

**CONDOMINIUM DOCUMENTS:
DRAFTING TO COMPLY WITH HUD CONDOMINIUM
PROJECT APPROVAL REQUIREMENTS**

ROBERT D. BURTON

Winstead PC
401 Congress Avenue, Suite 2100
Austin, Texas 78701

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ROBERT D. BURTON
Winstead PC
401 Congress Avenue, Suite 2100
Austin, Texas 78701
512-370-2869
FAX: 512-370-2850

EDUCATION:

B.S. M.S. (Accounting), University of North Texas

J.D., Tulane University, with honors and member and editor of Tulane Law Review

PROFESSIONAL ACTIVITIES

Shareholder, Winstead PC, Real Estate Development & Investments Practice Group and Co-Chair of Planned Community, Mixed-Use and Condominium Practice Group

Member, State Bar of Texas

Board Member, Texas Community Association Advocates

Member, Community Associations Institute

Full Member, Urban Land Institute

Board Member, Urban Land Institute – Austin, Urban Development and Mixed-Use Council

Member, Real Estate Council of Austin

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CONDOMINIUM DOCUMENTS: DRAFTING TO COMPLY WITH HUD CONDOMINIUM DOCUMENT APPROVAL REQUIREMENTS

I. INTRODUCTION: HUD AUTHORITY

Section 203(b) of the National Housing Act authorizes the Department of Housing and Urban Development (“HUD” or the “Department”) to issue, or commit to issue, mortgage insurance on loans to purchase or refinance one-family residential dwellings.¹ Section 203(b) is the primary mortgage insurance program administered by HUD. Section 234(c) of the National Housing Act authorizes the Secretary of HUD to issue, or commit to issue, mortgage insurance on individual condominium units.² Section 234(c) further authorizes the Secretary to adopt rules and conditions, which must be satisfied as a precondition to issuance of mortgage insurance on loans to purchase or refinance condominium units.³ The rules and conditions have been issued and codified.⁴ The periodic issuance of HUD Mortgage Letters has further supplemented the codified rules.⁵

II. OVERVIEW OF HUD CONDOMINIUM PROJECT APPROVAL

A. Two Approval Options: DELRAP and HRAP.

Since an individual condominium unit is created and established by a governance system,⁶ and since the components and administration of that system can have an effect on the value of the unit, HUD requires that all attached condominium projects be pre-approved as a condition to eligibility for mortgage insurance. The condominium pre-approval is referred

¹ 12 U.S.C. §1709(b) (2006 & Supp. 2010).

² 12 U.S.C. §1715y (2006 & Supp. 2010).

³ 12 U.S.C. §1715y(c) (2006 & Supp. 2010).

⁴ 24 C.F.R. §234 (2012) and 24 C.F.R. §203 (2012).

⁵ For example, see Mortgage Letters 2009-46A, 2009-46B, 2011-03, 2011-22, and 2012-18. Though a matter of some controversy among practitioners, HUD has taken the position that the National Housing Act and the rule-making authority vested in the Secretary, does not require the traditional public comment period otherwise applicable to the publication of new regulations.

⁶ At a minimum, a condominium declaration must be filed to establish individual units and common areas. In almost all cases, the governance system will also include rules and regulations applicable to the condominium project which affect ownership and use.

to by HUD as “project approval” and presently includes two separate approval tracks: Direct Endorsement Lender Review and Approval Process and HUD Review and Approval Process. Direct Endorsement Lender Review and Approval Process, known as “DELRAP”, is administered by a lender with direct endorsement authority with HUD. Under the DELRAP approval process, the lender determines whether the condominium project complies with the rules and conditions adopted by HUD for project approval and certifies satisfaction of the conditions to HUD. If the condominium project is approved by a specific lender under the DELRAP process, that lender’s loans will qualify for mortgage insurance provided that the individual borrower satisfies applicable underwriting criteria. The HUD Review and Approval Process, known as “HRAP”, is administered by HUD and is initiated directly by the sponsor or condominium association’s submission of a project approval application directly to HUD. If HUD approves the project, the project is considered approved for mortgage insurance and loans will qualify for mortgage insurance provided that the individual borrower satisfies applicable underwriting criteria. The principal difference between DELRAP and HRAP is that DELRAP approval is specific to the lender who has approved the project and provided the appropriate certifications to HUD. In most circumstances, the sponsor and condominium association should opt for the HRAP approval process since HRAP provides the prospective condominium unit purchaser with more options when selecting a lender.

