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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 limits on the extent of any easement created by the overlap of units, common elements, and limited common elements resulting from such encroachments; or

(ii) Monuments as boundaries. 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.

(5) Right of first refusal. 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 first refusal or similar restriction if the declaration or similar document is recorded prior to December 1, 1976. If the declaration was recorded prior to December 1, 1976, the right of first refusal must comply with §36.4854(b)(5)(ii); Provided, however, restrictions on the basis of age or restrictions established by a State, Territorial, or local government agency as part of a program for providing assistance to low- and moderate-income purchasers shall be governed by §36.4854(b)(5)(iv).

(Authority: 38 U.S.C. 3703(c))

(6) Leasing restrictions. Except as provided in this paragraph, there shall be no prohibition or restriction on a condominium unit owner’s right to lease his or her unit. The following restrictions are acceptable:

(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 §36.4809(e) or §36.4854(b)(5)(iv).

(d) Rights of action. 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.

(Authority: 38 U.S.C. 3703(c)(1), 3710(a)(6))

§ 36.4363 Miscellaneous legal requirements.

(a) Declarant transfer of control of owners’ association—(1) Standards for transfer of control. 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 percent of the units have been conveyed to unit purchasers,

(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, or

(iii) On a case basis, modifications or variations of the requirements of paragraphs (a)(1)(1) and (11) of this section will be acceptable, particularly in circumstances involving very large condominium developments.
§ 36.4364 Documentation and related requirements—flexible condominiums and condominiums with off-site facilities.

(a) Expandable condominiums. The following policies apply to condominium regimes which may be increased in size by the declarant:

(1) 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. The declarant must build each phase in accordance with an approved general plan for the total development (§ 36.4861(d)(2)) supported by detailed plats and plans of each phase prior to the construction of the particular phase.

(2) The reservation of a right to expand the condominium regime, the method of expansion and the result of an expansion must not affect the statutory validity of the condominium regime or the validity of title to the units.

(3) 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 have the proposed legal documentation to accomplish the merger reviewed prior to recordation. However, the Secretary’s final approval of the merger will not be granted until the successor condominium has been legally established and construction completed. 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 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.

(Authority: 38 U.S.C. 3703(c)(1), 3710(a)(6))