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Resort area amenities agreements, clubs and recreational covenants

With property values no longer rising (and falling in some markets), focus returns to the recreational value of mountain property beyond square-foot prices. Developers now seek to enhance values, property managers look for new revenue sources, and owners hope to enjoy their vacation homes while real estate markets recover. Adding a new amenity through an access agreement can help achieve these goals.

Many resort properties rely primarily on ski season use and proximity to ski lifts. But affiliation with a golf club can expand annual use while nongolf social clubs also grow in popularity. Access to prized streams for anglers or affiliation with a rafting company or with equestrian stables may provide a better fit for other communities. In structuring an amenity access agreement, consider at least these key factors: term of amenity use, capacity issues and the enforcement of financial obligations for amenity expenses.

Easements offer the greatest certainty for long-term use of an amenity, enforcement of financial obligations and allocation to real estate tax values. The easement burdening both the amenity and the residential resort should describe how either party may limit the number of users and also provide a reasonable procedure to wind down the easement obligations. The landowner liability protections of the Colorado Recreation Use Statute should be closely reviewed. Often the easement will grant the amenity owner a right to lien the residential property if a financial obligation is not paid. With such strong enforcement remedies, the



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expense lien should be subordinated to any lien granted by the residential owner to avoid interference with purchase financing.

On the other end of the spectrum, when greater flexibility is desired, an amenity access agreement may be a temporary license, lease or a short-term service contract. For example, a resort owners association may enter into a seasonally recurring service contract with a rafting company, birdwatching society or local winemaker, offering advance reservations, special events or preferred rates to individual resort owners. Colorado regulations concerning the qualifications and licensing of outfitters and guides should be reviewed.

In the middle of the spectrum are affiliation agreements with existing clubs. For existing golf communities, golf membership may be mandatory and payment of financial obligations enforced through liens granted in the golf community covenants. If membership is made mandatory through real covenants, the prevailing legal

residential owners should receive budget approval or audit rights regarding amenity expenses and separate consent rights before incurring expenses for major capital improvements or replacements.

Additionally,

the amenity view treats membership as an appurtenant real estate right and allows enforcement of the golf club's lien against successors in title. As highlighted in recent decisions involving the Fairway Pines Estates Owners Association, however, this view is not free from challenge. The membership plan also may permit a number of off-site or "national" members whose continued membership may not be mandatory and, rather than a real estate interest, could be treated either as a revocable license, stock or a debt instrument.

Perhaps the simplest form of amenities agreement between a golf club and off-site resort is the bulk reservation of national memberships with a preferred initiation deposit to be offered to off-site resort owners. Two other types of amenities agreements are common. The golf membership plan may permit an off-site resort owners association to join as a corporate national membership, allowing the resort owners to access the golf facilities through the association's membership. The resort association then would be responsible for collecting and enforcing financial obligations payable to the golf club. The golf club also may annex or overlay the golf club covenants over the resort community. The resort owners would become mandatory members subject to direct enforcement of financial obligations and potential liens as granted in the golf community's real property covenants.

Parallel issues arise with the growing popularity of nongolf social clubs, which offer a range of benefits, such as slopeside parking, private lockers, fitness center and members-only social

events. By expanding access to an existing project amenity, the owners and operators of that amenity may develop a new revenue source or offer cross-use of such amenity as valuable in trade with another community. If social club memberships are anticipated in the initial community documents, the social club may be held by the initial developer in a separate commercial unit or parcel. The social club owner is then similar to the golf club owner and can control the range of social memberships offered to community owners, to owners in neighboring communities through affiliation agreements, and to the general public.

Compare treatment of the same amenity package if owned as a common element of a condominium community and managed by a nonprofit owners association. To offer these amenities as a social club to third parties, the association must secure approval from the applicable portion of owners under the community governing documents. The association must consider how it will apply and report taxable income from the social club, including structuring the program to avoid changing the association's income tax status, avoid distributable cash for owners, and triggering securities law concerns. The possibility for recharacterization of the common element amenity as commercial space during property tax assessment also should be considered.

Speculation driving up mountain land values is over at least for the current cycle. Still, despite the temporary downturn, we should not forget the recreational wealth still held in the Rockies.▲