON ELEMENTS

*Connecticut law prohibits towns and cities from taxing the common elements separately from the units. The association should not have to pay property tax on the common elements. Yet some associations still receive tax bills on their common elements.*

Subsection 47-204(b)(2) of the Connecticut Common Interest Ownership Act provides that in a condominium or planned community where there are unit owners other than the declarant, "no separate tax or assessment may be rendered against any common element for which a declarant has reserved no development right." In theory, the common elements serve and enhance the units. The value of the common elements is already reflected in the value of the units. Just imagine what a unit would be worth without the common elements serving it. To assess and tax the common elements separately is to tax them twice.

### Why Cities and Towns Still Tax the Common Elements

In our experience, cities and towns try to impose taxes on common elements for several reasons. The most common reason is confusion over the common elements of planned communities.

In a condominium, the common elements are owned by all of the unit owners. As the declarant develops and sells the units, there is no separate deed of the common elements to anyone. Each unit owner acquires an undivided interest in the common elements as part of the deed to his or her unit.

In a planned community, the common elements are owned by the association. At some point during the development of the community, the declarant deeds all of the common elements to the association. Some assessors, seeing the deed, conclude that the common elements are somehow separate from the rest of the community and are, therefore, subject to separate taxation. The common elements of planned communities often include large areas of open space. This space appears to tax assessors as more land that can be developed.

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*Taxing Your Common Elements continued from page 2*

In fact, this is not the case. Aside from ownership, the common elements of a planned community are just like the common elements of a condominium. They are subject to the provisions of the declaration and exist for the benefit of the units.

In other cases, the declarant reserved development rights in some of the common elements. For example, the developer may have reserved the right to build more units in a portion of open land. Cities and towns may tax the development rights, and the declarant is responsible for paying that tax. Sometimes, after the development rights expire, the city or town continues to tax these common elements.

We also know of one city that tried to impose property taxes on a parking garage that was part of the common elements of a high-rise condominium. The city argued that the garage could be taxed because the documents gave the association the power to rent parking spaces to the unit owners. The tax assessor thought that anything that could be rented out was subject to property tax.

#### The Association May Not Know About the Tax

Some associations don't even know that the city or town is taxing the common elements. The assessment notices and tax bills may have been sent to the association in care of declarant's office while the declarant controlled the association. The declarant may have thought that the taxes were being imposed on the development rights or may not have known that the city or town could not tax common elements. In either case the declarant might have paid the tax bills while it was developing the community.

Once the declarant completed the project, it may have continued to receive assessment notices and tax bills. However, as far as the declarant was concerned, the bills were no longer its problem and so they remained unpaid. Many towns will, without question, continue to send tax bills to an address for several years even if the bills aren't paid. Under Connecticut law, property tax liens enjoy first priority on real estate. Towns can therefore wait several years before taking any action, other than recording a tax lien.

#### Finding Out If the Town Is Taxing Your Common Elements.

The best way to find out if the city or town is taxing your common elements is to check with the assessor. The assessor's office keeps track of tax assessments by location as well as by owner. This makes it possible to verify whether any taxes are being imposed, even if the notices and bills are being sent to the wrong party.

If your community has been in existence for a number of years, and the association has never received any communications from the assessor or tax collector, then it is unlikely (though not impossible) that the city or town is taxing your common elements. On the other hand, if your community is currently going through transition from declarant control, or has gone through transition in the past two or three years, you should take the time to check with the assessor.

#### If The City or Town Is Taxing the Common Elements

Under Connecticut law, there are two ways to challenge improper tax assessments. The first procedure challenges the amount of the assessment. The second procedure challenges the legality of the entire assessment.

1. Challenging the amount of the assessment. Under Section 12-111 of the Connecticut General Statutes, any property owner may challenge the current tax assessment on his or her land if he or she feels it is excessive. This involves appealing the assessment first to the local board of assessment appeals and then, if necessary, to the superior court. The property owner is not necessarily required to have a lawyer. However, the deadlines involved are somewhat rigid and the arguments can be very technical. We therefore recommend seeking legal counsel at once.
2. Challenging the legality of the assessment. Under Section 12-119 of the Connecticut General Statutes, a property owner may challenge

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*Taxing Your Common Elements continued from page 3*

assessments on nontaxable property or assessments that disregard the requirements of Connecticut law. This is the procedure that applies to challenges to assessments against common elements. It can be used to address tax bills for the current year and one year prior. This procedure requires an action in superior court and the assistance of a knowledgeable lawyer is essential.

#### Where to Beware

Sometimes, the declarant will abandon a project, leaving some development rights unexercised and the taxes on those rights unpaid. Some towns have attempted to collect these taxes from the association or threatened to foreclose the town's tax lien on the common elements. Whether the town may do so has not been settled definitively by the courts. Again, it is important to seek knowledgeable counsel if you have any indication that the town is trying to make the association responsible for unpaid taxes on the development rights.