Under both approval tracks, the project must comply with the rules and conditions for project approval. On June 30, 2011, HUD issued Mortgage Letter 2011-22,⁷ which adopted a consolidated “Condominium Project Approval and Processing Guide” (the “Guide”).⁸

B. The Detached Exception.

Effective June 12, 2009, condominium project approval is not required for detached or “site” condominiums.⁹ HUD has further defined site-based

⁷At <http://portal.hud.gov/hudportal/documents/huddoc?id=11-22ml.pdf>.

⁸At <http://portal.hud.gov/hudportal/documents/huddoc?id=1122mlguide.pdf>.

⁹ See HUD Mortgage Letter 2009-46B, <http://portal.hud.gov/hudportal/documents/huddoc?id=09-46bml.pdf>

condominiums as a condominium that meets the following criteria:¹⁰

- 1) Single family totally detached dwellings where no physical dwelling improvements are shared, e.g., garages, breezeways, archways;
- 2) Subject to the terms and provisions of a condominium declaration;
- 3) The actual condominium unit includes the entire structure, i.e., the unit boundaries encapsulate the dwelling;¹¹
- 4) Insurance and maintenance costs are the responsibility of the unit owner; and
- 5) Any common assessments collected will be for amenities outside of the footprint of the individual site.

It should be noted that if a single declaration establishes both detached and attached condominium units, HUD condominium project approval is required.

III. HUD CONDOMINIUM DOCUMENT PROVISIONS

A. Recommended Provisions.

The Guide does not include recommended text of specific document provisions that must be included in condominium documents. However, the Guide does require that certain conditions be present as a condition to approval, and that the condominium documents comply with applicable law. In addition, as discussed in Part IV of this article, if the condominium project will require Fannie Mae, Freddie Mac, or Veteran’s Administration approval under their respective mortgage insurance programs, certain provisions will need to be included in the condominium documents. In addition, due to the continued fragile state of the HUD mortgage insurance program and the Department’s history of modifying guidance based on changes in the political or economic environment, there are certain customary provisions the practitioner should consider including despite the lack of any specific mandate.

¹⁰ Condominium Project Approval and Processing Guide, at <http://portal.hud.gov/hudportal/documents/huddoc?id=11-22mlguide.pdf>, p. 19.

¹¹ There remains the question of whether yard area can be included as limited common element and still be considered “detached” for the purpose of project approval. The Guide requires the unit to include the “entire structure as well as the site and air space and are not considered to be common areas or limited common areas.” Guide, p.19. Do the terms “site and air space” pertain to the area and air space enveloping only the structure?

(i) Mortgage Protection. The mortgagee protection clause requires that certain material modifications to the condominium declaration be approved by 51% of all mortgagees. A sample mortgagee protection clause is attached as Exhibit A to this article. While this provision is not expressly required by the Guide, it is required by Fannie Mae guidelines,¹² and is so frequently seen in condominium documents recorded over the past decade that exclusion is not recommended.¹³ Note that the sample mortgagee protection clause includes express carve-outs for amendments prosecuted by the sponsor to add additional units or modify the project when exercising special declarant rights.¹⁴ The exclusions are permissible FNMA exceptions to the mortgagee amendment approval requirement and HUD has also accepted these exclusions.

(ii) Board Amendment for Changes in Underwriting Guidelines. Section 82.067 of the Texas Property Code permits the sponsor to include a provision in the declaration which allows the board of directors of the condominium association to amend the declaration without owner consent provided that the amendment is necessary “to meet the requirements of the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Federal Housing Administration, or the Veterans Administration.”¹⁵ A sample underwriting

¹² Though beyond the scope of this article, most projects will utilize HUD and Fannie Mae condominium project approval for sales. This is due to different loan limits between the two agencies and HUD’s requirements that it will issue mortgage insurance on no more than 50% of units within the project.

¹³ It should be noted that prior to 2010, Fannie Mae, HUD and VA honored reciprocity with respect to project approvals. In other words, Fannie Mae project approval resulted in HUD project approval and vice versa. Since Fannie Mae included specific guidelines on mandatory condominium document provisions, practitioners would draft to the Fannie Mae standard. These Fannie Mae provisions have become customary and accepted by the market. As a result, there is justifiable reluctance about removing Fannie Mae provisions from condominium documents even if the project will only seek HUD approval.

¹⁴ Special declarant rights are defined in §82.003(22) of the Texas Property Code.

¹⁵ Tex. Prop. Code. Ann. §82.067(f) (West 2012).

amendment provision is attached as Exhibit A to this article. As previously noted, HUD and staff have had frequent occasion to modify and supplement the rules and procedures attributable to condominium project review and approval based on political and economic considerations.¹⁶ Including the amendment right afforded by Section 82.067 is a means to respond to changes and preserve mortgage insurance eligibility.

