

Declarant Rights: Are Developers Leaving Money on the Table?

Article
03.30.2015

When a residential subdivision is developed, it is common for the developer to record a Declaration of Covenants, Conditions, Easements and Restrictions along with the subdivision plat. This Declaration addresses use restrictions that will govern the residents, as well as easements for their use and enjoyment of common areas such as ponds, private roads and amenities, and other matters relating to the homeowners' association (HOA) that will govern the subdivision. It is also customary for many Declarations to reserve various rights in favor of the developer (usually termed the "Declarant") for so long as the Declarant is the owner of any Lot. If the initial developer sells its interest in the project to a successor developer, the Declaration may provide that these Declarant rights can also be transferred. These rights may be valuable, so the initial developer should consider addressing them as a separate component of the sale transaction.

Declarant rights may include the power to appoint Directors to the HOA Board, the power to amend the Declaration, the right to control the HOA's architectural review committee, exemptions from HOA assessments, reservations of easements to use common areas for the developer's sales activities, the right to grant easements to others, and the right to grant exemptions from HOA assessments to builders. If these Declarant rights are assigned in connection with a sale of the project by the initial developer, the successor developer could receive a substantial benefit justifying an increased purchase price.

The Declaration typically dictates whether Declarant rights may be assigned to a successor developer, and how this must be accomplished. If you are a developer selling your interest in a residential subdivision, you should be aware of exactly what rights you have as the Declarant under the Declaration, what value those rights may have to a successor developer, the extent to which they are assignable, and what procedures must be followed in order to assign them. This will give you the ability to negotiate for a better purchase price. If these points are left unaddressed, developers could be leaving money on the table.

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