The Common Interest Ownership Act makes it clear that common elements should not be taxed separately to the association. Nevertheless, from time to time, some towns do attempt to assess and tax common elements. If your community has gone through transition recently, it is important to check to see if your common elements are being taxed. If your association receives any assessment notices or tax bills, you should check with your lawyers at once in order to take the steps necessary to challenge the improper assessment or taxation.



## KEEPING YOUR ACTIVE ADULT COMMUNITY ACTIVE

*Federal law requires age-restricted communities to meet minimum occupancy standards, and to adopt and observe policies and procedures that protect their "adults only" status. Failure to comply with these requirements could result in a loss of the ability to enforce age restrictions.*

#### Permissible Age Restrictions

The Fair Housing Amendments Act of 1988 ("FHAA") prohibits discrimination against families with children, and certain other classes of people, in the sale or rental of housing. This prohibition applies to common interest communities as well as other forms of housing. Under the Act, associations may not, generally, prohibit children from living in common interest communities.

However, the FHAA provides an exception, referred to as a safe harbor, to this general prohibition. This safe harbor applies to housing specifically intended as "housing for older persons." A community qualifies as housing for older persons if:

1. The association has adopted policies and procedures that demonstrate an intent to operate as housing for older persons;
2. At least one occupant in at least 80% of the units is 55 years of age or older; and
3. The association has adopted policies and procedures for verifying that there is at least one occupant in at least 80% of the units who is 55 years of age or older.

The association can prohibit families with children under the age of 18 from living in the community under the protection of the safe harbor only if these requirements are met.

#### Demonstration of Intent to Operate as Housing for Older Persons

Demonstrating an intent to operate as an age-restricted community begins with the declaration. The declaration must require that at least 80% of the units be occupied by at least

*Active Adult Community continued on page 5*

*Active Adult Community continued from page 4*

one person who is 55 years of age or older. The declaration may set a requirement higher than 80%, but not lower than 80%. Many declarations require that 100% of the units comply with the age restrictions. This is acceptable. The 80% requirement in the Act is a minimum, not a maximum. The declaration may also provide for certain exceptions in situations of hardship, such as cases of surviving spouses who are not 55 years of age or older. Exceptions are permissible so long as at least 80% of the units are still occupied by at least one person who is 55 years of age or older.

In addition to requiring that an occupancy restriction be included in the declaration, the FHAA and Title 24 of the Code of Federal Regulations ("Federal Regulations") require the association to adopt and observe policies and procedures that also demonstrate an intent to comply with the Act. Simply calling a community an "active adult community" does not comply with the Federal Regulations. The policies and procedures must be specifically designed to ensure that the community continues to be operated exclusively as housing for older persons. Examples may include, but are not be limited to, the following:

1. Requiring unit owners and real estate agents that are selling units to describe the community to prospective purchasers as housing for older persons;
2. Advertising the community as housing for older persons;
3. Displaying a statement on the common elements of the community that it is housing for older persons.
4. Maintaining consistency in the application and enforcement of the age and occupancy restrictions;
5. Making sure that all resale certificates clearly set out the age and occupancy restrictions; and
6. Mandating that all lease provisions require tenants to acknowledge the age and occupancy restrictions.

#### Verifying the Age of Residents

Under the Federal Regulations, the association must develop procedures for routinely verifying

that at least 80% of the units are occupied by at least one person who is 55 years of age or older. Verification should take place as follows:

1. Sale or Lease of Units - Prior to the sale or lease of a unit, and any time that the occupants of the unit change, the prospective occupants should provide proof of age to the association. If they do not, the association should contact the new owners to request this information.
2. Regular Surveys of Residents - The association must conduct a survey of the residents at least every other year to verify compliance with the age restrictions. The Federal Regulations require that the association make a summary of the surveys available for inspection at the request of any person. The summary should state the total number of units in the community, how many of these units have one or more occupants who are 55 years of age or older, and the total percentage of units occupied by one or more persons who are 55 years of age or older. This percentage must always equal or exceed 80%.

Any information obtained in verifying proof of compliance with the Federal Regulations, including the surveys and summaries, should be kept in the association's permanent records.

#### Acceptable Forms of Verification

The association may accept any of the following as proof of age of a resident:

1. Driver's license.
2. Birth certificate.
3. Passport.
4. Immigration card.
5. Military identification.

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Active Adult Community continued from page 5

- 6. Any other state, local, national or international official document containing a birth date of comparable reliability.
- 7. A certification in a lease application, affidavit or other document signed by any member of the household, age 18 or older, asserting that at least one person in the residence is 55 years of age or older.

The association should make a photocopy of the document and retain it for its records. In the case of a certification, the association should retain the original.