(iii) Leasing. The Guide provisions on minimum lease terms have created some confusion.¹⁷ The confusion stems from the Guide’s example of a 6-month minimum lease term as beneficial for project stability coupled with a statement that leasing restrictions are permissible if such restrictions meet one or more of Guide’s seven stated criteria. Our experience is that HUD is interpreting the seven criteria as a list of permissible and impermissible conditions associated with leasing restrictions. The seven criteria are as follows:¹⁸

- 1) All leases must be in writing and subject to the declaration and by-laws of the condominium project.
- 2) The condominium association may request and receive a copy of the sublease or rental agreement.
- 3) The condominium association may request the name(s) of all tenants including the tenants’ family members who will occupy the unit.
- 4) Unit owners are prohibited from leasing their units for an initial term of less than 30 days.

- 5) The condominium association may establish a maximum allowable lease term, e.g. six months, twelve months, etc.
- 6) The condominium association may establish a maximum number of rental units within the project; however, the percentage of rental units may not exceed the current FHA condominium project owner-occupancy requirement.¹⁹
- 7) The condominium association may not require that a prospective tenant be approved by the condominium association and/or its agent(s), including but not limited to meeting creditworthiness standards.

Based on HUD application of the leasing rules, we believe that Items 1 through 3, 5 and 6 are restrictions, which may be included in the condominium project documents. HUD is presently applying Item 5 to require a minimum lease term of no more than 30 days. Item 7 is a condition that must not be included in the condominium documents.

(iv) Insurance. The Guide requires that the condominium association procure property insurance covering 100% of the current replacement cost of the condominium, which for purpose of HUD project approval may require that the association procure insurance for the common elements and the units despite the fact that the Association, under the Texas Uniform Condominium Act, need not insure units. Specifically, Section 82.111(b) of the Texas Property Code requires that the association procure insurance for the units, in addition to the common elements, if the units include horizontal boundaries.²⁰ As a result, it is permissible under Texas law for a project without horizontal boundaries, e.g., a townhome product, to obtain property insurance for the common elements and not the units. However, the Guide: (i) prohibits a unit owner from obtaining gap coverage if the association has not procured 100%

¹⁶ 42 U.S.C. 3535(d) (2006 & Supp. 2010) authorizes the Secretary of HUD to “delegate any of his functions, powers, and duties to such officers and employees of the Department as he may designate, may authorize such successive redelegations of such functions, powers, and duties as he may deem desirable, and may make such rules and regulations as may be necessary to carry out his functions, powers, and duties.” The Federal Housing Administration Commissioner/Assistant Secretary for Housing and FHA staff presently issues rules and procedures associated with condominium project approval.

¹⁷ See Condominium Project Approval and Processing Guide, at <http://portal.hud.gov/hudportal/documents/huddoc?id=11-22mlguide.pdf>, p. 26.

¹⁸ *Id.*

¹⁹ The FHA condominium project owner occupancy requirement is 50% for existing projects and 30% for projects until 1 year after the first conveyance of a unit. Guide, p. 43-44.

²⁰ Horizontal boundaries, in effect, means that some portion on one unit is above another unit.

replacement value insurance; and (ii) requires that each unit owner obtain HO-6, or “walls-in” coverage.²¹ Consequently, dependent upon how unit boundaries are established under the condominium declaration there may be a “gap” between the insurance policy on the common elements procured by the association and the HO-6 policy obtained by each unit owner, i.e., the unit may be defined to include an area not covered by the HO-6 policy. HO-6 insurance differs slightly from one insurance company to the next and the prospective unit owner will not procure such insurance until shortly before or at unit closing. Confirmation of HO-6 insurance and the insurance procured by the association will be confirmed as part of the purchaser’s loan level underwriting.²² Questions may then arise regarding whether the project insurance meets FHA requirements. For those projects where FHA project approval is important, we recommend that the condominium association procure 100% replacement value insurance for common elements and units excluding improvements and betterments installed by unit owners.

- (v) Development Period. Development rights are rights reserved in the condominium declaration to enable the sponsor to create units, common elements, and add and withdraw land from the project.²³ The ability to create units and common elements is critical to managing the presale requirements imposed by HUD as a precondition to issuance of mortgage insurance.²⁴ Section 82.055(14) of the

Texas Property Code requires that the condominium declaration specify the time period during which the sponsor may exercise such rights. Though the Guide provides no express limit on the duration of these rights, Fannie Mae guidelines limit this period to seven (7) years. We recommend that but for unusual circumstances, the 7 year period be utilized for HUD projects for the same reasons expressed in Section III.A(i) of this article.

