

## Real Estate Law: Home is where the heart (or HOA) is



By **DONALD E. SNYDER, JR.**

I was welcomed to the world of Homeowner's Associations ("HOAs") as a young associate in the early 1980s, when I was assigned the task of establishing an HOA for a local townhouse development. At the time, HOAs were just starting to come into vogue in the upstate real estate market, so I had only a few upstate precedents to guide me in preparing the HOA documents and offering plan. Thankfully, the regulations, although they seemed pretty daunting at the time, really set out in specific detail the requirements for establishing an HOA.

In general, an HOA owns and/or operates the areas and facilities common to a group of homes, lots, condominiums, or cooperatives. Sometimes you may have a so-called master, or an umbrella HOA, which owns or operates common facilities for a group of condominiums, co-ops, or HOAs. With an HOA, generally you have a subdivision of lots with certain common area parcels owned by the HOA. A purchaser buys a lot and, in doing so, the purchaser becomes a member of the HOA, which owns the common areas. Membership allows the lot owner to use the common facilities of the association. Contrast this with a condominium, where the unit owner typically purchases the interior space of his unit and is also conveyed a percentage of undivided interest in the common elements.

The types of facilities owned by the HOA vary greatly from project to project. They may include extensive recreational facilities, or they may simply

include roadways and open space areas. Membership in the HOA obligates the homeowner to pay for the maintenance of the facilities and for the services related to those facilities. Expenses may include labor charges, heating, utilities, water charges and sewer rents, maintenance, insurance, legal fees, accounting fees, taxes and reserves for maintenance or replacement.

HOAs may be set up as nonprofit corporations. The HOA's primary organizational documents are its declaration, certificate of incorporation, by-laws, and rules and regulations. The declaration may encumber the common property with an easement for the benefit of the individual lot owners and provide for automatic association membership, voting rights, and certain use restrictions. It may also grant power to the HOA to own and maintain the common property, to make and enforce the covenants, rules, and restrictions, to levy and collect maintenance assessments, and to file liens for unpaid assessments against individual lots.

A developer setting up an HOA needs to be mindful of complying with the provisions of the Martin Act under Article 23-A of the General Business Law. The Act applies to all types of sales of cooperative interests in real estate. This includes the sale of participation interests in an HOA. The Act requires the complete description and disclosure of the real estate interests being sold to be set forth in an offering plan. No advertising or sales may take place until the offering plan has been accepted for filing by the attorney general. Failure to comply with the Act is illegal. The requirements for offering plans for newly constructed, vacant homeowner's associations are governed by Part 22 of Title 13 of the New York Codes, Rules and

Regulations.

Some "de-minimis" HOA developments might only include private roadway systems with a declaration of easement or with common right-of-way provisions added to the buyers' deeds. However, the attorney general has taken the position that this involves the sale of a cooperative interest in realty covered by the Martin Act.

Initially, the attorney general took the position that if there were more than four lots served by a private roadway, a complete offering plan was required. If there were four or fewer lots, the developer could apply for a no-action letter. The department of law may then, in its discretion, issue a no-action letter providing that it will not take any enforcement action on the offering because the transaction does not require the filing of an offering plan.

More recently, the attorney general in the late 1990s adopted Cooperative Policy Statement #7 ("CPS-7"), which has since been amended. CPS-7's application requirements are very similar to the requirements for a no-action letter with an important distinction. Under CPS-7 the number of lots served by a private road is irrelevant.

Note that the Monroe County Bar Association has developed a separate contract form for HOAs and condominiums that may include information a purchaser would want to consider when purchasing a home in connection with an HOA or condominium.

As you can see, if you are looking to develop or purchase property associated with an HOA, it's good to know your ABCs.

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