Barley Snyder

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Incorporating for Real Estate Agents

By: Daniel T. Desmond
Related Practice Area: Real Estate
Related Industry: Construction

As a real estate agent, you're already running your own business. But have you incorporated to enjoy any of the legal or tax benefits?

Once real estate agents incorporate, they enjoy personal asset and liability protection, possible tax benefits and a built-in succession plan that can offer incentive compensation to junior members on their team. While there is an upfront cost that often hinders agents from incorporating, the long-term benefits and protections routinely pay for that cost many times over.

There are many different types of entities real estate agents could choose from, but the easiest to form and operate will be an LLC. Moreover, if the LLC elects S-corporation taxation status, it can experience significant tax savings on self-employment taxes. In many cases, the tax savings alone could far offset the cost of formation.

The process still is mostly new for real estate agents, as the Pennsylvania Real Estate Commission amended the Real Estate Licensing and Registration Act in 2009 to make incorporating into "qualified associations" legal. But we do know there are certain qualifications that go along with the incorporation:

- The entity cannot hold the real estate license; agents keep their license in their individual names.
- The entity can only be owned by one or more licensees who are all affiliated with the same broker.
- Commissions may be paid to the qualified association, who can then distribute that income to its members as salaries/distributions.

- The entity must be registered with the Pennsylvania Real Estate Commission in order to be a qualified association.
- The entity cannot advertise as providing real estate services and may not have the term "real estate" in their entity title. The reason for this is that the real estate agent must remain front and center to their clients.
- The association cannot hold escrow funds.

While the owners of qualified associations do not enjoy personal liability protection in regard to their clients, they would be protected from personal liability in other situations such as contract disputes with third parties and liability from tenants of properties the association owns.

If you are a real estate agent interested in a qualified association, please reach out to me at any time.

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Catching up with ... Erica Townes

By: Erica R. Townes
Related Practice Area: Real Estate
Related Industry: Construction

In each Barley Snyder Real Estate and Construction Newsletter, we'll feature someone from our firm to help you learn more about them. In this edition, we're catching up with the one of our newest real estate attorneys, Erica Townes.

College: Old Dominion University

Law school: Widener University Commonwealth School of Law

From: Mechanicsville, Va.

Lives: York, Pa.

Started at Barley Snyder: March 2019

Work: Erica is an associate in the Real Estate and Business practice groups, assisting clients in residential and commercial development, property acquisition, lease negotiation and land use concerns. She also assists start-up business owners in forming business entities and governing documents and already has worked with a high-profile real estate case in downtown York.

Did you know?: While not a performer herself, Erica is an enthusiast and fan of musical theater. Her favorite show currently running on Broadway is "Hamilton."

She says: "It has been an exciting and enjoyable experience joining the Barley Snyder team. The firm's collaborative and collegial approach to practicing law separates it from other legal service providers and also translates into superior service for our clients."

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Long Name, Important Step: The Ins and Outs of Subordination, Non-Disturbance and Attornment Agreements

By: Maria Di Stravolo Elliott
Related Practice Area: Real Estate
Related Industry: Construction

(Editor note: This is Part 1 of a three-part series examining different types of collateral agreements often following commercial leases. Part 2 will be coming in our fall newsletter)

While it may be a mouthful to say, a Subordination, Non-Disturbance and Attornment Agreement (SNDA) is a vital cog of commercial leases.

The three-party agreement between the mortgage lender, the borrower (normally the landlord) and the tenant is designed to protect all parties in the event of a foreclosure on the property.

There are standard SNDAs the lenders or landlords often possess and reuse multiple times. But those standard documents don't always cover every base and can sometimes be stilted to favor one party over the other two.

Here are some things all parties in a SNDA need to know before signing on the dotted line:

Subordination

A lender should ensure that the lease agreement is subordinate - or that it has less priority - to the lease agreement. This will allow the lender or whoever buys the foreclosure to have flexibility to retain the tenant or to terminate the lease. Many lease agreements have been in place for years, and tenants may not be paying market rent. Or, a new owner of the property has someone willing to pay a higher rent, or may have different intentions for what they want to do with the property.

The landlord also needs to ensure any leases include a provision that the lease is subordinate to the mortgage. If it isn't included, it likely will become more difficult to obtain financing or refinancing if the lease has already been signed. If this isn't included, and the lease already is signed, landlords should encourage the tenant to sign a subordination agreement (if the tenant is willing to do it).