- (vi) Transition of Association Control. The Guide includes requirements on the transition of control from the sponsor to unit owners, which requirements are the same as those set from in the Texas Uniform Condominium Act.²⁵ However, for purposes of HUD project approval it is recommended that the transition requirements be expressly and conspicuously set forth in the condominium declaration rather than incorporated by reference to Texas law. A sample transition clause is attached as Exhibit A to this article.

B. Ineligible Projects.

Projects ineligible for HUD project approval include projects with a mandatory rental pool, projects which have more than 25% of total space used for nonresidential purposes, live/work projects with more than 25% of project area or unit area dedicated to non-residential purposes, and projects where purchasers must be approved by the board or the consent of a third-party.

IV. HARMONIZING HUD, FANNIE MAE AND VA

Prior to February 1, 2010, HUD, Fannie Mae and the Veteran’s Administration honored reciprocity with respect to condominium project approvals.²⁶ In other

²¹ An HO-6 policy usually covers damage to personal property, interior walls and floor coverings, and improvements and betterments installed by the unit owner.

²² FHA project approval is obtained for the entire project. However, at each closing, the purchaser’s lender will confirm that certain FHA requirements have been satisfied. This confirmation usually takes the form on a Condominium Questionnaire completed by the sponsor or manager of the condominium association.

²³ Tex. Prop. Code Ann. §82.003(12) (West 2012).

²⁴ Strategies associated with legal phasing are beyond the scope of this article. However, for new projects, HUD requires that at least 30% of all units established by the declaration be conveyed or under contract to owner-occupants. For a large project, units will be created in phases by amendment to the condominium declaration to ensure that the presale requirement is satisfied as the

project is developed. Note that phasing is also a means to limit a sponsor’s exposure to assessments payable on unbuilt units. Section 82.112(c) of the Texas Property Code requires that the sponsor commence payment of assessments no later than three years after the first conveyance of a unit.

²⁵ Section 82.103(c) of the Texas Property Code provides that the sponsor must relinquish control of the condominium association on or before 120 days after 75% of the units that may be created under the condominium declaration have been conveyed to third parties.

²⁶ Project Review Information and Frequently Asked Questions, Fannie Mae, February, 28, 2012, p. 9, See <https://www.fanniemae.com/content/faq/project-review-summary-faqs.pdf>.

words, a condominium project approved by Fannie Mae would be considered approved by HUD, and vice versa. Reciprocity was the result of harmonization of approval criteria and cooperation between the agencies over the years. The harmonization of rules and cooperation between the agencies ended as a result of the real estate downturn in 2008, when Fannie Mae revised its approval guidelines and HUD began the process to rewrite the HUD condominium project approval guidelines. In addition, the Veteran's Administration presently requires that a condominium project be separately submitted for approval without regard to whether the project has been approved by HUD or Fannie Mae.

Termination of reciprocity between the agencies requires that the condominium documents be prepared in accordance with the requirements of each agency. As noted in this article, HUD does not currently have mandatory provisions that must be included in the documents. However, Fannie Mae and VA do have such document requirements. Generally, the provisions recommended in Section III. A above will satisfy the Fannie Mae guidelines. However, the VA guidelines include specific requirements over and above the requirements imposed by Fannie Mae. Exhibit B attached to this article includes a worksheet which may be used to draft the condominium documents in a manner that complies with the VA requirements, or to evaluate whether existing condominium documents comply with the VA requirements.

V. CONCLUSION

Though HUD does not provide specific provisions that must be included in the condominium documents, the practitioner should include certain customary provisions based on HUD's historical document review and approval practices. In addition, due to the termination of reciprocity between condominium project approval agencies, the condominium documents should be drafted in a manner that complies with each agencies guidelines and requirements. Finally, the practitioner is advised to keep abreast of changes in project approval guidelines. HUD guidelines will change based on a variety of factors, including agency leadership, HUD fiscal directives, politics, and the economy.

