

MARKUP #1 ->

other than that specified in the Declaration; or (xiii) any provisions that expressly benefit Mortgage Holders, Insurers or Guarantors.

(c) An Eligible Mortgage Holder, Insurer or Guarantor who receives a written request to approve additions or amendments who does not deliver or post to the requesting party a negative response within thirty (30) days after the notice of the proposed addition or amendment, shall be deemed to have approved such request, provided the notice has been delivered to the Eligible Mortgage Holder, Insurer or Guarantor by certified or registered mail, return receipt requested.

(d) Except as provided by statute, or in case of condemnation or substantial loss to the Units or Common Facilities, unless the holders of at least two-thirds (2/3) of the First Mortgagees (based on one (1) vote for each First Mortgage owned), or two-thirds (2/3) of the Total Voting Power of the Association have given their prior written approval, the Association and/or the Owners shall not be entitled to:

(1) By act or omission, seek to abandon or terminate the Property as a common interest development;

(2) Change the pro rata interest or obligations of any individual Unit for the purposes of: (i) levying assessments or charges or allocating distributions of hazard insurance proceeds or condemnation awards, or (ii) determining the pro rata share of ownership of each Unit in the Common Facilities; provided that no Owner's undivided interest in the Common Facilities may be changed without the consent of that Owner.

(3) Partition or subdivide any Unit;

4) By act or omission, seek to abandon, partition, subdivide, encumber, sell, or transfer the Common Facilities. The granting of easements for public utilities or for other purposes consistent with the intended use of the Common Facilities by the Association shall not be deemed a transfer within the meaning of this clause;

(5) Use hazard insurance proceeds for losses to any improvements on the Common Facilities) for other than the repair, replacement or reconstruction of such improvements, except as provided in Article VIII.

ISSUE #1

9.6 **Right to First Refusal:** The right of an Owner to sell, transfer, or otherwise convey his or her Unit shall not be subject to any right of first refusal or similar restriction.

9.7 **Distribution of Insurance or Condemnation Proceeds:** No provision of the Declaration gives an Owner, or any other party, priority over any rights of First Mortgagees in the case of a distribution to Owners of insurance proceeds or condemnation awards for losses to or taking of the Common Facilities.

MARKUP #1 · FAIR HOUSING ACT (FHA) LIABILITY RISK

BOARD & COUNSEL REVIEW

Sec. 9.6 (p. 24): Right of First Refusal (ROFR) clause lacks mandatory exemptions for foreclosure, deeds in lieu of foreclosure, and FHA/GSE-insured mortgages.

Statutory / Legal Reference: Fannie Mae Selling Guide B4-2.1-03, Freddie Mac Guide Ch. 5701, & 24 C.F.R. § 203.43b (FHA / Agency Lending Guidelines)

Statutory Comparison: Under federal HUD/FHA regulations (24 C.F.R. §§ 203.41, 203.43b), VA regulations (38 C.F.R. § 36.4354), and Fannie Mae / Freddie Mac project eligibility standards, any Right of First Refusal in the governing documents renders the entire community non-warrantable for federal and conventional secondary-market mortgages unless it expressly exempts foreclosures, deeds-in-lieu of foreclosure, and mortgagee transfers, and complies with anti-discrimination mandates.

CURRENT WORDING IN DOCUMENT:

Right to First Refusal: The right of an Owner to sell, transfer, or otherwise convey his or her Unit shall not be subject to any right of first refusal or similar restriction.

SAMPLE DISCUSSION WORDING (FOR HOA ATTORNEY REVIEW):

Any Right of First Refusal reserved herein shall not apply to or impair the rights of any institutional First Mortgagee, nor shall it apply to any transfer or conveyance by foreclosure, deed in lieu of foreclosure, or subsequent sale by a First Mortgagee, Fannie Mae, Freddie Mac, FHA/HUD, or VA, in compliance with 24 C.F.R. §§ 203.41, 203.43b, 38 C.F.R. § 36.4354, and Fannie Mae Selling Guide B4-2.1-03.