

## Matrix of Secondary Market (FHA, VA, Fannie Mae, Freddie Mac) Requirements for Condominium Unit Loans

The following pages are taken from a project originally done for updating published materials.

We are attempting to organize (by subject matter) the requirements of the various secondary market lenders, guarantors and insurers who deal in condominium unit loans, so that we can:

analyze what we need to put in our condominium documents (to try to qualify with as many secondary market requirements as possible) to avoid the necessity of amending documents later when someone wants to “qualify” the project;

cross reference the requirements in condominium documents included in future editions of *Ohio Condominium Law* <http://west.thomson.com/productdetail/152941/40361815/productdetail.aspx> and *Ohio Real Estate Law* published by West (now part of Thomson Reuters). (Please excuse the shameless self-promotion.); and

have a checklist of items to review when evaluating how difficult (or easy) it will be to qualify a specific project.

The “Matrix” has since been used in presentations for the ABA and the American College of Real Estate Lawyers (ACREL)

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Note that this is not an exhaustive list of all secondary market requirements. It was prepared with an initial emphasis on documentary requirements (which is the attorney’s bailiwick), does not attempt to be comprehensive with regard to some topics (such as rules regarding expandable projects) and avoids some topics which are rarely problematic (such as permitted easements and title exceptions). It is the author’s hope that it will be a helpful starting point.

## Ineligible Projects

### **FHA FHA Condominium Project Approval & Processing Guide 1.4 (June 30, 2011)**

Mandatory rental pools or other arrangements which restrict owner's ability to occupy the unit;

25% of total space is used for nonresidential purposes

Condominium Hotels or "Condotels" (examples – has registration services, has word "hotel" or "motel" in title

Located in Coastal Barriers of Atlantic, Gulf of Mexico or Great Lakes

Timeshares or segmented ownerships

Multi-dwelling Units;

Assisted Living Facilities

Projects where developer retains ownership of common areas or amenities after control turned over

### **FNMA Fannie Mae Single Family/2011 Selling Guide B4-2.1-02 (12/01/2010).**

Hotel or motel, or that restrict owner's ability to occupy their own unit, or which have mandatory rental pool agreements, or which give management control over occupancy (see regs for further descriptions)

Projects with non-incident business operations owned by association (e.g., spa, restaurant, health club)

Investment securities (filed with SEC or where promoted as investment opportunities)

Tenancy-in-common or similar arrangements; Timeshares or other segmented ownership projects

New project (not fully completed or less than 90% conveyed to purchasers) with a unit less than 400 sq. ft. Fannie Mae Single Family/2011 Selling Guide B4-2.2-04 (12/01/2010).

Sales where Interested Party Contributions are in excess of Fannie Mae's eligibility policies for individual mortgage loans, including, but not limited to:

Builder/developer contributions; sales concessions; and HOA or principal and interest payment abatements and/or contributions not disclosed on HUD-1.

For rules on HOA credits in excess of 12 months which are paid outside of closing and not disclosed on the HUD-1, see Fannie Mae Single Family/2011 Selling Guide B3-4.1-03 (06/30/2010).

Projects where more than 20% of the total space is used for non-residential purposes



**Ineligible Projects (continued)**

**FNMA** (Continued) Fannie Mae Single Family/2011 Selling Guide B4-2.1-02 (12/01/2010).

Projects where a single entity (individual, investor group, etc.) owns more than 10% of total units.

Multi-dwelling unit projects or co-ops (see regs for variations on the theme)

Projects that represent legal, but non-conforming, use of land if zoning regulations prohibit rebuilding the improvements to current density in the event of partial or full destruction

See “Pending Legal Actions” section for additional description of actions which would make project ineligible

**Freddie** Freddie Mac Single Family Seller/Servicer’s Guide 42.3 (08/16/10)

(a) project which is (or has potential to be) subject to state or federal securities regulation

(b) Hotel or resort

(c) project with multi-dwelling units

(d) project with more than 20% of square footage used for non-residential use

(e) common interest [tic] (f) fragmented ownership; or (g) timeshare

(i) legal non-conforming use (attached projects)