EXHIBIT A

A. Sample Mortgagee Protection Provision:

Amendments of a Material Nature. A document amendment of a material nature must be approved by owners representing at least sixty-seven percent (67%) of the votes in the Association and by at least fifty-one percent (51%) of Eligible Mortgagees. **THIS APPROVAL REQUIREMENT DOES NOT APPLY TO AMENDMENTS EFFECTED BY THE EXERCISE OF A DEVELOPMENT RIGHT PROVIDED IN APPENDIX “A” ATTACHED HERETO.** A change to any of the provisions governing the following would be considered material:

- Voting rights.
- Assessment liens or the priority of assessment liens.
- Reductions in reserves for maintenance, repair, and replacement of Common Elements.
- Responsibility for maintenance and repairs.
- Reallocation of interests in the General Common Elements or Limited Common Elements, or rights to their use; except that when Limited Common Elements are reallocated by Declarant pursuant to any rights reserved by Declarant pursuant to Appendix “A”, by agreement between Owners (only those Owners and only the Eligible Mortgagees holding mortgages against those Units need approve the action).
- Redefinitions of boundaries of Units, except pursuant to any rights reserved by Declarant pursuant to Appendix “A”.
- Convertibility of Units into Common Elements or Common Elements into Units.
- Expansion or contraction of the Regime, or the addition, annexation, or withdrawal of property to or from the Regime.
- Property or fidelity insurance requirements.
- Imposition of any restrictions on the leasing of Units.
- Imposition of any restrictions on Owners’ right to sell or transfer their Units.
- Restoration or repair of the Regime, in a manner other than that specified in the Documents, after hazard damage or partial condemnation.
- Any provision that expressly benefits mortgage holders, insurers, or guarantors.

B. Sample Underwriting Amendment Provision

During the Development Period, Declarant may amend this Declaration and the other Documents, without consent of other Owners or any mortgagee, for the following limited purposes: (i) to meet the requirements, standards, or recommended guidelines of an Underwriting Lender to enable an institutional or governmental lender to make or purchase mortgage loans on the Units.

C. Sample Transition Clause

Declarant may appoint, remove, and replace any officer or director of the Association, none of whom need be Members or Owners, and each of whom is indemnified by the Association as a “Leader,” subject to the following limitations: (i) within one hundred and twenty (120) days after fifty percent (50%) of the total number of Units that may be created have been conveyed to Owners other than Declarant, at least one-third of the Board must be elected by the Owners other than Declarant; and (ii) within one hundred and twenty (120) days after seventy-five percent (75%) of the total number of Units that may be created have been conveyed to Owners other than Declarant, all Board members must be elected by all Owners, including the Declarant.

EXHIBIT B

VA COMPLIANCE CHECKLIST

VA REQUIREMENT	SOURCE OF VA REQUIREMENT	GOVERNING DOCUMENTS COMPLIANT?	APPLICABLE PROVISION OF GOVERNING DOCUMENTS	DESCRIPTION OF AMENDMENT REQUIRED
1. Legal estate of each unit owner must comply with the provisions of 38 CFR 36.4350.	38 CFR 36.4357(b)			
2. Declaration shall allocate an undivided interest in the common elements to each unit.	38 CFR 36.4357(b)			
3. Interests may be allocated equally to each unit, may be proportionate to that unit's relative size or value, or may be allocated according to any other specified criteria provided that the method chosen is equitable and reasonable for that condominium.	38 CFR 36.4357(b)			
4. Declaration, bylaws and other enabling documentation shall conform to the laws governing the establishment and maintenance of condominium regimes within the jurisdiction in which the condominium is located, and to all other laws which apply to the condominium.	38 CFR 36.4357(c)(1)			
5. Declaration and all amendments or modifications thereof shall be placed of record in the manner prescribed by the appropriate jurisdiction.	38 CFR 36.4357(c)(2)			
6. If the bylaws are not recorded, then covenants, restrictions and other matters requiring record notice should be contained in the declaration or equivalent document.	38 CFR 36.4357(c)(2)			
7. The owner's association shall be required to make available to unit owners, lenders and the holders, insurers and guarantors of the first mortgage on any unit, current copies of the declaration, bylaws and other rules governing the condominium, and other books, records and financial statements of the owners' association.	38 CFR 36.4357(c)(3)			
8. The owners' association also shall be required to make available to prospective purchasers current copies of the declaration, bylaws and other rules governing the condominium, and the most recent annual audited financial statement, if such is prepared.	38 CFR 36.4357(c)(3)			