Non-Disturbance

All tenants want to negotiate for a non-disturbance clause in the SNDA. It allows the tenant to stay at their leased property in the event of a foreclosure. Tenants may have invested significant amounts of money into the leased property and don't want to find a new location if the property faces foreclosure. Lenders may agree to this component, but will also attach a clause that the tenant cannot be in default of its lease for this provision to be in effect.

Attornment

Lenders want to make sure the attornment component is clearly spelled out, which means that the tenant will attorn (or recognize) the lender or new owner of the property as the new landlord. That includes making rent payments to the new owner. A tenant, however, will want to include a provision that it will not pay rent to the new landlord until it receives written notice that the new owner is succeeding to the previous owner as the landlord.

Notice to Lender of Landlord Default

Lenders want it - tenants don't. The SNDA could include a requirement for the tenant to inform the lender when the landlord is in default of the lease. Such notice then allows the lender to cure the default, which could be a lengthy process that could adversely affect the tenant's business. If the tenant has the right to cancel the lease or abate the

rent due to a landlord default, the lender may also require that tenant must accept a lender's cure of landlord's default.

Recording of the SNDA

Tenants want to make sure the SNDA is recorded in the county's recorder of deeds office. That way, if a new owner comes in through foreclosure, they will know that there is a lease being protected.

It is important to remember that not all standard SNDA forms include all of the important provisions lenders, landlords and tenants should be negotiating for. Before you sign an SNDA, be sure to talk with an attorney that has experience in commercial real estate leases.

Maria Di Stravolo Elliott is the chair of the Barley Snyder Real Estate Practice Group. Part 2 of this series will explain guarantee agreements. Maria can be reached at 717-399-1517 or at melliott@barley.com.

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Pennsylvania's Legislature Changes the Law Governing Common-Interest Ownership Communities

By: Christopher A. Naylor and Erica R. Townes
Related Practice Area: Real Estate
Related Industry: Construction

Recently, Gov. Tom Wolf signed in to law Act 84 of 2018, which amends a number of legal and procedural sections of the Pennsylvania Uniform Condominium Act, the Pennsylvania Uniform Planned Community Act and the Pennsylvania Uniform Real Estate Cooperative Act.

One of Act 84's principal changes provides for additional enforcement options for homeowner associations (HOAs) against unit owners who are delinquent in paying their assessments or who have violated the rules and regulations of the association. Specifically, in these circumstances, if a unit owner violates these conditions, it could result in the suspension of the owners' right to:

- vote on association matters
- serve on the board or any committees
- access common elements, recreational facilities or amenities

Accordingly, a unit owner whose assessments are delinquent, or who has installed a fence in violation of community rules, may be denied access to the community's pool or clubhouse, for example.

Another key change in the amendments involves the statute of limitations period for construction warranty claims by an association against the declarant, which currently sits at six years from the time the warranty begins (the warranty itself is for two years). The amendments, however, change that limitation period to the said six years *or* two years after unit owners elect an executive board when the declarant control period ends, whichever is later. In the event that the statute of limitations would otherwise run out during the period of declarant control, the new amendments extend an association's ability to address any warranty claims after the transfer of control to the unit owners.

In addition, this act provides alternative procedures if the election of the executive board of the association does not occur after the termination of the period of declarant control, whether the declarant delays or refuses to have such

election. In such event, a special meeting of the unit owners may be called for such purpose by any member of the executive board elected by the unit owners or, if there is no such member of the executive board, the unit owners entitled to cast at least 10% of the votes in the association.

Act 84 also addresses the transfer of storm water management operation to associations under the Pennsylvania Department of Environmental Protection regulations, clarifying the responsibility for storm water management facilities once they are completed. For example, if the declaration provides that the association or unit owner will be responsible for the operation and maintenance of storm water management facilities, the declaration must expressly state this.

The provisions of Act 84 apply only to common interest communities created after the amendments became effective in December 2018, but communities created before their effective date may elect to have these changes apply. HOA boards should review their policies and procedures to consider whether to incorporate these changes in the law.

If you have questions about the Act 84 changes, or any other laws governing common interest communities, please contact any of the attorneys in Barley Snyder's Real Estate Practice Group.

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