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Resale Certificates – *Disclosing Future Capital Projects and Current Violations*

By William Ward, Esq.

This article focuses on two issues facing Associations when preparing the Resale Certificate. What information should be disclosed concerning upcoming projects, which have been discussed, but not approved? Whether the Board is obligated to disclose that the current owner is in violation of provision(s) of the Declaration, Bylaws, Rules, Policies, or Maintenance Standards?

A frequent scenario occurs when the Association approves a special assessment for a capital project discussed at Board meetings or owners' meetings shortly after a new owner purchases a unit, but which was not approved by the Board of Directors prior to issuance of the Resale Certificate. The new owner objects to paying for failure of the Board of Directors to disclose the upcoming project in the Resale Certificate, which immediately creates an adversarial relationship with the new owner.

The statutory provisions in C.G.S. 47-270 are clear and unequivocal. The 17 categories of information are factual recitations designed, amongst other purposes, to allow a potential Buyer the opportunity to evaluate the financial stability of the Association, inform the Buyer of all amounts due and owing to the Association for the Unit being purchased, and disclosing known violations. The Resale Certificate protects the Association because the Buyer is bound by all information disclosed in the Resale Certificate including being liable for payment of all amounts assessed against the unit and correcting existing violations. The Buyer has five days, excluding Saturdays, Sundays, and legal holidays (seven days if sent by registered or certified mail) to void the purchase contract (hereinafter the "right to rescind") after receipt of the Resale Certificate and the required documents.

C.G.S. 47-270(a)(4) governs capital expenditures. It requires disclosure of:

"(4) a statement of any capital expenditures in excess of one thousand dollars approved by the executive board for the current and next succeeding fiscal year."

Though the Board, and/or the unit owners, may have discussed an upcoming capital project for months, C.G.S. 47-270(a) does not permit the Board of Directors to disclose those discussions to a potential Buyer since that information is not in one of the 17 statutory categories. If a Buyer exercises its right to rescind the Seller may sue the Association for the loss suffered from the cancelled sale (reduced sale price, cost of paying the expenses of the unit until sold, legal fees, etc.) due to tortious interference with contract because of the disclosure of non-statutorily required information.

The Seller must allege and prove that the Buyer rescinded the contract as a result of the illegal disclosure of the future capital project

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"If a Buyer exercises its right to rescind the Seller may sue the Association for the loss suffered from the cancelled sale..."

and prove the Seller's loss. If proven, then the Association would be responsible for the loss suffered by the Seller. Even if the Seller does not sue the Association, it can cause friction and discord in the Association.

To avoid such lawsuits, or claims, I recommend that the Board of Directors, when considering a capital project in excess of one thousand dollars which have not been approved, send a letter to all owners informing them that the Board of Directors is unable to disclose information about the anticipated capital project without their permission, instructing the owners to disclose to potential Buyers the capital project being discussed, and request that a Seller include the information known about the anticipated capital project in the listing agreement and contract of sale. Another alternative is for the Board of Directors to ask for written permission from a Seller to disclose the information in the Resale Certificate.

Assuming a Seller complies, there is full disclosure to the potential Buyer of the anticipated capital project, which the Board of Directors could not have legally disclosed, and the anticipated cost will be negotiated into the sale price. If it isn't negotiated into the sale price and the Buyer objects after closing, the Board has written verification that it notified all owners that it was unable to disclose the information, the Seller was informed of that fact and, therefore, the Buyer's

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dispute is with the Seller not the Association. Being a big fan of belts and suspenders, I also recommend sending a letter to the Seller, with a copy of the original letter, reminding them to disclose the discussions of the upcoming capital project to the Buyer whenever the Association receives a request for a Resale Certificate. By following the above recommendations, the Board of Directors will protect the Association from liability and minimize potential discord in the community.

Another common scenario involves a unit with a violation, which occurred without approval of the Board of Directors such as finishing a basement, extending a deck, modifying a bathroom involving electrical or plumbing, unauthorized work to the interior of the unit, or other violations of the documents. C.G.S. 47-270(a)(13) requires:

"(13) a statement disclosing the effect on the unit to be conveyed of any restrictions on the owner's right to use or occupy the unit or to lease the unit to another person."

If the Board is aware of a violation, my opinion is that it should be disclosed. Arguably an uncured violation is allowing a use of the Unit in violation of the condominium documents. For example, if the Seller constructed a bathroom without permission or permits, the Board of Directors could order that it be removed and, therefore, the Buyer would be unable to use it. If the Board of Directors has actual notice or knowledge, then the violation must be disclosed in the Resale Certificate pursuant to Section 13 of 47-270(a) in order for the Board of Directors to be able to take enforcement action against the Buyer post-closing if the violation is not cured prior to the sale. By disclosing it in the Resale Certificate the Buyer has notice of the violation and can negotiate with the Seller to cure the violation and/or negotiate the purchase price.

Without actual notice or knowledge, the Board of Directors has no ability to disclose the violation in the Resale Certificate. Without disclosing the violation in the Resale Certificate, it will be very difficult for the Board of Directors to take any enforcement action post-closing. The Board of Directors has the burden of proving the violation and when it occurred. If it cannot prove that the violation did not exist when the current owner purchased the unit, it is unlikely a court would validate any enforcement action unless it involved a significant safety or health hazard, or a code violation.

The reverse is also problematic. The Board of Directors should be very wary of attempting to enforce a known violation when the current owner sells unless it is by written agreement with the current owner that the violation will be cured prior to the sale of the unit, or it is disclosed in the Resale Certificate. Failing to enforce a known violation, which is not disclosed in the Resale Certificate, and opting to enforce it post-closing has very little chance of success.

To minimize potential issues with Buyers in connection with the above issues, or other potential issues, (including the failure to amend your Declaration and Bylaws to conform to the 2010 and subsequent amendments to the Common Interest Ownership Act) I recommend that all Resale Certificates contain the following disclosures in bold lettering at the end.

This Resale Certificate complies with the provisions of C.G.S. 47-270(a) of the Connecticut Common Interest Ownership Act. Only the information required by C.G.S. 47-270(a) is provided. The Association disclaims any duty to disclose or to certify any other information.

The information contained herein is valid as of the date of this Resale Certificate. The Association does not have any obligation to furnish updates to the Resale Certificate if any of the information disclosed herein changes after the date hereof unless requested in writing prior to the date of closing.

Please note that as of July 1, 2010 through the date of this Resale Certificate, many provisions of Connecticut's condominium statutes were amended. The Association's Declaration and Bylaws do not reflect these changes yet. Please consult with your attorney if you have questions about the amendments in the condominium statutes.

Association living has enough challenges, especially considering the unique issues COVID-19 thrusted upon you. The above recommendations are designed to minimize potential disputes and to avoid creating adversarial relationship with new owners. Though it requires extra work on behalf of the Board, it is far less than the time and potential cost of resolving a post-closing claim. ■

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ENVIRONMENTAL TIP

Spring Cleaning

It's that time of year! As much as possible, try to avoid harsh chemicals, plastics, and disposables when cleaning your home. It is best to use non-toxic solutions and zero-waste options, which, in addition to being simpler and reusable, save money. A win for you and for the environment!

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