VA COMPLIANCE CHECKLIST

VA REQUIREMENT	SOURCE OF VA REQUIREMENT	GOVERNING DOCUMENTS COMPLIANT?	APPLICABLE PROVISION OF GOVERNING DOCUMENTS	DESCRIPTION OF AMENDMENT REQUIRED
9. While the declarant is in control of the owners' association, amendments to the declaration, bylaws or other enabling documentation must be approved by VA. This provision does not apply to amendments which annex additional phases to the condominium regime in accordance with a general plan of development.	38 CFR 36.4357(c)(4)			
10. The description of the units, common elements, any recreational facilities and other related amenities, and any limited common elements shall be clear and in conformity with the law of the jurisdiction where the project is located.	38 CFR 36.4357(d)(1)			
11. Responsibility for maintenance and repair of all portions of the condominium shall be set forth clearly.	38 CFR 36.4357(d)(1)			
12. The declaration or other legally enforceable and binding document must state in a reasonable manner the overall development plan of the condominium, including building types, architectural style and the size of the units for those phases of the condominium which are required to be built.	38 CFR 36.4357(d)(2)			
13. Under the applicable provisions of the declaration or such other legally enforceable and binding document, the development of the required portion of the condominium must be consistent with the overall plan, except that the Declarant may reserve the right to change the overall plan or decide not to construct planned units or improvements to the common elements if the declaration sets forth the conditions required to be satisfied prior to exercise of that right the time within which the right may be exercised, and any other limitations and criteria that would be necessary or appropriate under the particular circumstances.	38 CFR 36.4357(d)(2)			
14. In an expandable project, additional phases which are not required to be built may be described in the development plan in very general terms, or the declaration may provide that the Declarant makes no assurances concerning the construction, building types, architectural styles and size of the units, etc. of these phases.	38 CFR 36.4357(d)(2)			

VA COMPLIANCE CHECKLIST

VA REQUIREMENT	SOURCE OF VA REQUIREMENT	GOVERNING DOCUMENTS COMPLIANT?	APPLICABLE PROVISION OF GOVERNING DOCUMENTS	DESCRIPTION OF AMENDMENT REQUIRED
15. The declaration may not bind the owners' association to any management contract, employment contract or lease of recreational or parking areas or facilities; or any contract or lease, including franchises and licenses, to which a Declarant is a party unless the owners' association has a right of termination which is exercisable without penalty at any time after transfer of control, upon not more than 90 days' notice to the other party.	38 CFR 36.4358(a)(2)			
16. The owners' association shall be granted a right of entry upon unit premises and any limited common elements to effect emergency repairs, and a reasonable right of entry thereupon to effect other repairs, improvements, replacement or maintenance as necessary.	38 CFR 36.4358(b)(1)			
17. The owners' association should be granted other rights, such as the right to grant utility easements under, through or over the common elements, which are reasonably necessary to the ongoing development and operation of the project.	38 CFR 36.4358(b)(2)			
18. The declaration or its equivalent shall describe the authority of the owners' association to levy and enforce the collection of general and special assessments for common expenses and shall describe adequate remedies for failure to pay such common expenses.	38 CFR 36.4358(b)(4)(i)			
19. The common expenses assessed against any unit, with interest, late charges, costs and a reasonable attorney's fee shall be a lien upon such unit in accordance with applicable law.	38 CFR 36.4358(b)(4)(i)			
20. Each such assessment, together with interest, late charges, costs, and attorneys' fee, shall also be the personal obligation of the person who was the owner of such unit at the time the assessment fell due. The personal obligation for delinquent assessments shall not pass to successors in title or interest unless assumed by them, or required by applicable law.	38 CFR 36.4358(b)(4)(i)			

VA COMPLIANCE CHECKLIST

VA REQUIREMENT	SOURCE OF VA REQUIREMENT	GOVERNING DOCUMENTS COMPLIANT?	APPLICABLE PROVISION OF GOVERNING DOCUMENTS	DESCRIPTION OF AMENDMENT REQUIRED
21. There shall be in new or proposed condominium projects (including conversions) a provision for an adequate reserve fund for the periodic maintenance, repair and replacement of the common elements, which fund shall be maintained out of regular assessments for common expenses. Additionally, a working capital fund must be established for the initial months of the project operations equal to at least a 2months' estimated common area charge for each unit.	38 CFR 36.4358(b)(4)(ii)			
22. Any assessment lien must be subordinate to any Department of Veterans Affairs guaranteed mortgage except as provided in 38 CFR 36.4352	38 CFR 36.4358(b)(4)(iii)			
23. A lien for common expense charges and assessments shall not be affected by any sale or transfer of a unit except that a sale or transfer pursuant to a foreclosure of a first mortgage shall extinguish a subordinate lien for common expense charges and assessments which became payable prior to such sale or transfer. Any such sale or transfer pursuant to a foreclosure shall not relieve the purchaser or transferee of a unit from liability for, nor the unit so sold or transferred from the lien of, any common expense charges thereafter becoming due.	38 CFR 36.4358(b)(4)(iii)			
24. The declaration or equivalent document shall establish a duty on each unit owner, including the Declarant, to pay a proportionate share of common expenses upon being assessed therefore by the owners' association. Such share may be allocated equally to each unit, may be proportionate to that unit's common element interest, relative size or value, or may be allocated according to any other specified criteria provided that the method chosen is equitable and reasonable for that condominium.	38 CFR 38.4358(c)(1)			
25. The declaration or equivalent document shall allocate a portion of the votes in the association to each unit. Such portion may be allocated equally to each unit, may be proportionate to that unit's common element interest, relative size or value, or may be allocated according to any other specified criteria provided that the method chosen is equitable and reasonable for that condominium.	38 CFR 38.4358(c)(2)			

