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Land Use Issues Concerning Community Associations

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Every board member in every community association understands the legal obligation to comply with the mandates of the governing documents for their community. It is also commonly understood that the governing documents typically consist of the Articles of Incorporation, the Declaration, the Bylaws and the Rules and Regulations, each of which should be easily accessible to owners and board members. However, what is not always appreciated is that most Virginia and Maryland communities are also subject to land-use related development commitments that play a significant role in dictating how community association property can be utilized. These development commitments are often discovered only after the board has spent considerable time, effort and money in planning a change, only to be advised at the eleventh hour that the proposed modification is being rejected by the locality.

There are numerous examples of how these types of issues arise, but the most common mistakes involve unused recreation areas and tot lots, parking spaces and out-of-the-way open space. The first example involves a community tot lot that has not been used in years and the equipment is in dire need of replacement. The board debates the question of whether to spend association funds to upgrade the facility, or whether to remove the tot lot equipment and use association funds to develop a new picnic area desperately desired by the owners. The second situation concerns a board considering whether to eliminate some handicapped parking spaces, since more spaces are provided than are required

by the local codes. The last example deals with a situation where an association owns significant acreage of out-of-the-way open space and a neighboring property owner has offered top dollar to purchase such property. Should the association continue to expend significant funds to maintain this area despite the fact it is not used by the owners, or should it sell the property and use the proceeds to pay for much-needed repairs to the community? In all three examples, the governing documents of the associations that contemplated these changes allowed the board to take the contemplated action. However, prior to committing resources in pursuing the proposals, each board is well advised to also review and understand the development commitments made during the land-use process to fully appreciate whether the proposed modifications would be allowed by the locality.

It is beyond the scope of this memorandum to detail all land-use applications in every jurisdiction where we have community association clients. However, it is helpful to have a general understanding of development processes in order to understand the resulting development restrictions. In summary, the land-use process can be broken down into two general phases: the land density phase and the land division phase. Land density refers to the number of units (*e.g.* number of houses) and the type of units (*e.g.* single family detached, multi-family) which may be constructed on a parcel of land. Land division refers to the process of actually dividing a large parcel of land into

smaller lots upon which the ultimate units are constructed.

The land density phase begins when a developer files an application proposing to increase the density of a specific parcel, or proposing a specific type of use on a specific parcel. Although each jurisdiction uses different terminology, typical applications are referred to as rezonings, special exceptions, special permits and site plans. A rezoning refers to the process of changing the permissible uses of land. This usually involves seeking approval to increase the density (*e.g.*, number of permitted houses) or use on a piece of property. An example is requesting permission to build a subdivision on property formerly used as a farm. Special exceptions, special permits and site plans are typically applications by which a jurisdiction ensures a particular use in a particular location does not unreasonably impact the existing neighborhood. For example, a residential zoning district might allow a church use, but still require a special permit application review to ensure that the resulting traffic associated with the church will not adversely impact the surrounding community. Each application involves the developer filing written applications, usually including development plans, which are then subjected to a detailed review by the locality's governing body.

The density phase applications are typically approved or disapproved by the governing body of the locality in which the property is located (*e.g.*, Board of Supervisors) after a public hearing at which anyone can speak in support or opposition. The review is typically subjective, which means the developer is "encouraged" to offer development incentives which are

sometimes referred to as proffers or development conditions. Once these proffers/development conditions are accepted and approved, the commitments become legally enforceable conditions and are binding upon all future land owners, including community associations.

The land division phase occurs after the developer has determined the ultimate density and use of the property. At this stage the developer knows the number of units, the type of units and the general location of the units, and is aware of whether the development is subject to proffers/development conditions. The land division stage is the process by which the property is formally subdivided into the individual lots and units. Typically, these reviews and approvals are not subject to public debate, but rather are reviewed pursuant to a fixed set of guidelines (*e.g.*, every lot must be one acre or more). A subdivision plan or plat is the typical document by which the actual subdivision occurs. Once these plans are approved, no changes can occur without approval of the locality.

Collectively, the development plans, development conditions, proffers, site plans and subdivision plans constitute the development commitments. The nature of the development commitments can cover a very wide range of issues. A typical development plan will specify the general location of lots, streets, parks and open space. The development plan often mandates how many units are permitted, how many parking spaces are required, how much open space is required and often exhibits the open space as "active" or "passive." Proffers and development conditions can be very detailed

and govern almost any aspect of development. Proffers have been known to prohibit certain trees from being removed or even to specify the exact equipment required to be located on a tot lot. Subdivision plans and site plans will detail the exact locations of lots, streets and parks and can even be as detailed as showing the exact location of entrance features or the dimensions of each parking space

These development commitments obviously impact the association's ability to make changes to the community, regardless of membership sentiment, and must be understood in order to make educated decisions about any proposed change in the use or amenities located on association property. Circling back to the earlier examples, that unwanted tot lot might be expressly mandated in proffers, and any attempt to remove it might be cause to alert the local zoning enforcement office. The number of handicapped parking spaces might be shown on the development plan and, therefore, will be required regardless of the current code requirements. Similarly, in connection with conveying the unwanted open space, it is very likely that the developer was required to commit a certain percentage of the development to open space, and that percentage is evidenced on the development plan and subdivision plan. Any attempt to reduce this percentage by conveying part of the open space would constitute a violation of the development conditions and would be prohibited.

Although it is clearly in the association's best interest to have detailed knowledge as to the development commitments that apply to the community, most associations are never provided copies of the documents exhibiting the commitments. This often leads to the board expending association resources pursuing a proposal without the knowledge that the proposal is specifically prohibited by the development commitments. To avoid this unfortunate situation, all associations are urged to be proactive in understanding the development commitments governing its property. All development documents should be on file in the locality's zoning office and should be available to the general public. While it can be a challenge to completely understand all of the applicable development restrictions, with some effort (and some legal assistance), the development commitments can be understood and may be used to understand the allowed uses for community association property.