(j) litigation (or ADR) involving safety, structural soundness, habitability

(k) projects sold with excessive “interested party contributions” (See Freddie Mac Single Family Seller/Servicer’s Guide 25.3 (08/16/11)

(l) where single entity owns more than 10% of units

(m) project comprised of owners who own their units and renters who rent or lease from the developer or a third party. (doesn’t apply to conversions where tenants entitled to rent by law)

(n) continuing care facilities (see regs. for further description)

(o) project that Fannie Mae has rejected

## Mixed Use

**FHA** FHA Condominium Project Approval & Processing Guide 2.1.3 (June 30, 2011)

No more than 25% of total floor area non-residential/commercial (special rules for “live/work” projects)

Exceptions can be granted to existing projects > 1 year old, where control turned over, but no more than 35%

**VA** Commercial areas are acceptable, but will be considered in value. 38 CFR §36.4360a(g)

If mixed use, voting rights among members must be fully described, including provisions allowing for representation or protection of minority interests. VA Lenders Handbook, 16-B, Exhibit A,(A)4(a) (7/1/2000).

**FNMA** No more than 20% commercial. Fannie Mae Single Family/2011 Selling Guide B4-2.2-04 (12/01/2010).

**Freddie** project is ineligible if more than 20% of total square footage is non-residential [42.3(d) (08/16/10) and 42.11(h) (10/09/09) Freddie Mac Single-Family Seller/Service’s Guide.

Can’t have multiple classes of unit owners and with a commercial entity as manager over the entire project. 42.7(d), (04/01/11).

Can’t have a hotel, and may not have fragmented ownership or interest. 42.7(d),2 (04/01/11).

Docs must explicitly address retail and commercial uses. 42.7(d),5 (04/01/11).

Commercial owners pay all costs related to commercial space. For example, renovation of retail space or retail lobby (unless whole building where majority of residential and majority of commercial owners agree). 42.7(d), 6 (04/01/11).

Commercial owners can’t override residential on issues involving residential units. 42.7(d),9

Docs must identify CE reserved for residential owners, including parking. 42.7(d),10 (04/01/11).

Commercial owners carry appropriate commercial insurance paid for by them. 42.7(d),8 (04/01/11).

Operating reserves of at least 3 months. 42.7(d),12 (04/01/11).

Docs explicitly address how assessments divided b/w residential & commercial units. 42.7(d),11 (04/01/11).

Project management must not manage a rental program for residential units. 42.7(d),13 (04/01/11).

If common entrance, a majority of commercial & a majority of residential votes are needed for upgrade. 42.7(d),7 (04/01/11).



## Conversions

**FHA** FHA Condominium Project Approval & Processing Guide 1.5.1 (June 30, 2011) has detailed rules for newly converted projects for which applications for approval are submitted through HUD “HARP” process (no DELRAP, where Direct Endorsement Lender approves project) with 2 years from date of conversion.

### For All Newly Converted Projects:

Only where conversion complete, not based on conversions or phases that are anticipated in the future

Work completed as evidenced by engineering or architectural inspection w/i 12 months of completion

Reserve study & engineer’s report: commenting favorably on structural integrity, remaining useful life

Review of current year budget, current balance sheet, actual income & expense statement must determine that budget and operating results are sufficient and:

Includes allocations/line items sufficient to maintain & preserve all amenities and features unique to project

Provide funding and replacement reserves for capital expenditures & deferred maintenance of 10% of budget

Provides funding for insurance coverage and deductibles

Funds to cover total cost of any items identified in reserve study or engineers report that need to be replaced within 5 years from date of study must be deposited in HOA’s reserve account

Detailed description of work proposed or already completed in order for units to be ready for sale

Developer must provide comprehensive sale and marketing strategy

### Additional for NON-GUT (painting, new carpet, replacement of cabinets, fixtures, doors or windows) Conversions

51% conveyed or under contract to owner-occupant principal residents (contract & loan commitments)

