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Limits on a condominium association's right of first refusal

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Are you selling your condominium unit? If so, you should review your condominium association's master deed and by-laws to determine whether they give the association a "right of first refusal" whenever a unit owner intends to sell his unit.

A right of first refusal provision normally contains at least three basic components. It requires a unit owner who wishes to sell his unit to first offer it to the association on the same terms and conditions as offered to any purchaser; requires the owner, before accepting any offer to buy the unit, to notify the association's board of directors of the terms of the offer; and in either of these cases allows the association a specified period of time in which to advise the unit owner whether the association wants to purchase the unit itself. A right of first refusal provision also may assert that failing to comply with it will render any attempted sale null and void and will convey no title to the intended purchaser.

Given the recent, major decline in real estate prices, there is a greater possibility than usual that a condominium association may seek to exercise a claimed right of first refusal -- especially if the sale price is below market rates -- in an effort to maintain the value of other units throughout the condominium complex or for other purposes. The New Jersey Condominium Act, however, prohibits most associations from exercising rights of first refusal. More specifically, the act provides that no master deed, bylaw or amendment adopted after September 11, 1980 may grant a developer or association a right of first refusal to buy a condominium unit upon resale, gift or devise by a unit owner. The act further provides that no contract for the sale of a condominium unit executed after that date may contain a provision giving such rights to a developer or association. These prohibitions were enacted by the state legislature in 1980, based on its finding that many associations' governing documents contained such provisions, which were deemed to be in the financial interest of the developer or association and wrongfully "designed to limit the freedom of a purchaser to resell the property as he sees fit."

Therefore, if your association's master deed and bylaws were recorded after September 11, 1980, the association is barred from enforcing any right of first refusal contained in those governing documents. The date of recording normally is stamped on the first page of an association's master deed filed in the office of the County Clerk/Register of the county in which the condominium is located.

The act does not entirely ban rights of first refusal that are contained in master deeds or bylaws that were recorded *prior* to September 11, 1980, but severely limits their enforceability. The act provides that such provisions are presumed to be "unconscionable" and legally unenforceable, subject, however, to the ability of an

association to “rebut” or overcome that presumption by demonstrating “evidence of the existence of facts and circumstances sufficient to justify and validate” the provision. Unfortunately, neither the act nor any reported New Jersey court decision specifies the types of “facts and circumstances” that an association must establish in order to “justify and validate” a claimed right of first refusal. It can be expected, however, that a reviewing court most likely would demand clear, definite and convincing proof of a legitimate, compelling association interest in order to allow the right of first refusal to be implemented, and that it may be difficult for an association to satisfy this requirement.