VA COMPLIANCE CHECKLIST

VA REQUIREMENT	SOURCE OF VA REQUIREMENT	GOVERNING DOCUMENTS COMPLIANT?	APPLICABLE PROVISION OF GOVERNING DOCUMENTS	DESCRIPTION OF AMENDMENT REQUIRED
26. There may not be any restriction upon any unit owner's right of ingress and egress to his or her unit.	38 CFR 38.4358(c)(3)			
27. In the event any portion of the common elements encroaches upon any unit or any unit encroaches upon the common elements or another unit as a result of the construction, reconstruction, repair, shifting, settlement, or movement of any portion of the improvements, a valid easement for the encroachment and for the maintenance of the same shall exist so long as the encroachment exists. The declaration may provide, however, reasonable limited on the extent of any easement created by the overlap of units, common elements, and limited common elements resulting from such encroachments.	38 CFR 38.4358(c)(4)(i)			
28. If permitted by the governing law within the jurisdiction where the project is located, the existing physical boundaries of a unit or a common element or the physical boundaries of a unit or a common element reconstructed in substantial accordance with the original plats and plans thereof become its boundaries rather than the metes and bounds expressed in the deed, plat or plan, regardless of settling or lateral movement of the building, or minor variance between boundaries shown on the plats, plans or in the deed and those of the building. The declaration should provide reasonable limits on the extent of any such revised boundary(ies) created by the overlap of units, common elements and limited common elements resulting from such encroachments.	38 CFR 38.4358(c)(4)(ii)			
29. The right of a unit owner to sell, transfer or otherwise convey his or her unit in a condominium shall not be subject to any right of refusal or similar restriction if the declaration or similar document is recorded on or after December 1, 1976.	38 CFR 38.4358(c)(5)			
30. There shall be no prohibition or restriction on a condominium unit owner's right to lease his or her unit, except for: (i) a requirement that leases have a minimum initial term of up to 1 year; or (ii) age restrictions or restrictions imposed by State or local housing authorities which are allowable under 38 CFR 38.4308(e) or 38 CFR 36.4350(b)(5)(iv).	38 CFR 38.4358(c)(6)			

VA COMPLIANCE CHECKLIST

VA REQUIREMENT	SOURCE OF VA REQUIREMENT	GOVERNING DOCUMENTS COMPLIANT?	APPLICABLE PROVISION OF GOVERNING DOCUMENTS	DESCRIPTION OF AMENDMENT REQUIRED
31. The owners' association and any aggrieved unit owner should be granted a right of action against unit owners for failure to comply with the provisions of the declaration, bylaws, or equivalent documents, or with decisions of the owners' association which are made pursuant to authority granted the owners' association in such documents. Unit owners should have similar rights of action against the owners' association.	38 CFR 38.4358(d)			
32. The declarant shall relinquish all special rights, expressed or implied, through which the declarant may directly or indirectly control, direct, modify, or veto any action of the owners' association, its executive board, or a majority of unit owners, and control of the owners' association shall pass to the owners of units within the project, not later than the earlier of the following: (i) 120 days after the date by which 75% of the units have been conveyed to unit purchasers; or (ii) the last date of a specified period of time following the first conveyance to a unit purchaser; such period of time is to be reasonable for the particular project. The maximum acceptable period usually will be from 3 to 5 years for single-phased condominium regimes and 5 to 7 years for expandable condominiums.	38 CFR 36.4359(a)(1)			
33. The bylaws of the condominium should be sufficiently detailed for the successful governance of the condominium by unit owners. Among other things, such documents should contain adequate provisions for the election and removal of directors and officers.	38 CFR 36.4359(d)			
34. The holder shall require hazard and flood insurance policies to be procured and maintained in accordance with 38 CFR 36.4326. Because of the nature of condominiums, additional types of insurance coverages – such as tort liability insurance for injuries sustained on the premises, personal liability insurance for directors and officers managing association affairs, boiler insurance, etc. – should be considered in appropriate circumstances.	38 CFR 36.4359(e)(1)			