Developer may own up to 49% of units at time of project approval

No other owner may own more than 10%

### Additional for GUT (down to shell; new HVAC or Electrical components; any structural modification) Conversions

100% complete (except preference items) before any unit mortgage is endorsed. (May escrow for weather related delays for common area items only)

Building permit (or equivalent) is required and Temporary or Permanent Certificate of Occupancy (or equivalent)



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## Conversions (continued)

**VA** In a conversion where the declarant is in control or still marking units not previously occupied, declarant must provide a statement by a registered professional engineer and/or architect, with an estimate of the remaining useful life of all components (10 years is required on all structural and mechanical components, or declarant must fund 1/10<sup>th</sup> the cost for each year less than 10). Not required for resale units when declarant is not in control and/or selling units (but it is, apparently, required where declarant is either in control or selling units.) 38 CFR 36.4360a(b)(7)(i)(C) (07/01/93)

In declarant controlled project, a statement by local authorities of the adequacy of off-site utilities (eg, sanitary or water) is required. If local authority declines, one may be obtained from a licensed professional engineer. 38 CFR 36.4360a(b)(7)(ii) (07/01/93)

**FNMA** For “gut” conversions (where property is renovated down to its shell, including new HVAC and electrical) created in last 3 years, engineer’s report (or functional equivalent) that was originally obtained for conversion must comment favorably on structural integrity and condition and remaining useful life of major components (heating & cooling systems, plumbing, electrical, elevators, boilers, roof, etc.). Fannie Mae Single Family/2011 Selling Guide B4-2.2-04 (12/01/2010).

For newly created, non-gut conversion, must be processed through FNMA’s Project Eligibility Review Service (“PERS”) The engineer’s report mentioned above, along with an independent reserve study, must be provided along with detailed descriptions of work proposed or already completed for units to be ready for sale. Fannie Mae Single Family/2011 Selling Guide B4-2.2-08 (12/01/2010). See also “Budget Requirements/Reserves” below.

**Freddie** Freddie Mac Single-Family Seller/Service’s Guide 42.2(i) (03/11/10) requires that for newly converted projects, the appraiser or other licensed professional must state that the project is structurally sound, and the condition and remaining useful life of the major components are sufficient for residential use.

All rehabilitation work is completed.

If a partial rehabilitation, lender must verify that all repairs affecting soundness and habitability are complete and replacement reserves have been allocated for all capital improvements, and the underwriter has determined that the reserves are sufficient to fund the improvements.

42.6(C) of the Guide (03/11/10) repeats the requirement that for conversions, there must be an initially funded reserve consistent with the remaining useful life of the individual common elements.

## Pre-Sales

**FHA** at least 30% sold -- FHA Condominium Project Approval & Processing Guide 1.5.1 (June 30, 2011)

-- contract AND evidence that lender is willing to make loan.

Can include secondary residence if meets requirements of 24 CFR 203.18(f)(2). (where mortgagor maintains or will maintain a part-time place of abode and typically spends less than a majority of the calendar year and its not a vacation home.

Requirement not applicable to existing projects or non-gut rehabilitation conversions (where 50% of units must be owner-occupied or sold to owners who intend to occupy the units).

**VA** While Declarant in control – 70%. 38 CFR §36.4360a(c)(1)

**FNMA** 70% sold or under Contract. Fannie Mae Single Family/2011 Selling Guide B4-2.2-05 (10/30/2009).

(Building in which units are located can not be in more than one phase to be counted in column as being “sold” for purposes of meeting 70% requirement. Fannie Mae Single Family/2011 Selling Guide B4-2.2-05 (10/30/2009).

Established Project, 90% conveyed to Buyers – Fannie Mae Single Family/2011 Selling Guide B4-2.2-06 (10/30/2009)

**Freddie** New Project – 70% Freddie Mac Single-Family Seller/Servicer’s Guide 42.6(a) (03/11/10)

Multiple sales to one owner = 1 sale 42.1 (08/16/10)

Building in which units are located can not be in more than one phase if there are multiple buildings in project to be counted in column as being “sold” for purposes of meeting 51% requirement. 42.6(b) (03/11/10).