If a resident cannot or refuses to provide any of the above items, the association may rely on one or more of the following to verify age:

- 1. Government records or documents, such as local household census.
- 2. Other forms or applications indicating the age or date of birth of the resident.
- 3. A statement from an individual who has personal knowledge of the age of the resident. The statement must set forth the basis for such knowledge and be signed under the penalty of perjury or under oath.

If the association cannot establish the age of the resident by any one of these means, it must then assume that the resident is under age 55.

Requirements of Local Governing Bodies

In addition to the requirements of the FHAA, many towns and cities impose their own requirements on housing for older persons through the use of planning and zoning ordinances and regulations. Some may require that all the occupants of the communities be 55 years of age or older. Others provide exceptions for spouses and partners. Although most local governments will accept the surveys and the summaries prepared by associations under the Federal Regulations, they may require additional records or verification.

The association should check with its local government, beginning with the planning and zoning department, to determine the requirements of that particular town or city.

Possible Loss of Safe Harbor Protections

Failure to adopt and observe the requirements of the FHAA, Federal Regulations and the local governmental body leaves the association vulnerable to a claim that the community is no longer entitled to the safe harbor protections. Should this happen, the association could no longer enforce the age restrictions of the declaration. At present, there is no case law on whether an association which has lost its safe harbor protections can later regain it. To maintain this protection, the associations should make every effort to comply with the above requirements.



New Clients

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

## REMINDER: YOU MAY NEED TO SEND ANNUAL NOTICES TO UNIT OWNERS REGARDING INSURANCE DEDUCTIBLES

*The insurance deductible provisions in your documents may require your association to provide an annual notice to unit owners, informing them of the amount of the deductible under the master insurance policy.*

We have assisted a number of our association clients in amending their governing documents to reallocate insurance deductibles. These amendments allow the association to assess the cost of repairing a unit, which is not covered by the master policy by virtue of the deductible, solely against that unit. The association makes this assessment in a manner that makes it likely that most of the deductible will be covered by the unit owner's individual insurance policy, provided the unit owner has purchased adequate coverage.

The amendment also requires the association to notify unit owners, at least once per year, of the need to purchase adequate coverage. This serves as a reminder to unit owners to discuss coverage requirements with their insurance agents and to purchase adequate coverage to reimburse them if their unit is damaged.

Please contact our office if your association would like assistance in preparing the annual notice to the unit owners.

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## NEWS ABOUT OUR PEOPLE

Scott Sandler has been re-elected Vice President and President-Elect of the Connecticut Chapter of the Community Associations Institute. Scott has served as a member of the board of the Chapter since 2004, working to address the needs of the associations who are members of the Chapter. Scott also serves as Co-Chairman of the Chapter's Trade Show Committee. On October 11, 2006, Scott participated as a guest speaker during an educational program conducted by the Independent Insurance Agents of Connecticut, for insurance agents who market policies to unit owners in Connecticut common interest communities.

Greg McCracken has joined our firm as a partner. Greg is a *Phi Beta Kappa* graduate of the University of California at Davis, where he received a BA in linguistics. He holds a JD from the University of the Pacific, McGeorge School of Law, where he was elected to the Order of the Coif and served on the board of editors of one of the law journals, as well as a Master of Urban Planning from the University of Illinois, where he received the AICP Outstanding Student Award. Greg practiced in several California litigation firms from 1993 through 1998. After receiving his Masters Degree, he spent the last five years practicing community association and land use law at a major Hartford law firm. He is a member of the Hartford County Bar Association and the Executive Committee of the Real Property Section of the Connecticut Bar Association. He is the Chairman of the Common Interest Communities Subcommittee of the Land Use, Planning and Zoning Committee 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*.

Larry Malick continues to serve on the Publication Committee of the Connecticut Chapter of the Community Associations Institute, which oversees preparation of the Chapter's magazine, *Common Interest*. Larry was a featured speaker at the ABC's Course, a workshop for association leaders, held in Glastonbury on September 30, 2006 and sponsored by the Connecticut Chapter of the Community Associations Institute. The members of the boards of many different associations attended the workshop and benefited from the presentations.

Mya Williamson has joined our office as a paralegal. Mya holds a paralegal certificate from Saint Joseph's College of West Hartford and an associate's degree from Greenfield Community College. Mya has spent the past several years working in customer service and management, which enabled her to develop strong interpersonal skills. We welcome Mya's enthusiasm.

**PERLSTEIN, SANDLER  
& MCCrackEN, LLC**

*Providing legal services  
to condominium and  
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including:*

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## OFFICE TELEPHONE EXTENSIONS

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:

Matthew N. Perlstein:	Extension 12
Scott J. Sandler:	Extension 15
Gregory W. McCracken:	Extension 29
Lawrence C. Malick:	Extension 16
Elizabeth A. Dickens:	Extension 10
Donna L. Diver:	Extension 14
Mya Beth Williamson:	Extension 30
Barbara S. Sack:	Extension 18
Jackie Castonguay:	Extension 13