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VA REQUIREMENT	SOURCE OF VA REQUIREMENT	GOVERNING DOCUMENTS COMPLIANT?	APPLICABLE PROVISION OF GOVERNING DOCUMENTS	DESCRIPTION OF AMENDMENT REQUIRED
35. The securing of appropriate fidelity bond coverage is recommended but not required, for any person or entity handling funds of the owners' association, including, but not limited to, employees of the professional managers. Such fidelity bonds should name the association as obligee, and be written in an amount equal to at least the estimated maximum of funds, including reserve funds, in the custody of the owners' association or the management agent at any given time during the term of the fidelity bond. However, the bond should not be less than a sum equal to 3 months' aggregate assessments on all units plus reserve funds.	38 CFR 36.4359(e)(2)			
36. The declarant's right to expand the regime must be fully described in the declaration. The declaration must contain provisions adequate to ensure that future improvements to the condominium will be consistent with initial improvements in terms of quality of construction.	38 CFR 36.4360(a)(1)			
37. The declarant must build each phase in accordance with an approved general plan for the total development supported by detailed plats and plans of each phase prior to the construction of the particular phase.	38 CFR 36.4360(a)(1)			
38. The declaration or equivalent document must contain a covenant that the condominium regime may not be amended or merged with a successor condominium regime without prior written approval of the Secretary. The declarant may add phases to an expandable condominium regime without the prior approval of the Secretary if the phasing implements a previously approved general plan for the total development. A copy of the amendment to the declaration or other annexation document which adds each phase must be submitted to the Secretary in accordance with 38 CFR 36.4360a(b)(6).	38 CFR 36.4360(a)(3)			
39. The declarant must purchase (at declarant's own expense) a general liability insurance policy in an amount not less than \$1 million for each occurrence, to cover any liability which owners of previously sold units are exposed to as a result of further condominium project development.	38 CFR 36.4360(a)(5)			

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VA REQUIREMENT	SOURCE OF VA REQUIREMENT	GOVERNING DOCUMENTS COMPLIANT?	APPLICABLE PROVISION OF GOVERNING DOCUMENTS	DESCRIPTION OF AMENDMENT REQUIRED
40. Each expandable project shall have a specified maximum number of units which will give each unit owner a minimum percentage of interest in the common elements. Each project shall also have a specified minimum number of units which will give each unit owner a maximum percentage of interest in the common elements. The minimum number of units to be built should be that which would be adequate to reasonably support the common elements. The maximum number of units to be built should be that which would not overload the capacity of the common facilities.	38 CFR 36.4360(a)(6)			
41. The maximum possible percentage(s) and the minimum possible percentage(s) of undivided interest in the common elements for each type of unit must be stated in the declaration or equivalent document.	38 CFR 36.4360(a)(6)			
42. The declaration or equivalent document shall set forth clearly the basis for reallocation of unit owner's ownership interests, common expense liabilities and voting rights in the event the number of units in the condominium is increased. Such reallocation shall be according to the applicable criteria set forth in 38 CFR 36.4357(b) and 38 CFR 36.4358(c)(1) and (2).	38 CFR 36.4360(a)(7)			
43. The declarant's right to expand the condominium must be for a reasonable period of time with a specific ending date. The maximum acceptable period will usually be from 5 to 7 years after the date of recording the declaration.	38 CFR 36.4360(a)(8)			
44. Each phase in the series approach is to be considered as a separate project. A separate set of legal documents must be filed for each phase or project that relates to the condominium within its own boundary. The declaration for each phase must describe the particular project as a part of the whole development area, but subject only the one phase to the condominium regime. A separate unit ratio must be established that would relate each unit to all units of the particular condominium for purposes of ownership in the common areas, voting rights and assessment liability. A separate association may be created to govern the affairs of each condominium. Each phase is subject to a separate presale requirement.	38 CFR 36.4360(b)(1)			

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VA REQUIREMENT	SOURCE OF VA REQUIREMENT	GOVERNING DOCUMENTS COMPLIANT?	APPLICABLE PROVISION OF GOVERNING DOCUMENTS	DESCRIPTION OF AMENDMENT REQUIRED
45. In the case of proposed projects, or projects under construction, the declaration should state the number of total units that the developer intends to build on other sections of the development area.	38 CFR 36.4360(b)(2)			

