CAN WE SELL THE COMMON PROPERTIES?

POTENTIAL CONSEQUENCES OF A SALE

How did the common properties become property of the Association? They were "donated" by the developer. This means they were guaranteed to the buyers for their use and enjoyment. A problem could be created if a member was deprived of the use of the facilities promised him. In addition, a future association member could take issue with not being able to utilize all facilities. An extensive (and expensive) review, analysis and vote would need to be taken to change our governing documents to avoid this potential problem.

Our Association has a non-profit status with the IRS. At the time the non-profit status was obtained, it was closely reviewed by the IRS, as they felt the roads should not be considered under IRS Code Section 501 c (7) as being used for pleasure, recreation and other non-profitable purposes. However, our representative prevailed with the IRS by insisting the members need the roads to travel between their homes and our recreational facilities.

Selling the recreational facilities can invalidate the argument that roads are needed to access the facilities and possibly negate our non-profit status. This revocation can be retroactive.

Also, if a sale of a common property does in fact happen, the money must be invested in a replacement recreational facility. If it is not, we not only face the potential retroactive revocation of our non-profit status, but then all revenue would be taxed at the corporation tax rate. Further, if for example, the money was put into the roads, the IRS could determine it generated a monetary benefit to each homeowners, and could become a taxable event for each homeowner.

CAN WE SELL THE COMMON PROPERTIES?

The legality of our being able to sell common properties has been debated for decades. A lot of time, effort and money has been spent on attorney opinions….and, of course, the attorney opinion changes with each attorney consulted.

Here are the considerations given over the years to this issue:

Many member have felt the properties can be sold based on the following item in the Articles of Incorporation:

b) The general purposes and powers are:

1. To acquire, hold, lease, encumber, convey, or otherwise dispose of real and personal property and to take real and personal property by will, gift or bequest; and to use the funds of this corporation and the proceeds, income and profits derived from any property of the corporation for any of the purposes for which this corporation is formed.

Others feel authorization to sell is given in our Bylaws:

ARTICLE XII
Amendments

These by-laws shall be amended or repealed only by one of the following methods:
a. by a two-thirds vote at a meeting of the members, provided that advance notice of the proposed change has been given, such notice shall be given not less than ten days nor more than sixty days prior to the meeting.
b. by written assent of members entitled to exercise fifty-one percent of the voting power of this corporation with seventy-five percent of those approving.
c. by a majority vote of the total membership of the organization. (As amended Sept 1979)

In fact, a vote was taken of the membership in 2003 regarding selling the common properties. The membership did not approve a sale.

Another opinion is that Davis-Stirling applies to this situation as indicated below:

The Davis-Stirling Act, along with the Declaration of Restrictions and our Bylaws provide regulations that apply to El Rancho Loma Serena Homeowners Association. (You can find links to all these documents on the home page).

Davis-Stirling Act sections 1359(a)(b)(1)(2)(3)(4) entitled Restriction on Partitions addresses the issue of selling common properties.

This section sets forth the necessary circumstances that would allow an association to sell common properties. We do not meet the necessary elements, and therefore cannot legally sell common properties.

A copy of the regulation appears below.

§1359. Restrictions on Partition

(a) Except as provided in this section, the common areas in a condominium project shall remain undivided, and there shall be no judicial partition thereof. Nothing in this section shall be deemed to prohibit partition of a cotenancy in a condominium.

(b) The owner of a separate interest in a condominium project may maintain a partition action as to the entire project as if the owners of all of the separate interests in the project were tenants in common in the

entire project in the same proportion as their interests in the common areas. The court shall order partition under this subdivision only by sale of the entire condominium project and only upon a showing of one of the following:

(1) More than three years before the filing of the action, the condominium project was damaged or destroyed, so that a material part was rendered unfit for its prior use, and the condominium project has not been rebuilt or repaired substantially to its state prior to the damage or destruction.

(2) Three-fourths or more of the project is destroyed or substantially damaged and owners of separate interests holding in the aggregate more than a 50-percent interest in the common areas oppose repair or restoration of the project.

(3) The project has been in existence more than 50 years, is obsolete and uneconomic, and owners of

separate interests holding in the aggregate more than a 50-percent interest in the common area oppose repair or restoration of the project.

(4) The conditions for such a sale, set forth in the declaration, have been met.

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