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GRANTING COMMON AREA TO INDIVIDUAL OWNERS

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A condominium owner asks for permission to place a skylight in the roof of his unit. A lot owner asks permission to move her fence four feet into the common area to increase the size of her backyard. The Association's CC&Rs say nothing about the Association's authority to grant owners exclusive use of portions of the common area as in the foregoing examples. What authority does the Association have in these situations?

Civil Code Section 1363.07 states that associations must obtain the approval of 67% of their membership (unless the CC&Rs establish a higher percentage) before they can grant to an individual member the exclusive right to use a portion of the common area. This statute also includes several exceptions where the 67% approval is not required. Section 1363.07 became effective January 1, 2006. The question frequently asked about this statute is whether associations whose CC&Rs do not expressly give them the authority to grant common area now have that authority. Unfortunately, the statute itself does not provide a clear answer.

In looking for the true intent behind this statute, the first place to look is the "legislative history," that is, the publications by the State Legislature which deal with the formulation and enactment of the statute in question. Unfortunately, the legislative history in this particular statute is of no assistance. Accordingly, we are left only with the wording of the statute itself, which does not clearly lead to only one conclusion. Consequently, whatever conclusion is reached must be characterized as inherently risky.

The statute does contain a condition to its use, and that is the association in question must either own common area or have an easement over common area. There is not, however, any wording or provision that is required to be in the association's CC&Rs before the statute applies. While this analysis is by no means conclusive, it does lead us to the supposition that the

legislature either presumed all associations can grant away the common area, or it did in fact wish to level the playing field by giving them all that authority. We can also ask if the Legislature wanted Section 1363.07 to apply only to associations whose CC&Rs contained the express authority to grant common area use rights, couldn't it have said so? By the narrowest of margins, our conclusion becomes Section 1363.07 does give associations the authority to grant common area to its members (with membership approval!), even though this conclusion is not unanimous among all the attorneys the author has questioned. It is, however, the majority position.

There is a similar question that has arisen with respect to a number of CC&Rs containing a provision such as the following: "No owner shall place or construct anything in the common area without the approval of the Board of Directors." Does such a provision grant the Board of Directors the specific authority to allow owners to place or construct something in the common area? It does not say so. However, if that subject is not further addressed elsewhere in the CC&Rs, the only logical answer is yes. Otherwise, the provision becomes meaningless. This is not quite the same as the analysis for Section 1363.07, but it is similar. We are attempting to apply that analysis which gives the statute meaning, clarity and usefulness.

Any association seeking to grant exclusive use rights in its common area, which does not have such authority expressed in its CC&Rs, should proceed with caution. The Board will have to make a decision, based upon the advice of counsel, whether it wishes to assume the risks inherent in using a statute whose meaning is not 100% clear. Only with an appreciation of the risks and ramifications should associations use Section 1363.07 as their source of power and authority to grant to homeowners rights in the common area.