Completed Project – 51% if borrower is investor. No requirement if borrower is going to use as primary or secondary residence. 42.5(b) (08/16/10)

In mixed use project, pre-sale requirement apply to residential units only. 42.7(d),3 (04/01/11).



## Owner-Occupancy

### FHA FHA Condominium Project Approval & Processing Guide 3.5 (June 30, 2011)

For existing projects, at least 50% owner occupied or sold to owners who intend to occupy

For proposed, under construction, or existing for less than 12 months, 30%.

If includes presales, need evidence that a lender is willing to make loan and buyer intends to occupy or evidence (e.g., certified spreadsheet or chart) from developer that lists all units sold, under contract, or closed.

Can include secondary residence if meets requirements of 24 CFR 203.18(f)(2). (where mortgagor maintains or will maintain a part-time place of abode and typically spends less than a majority of the calendar year and its not a vacation home.

### FNMA 70% sold or under Contract to buyer's intending to occupy (new project)

(Building in which units are located can not be in more than one phase to be counted in column as being "sold" for purposes of meeting 51% requirement. Fannie Mae Single Family/2011 Selling Guide B4-2.2-05 (10/30/2009).

In established project, no owner occupancy requirement if loan being purchased is secured by primary or secondary residence. Fannie Mae Single Family/2011 Selling Guide B4-2.2-06 (10/30/2009). For additional rules regarding other loans, and special rules for counting REO units held by financial institutions, see Fannie Mae Single Family/2011 Selling Guide B4-2.2-06 and 07 (10/30/2009).

In two- to four-unit projects, all but one unit must have been conveyed to owner-occupant principal residence or second home purchasers. Single Family/2011 Selling Guide B4-2.2-04 (12/01/2010).

### Freddie New Project – 70% Freddie Mac Single-Family Seller/Service's Guide 42.6(a) (03/11/10)

Project consisting of one building must have only one legal phase. Any one building in project comprised of multiple buildings cannot be subject to more than one legal phase. 42.6(b) (03/11/10).

Completed Project – 51% if borrower is investor. No requirement if borrower is going to use as primary or secondary residence. 42.5(b) (08/16/10)

In mixed use project, owner-occupancy requirement apply to residential units only. 42.7(d),3 (04/01/11).



## Pending Legal Actions

**FHA** Pending legal actions must be disclosed (except for routine foreclosures commenced by unit lenders) FHA Condominium Project Approval & Processing Guide 2.1.8 (June 30, 2011) Attorney letter must address:

reasons;

anticipated settlement/judgment date;

whether insurance coverage is sufficient to pay without affecting financial solvency of project;

whether it could affect ability of owners to transfer title to units; and

whether it could impact owner's rights

**VA** If developer controls, one of items to be submitted, even for existing unit resales, is a "litigation statement" VA Lenders Handbook, 16-A-03(18) (7/14/2003).

**FNMA** Fannie Mae Single Family/2011 Selling Guide B4-2.1-02 (12/01/2010) lists "ineligible projects":

-Any project for which HOA is named as a party to pending litigation

-Developer is named as a party to litigation and project is not yet turned over

Related to safety, structural soundness, habitability or functional use of the project

Minor matters not considered:

Non-monetary dispute involving neighbor disputes or rights of quiet enjoyment;

Where claimed amount is known, covered by insurance, and insurance company is defending; or

HOA is plaintiff in foreclosure or action for assessments.

**Freddie** Freddie Mac Single-Family Seller/Service's Guide 42.3(j) (08/16/10) includes, in its list of "ineligible projects":

-Where Developer (where project not turned over to home owners) or HOA;

-Is a party to current litigation, arbitration, mediation or other ADR; AND

-Dispute involves safety, structural soundness or habitability of the project.



## Budget Requirements/Reserves

### FHA FHA Condominium Project Approval & Processing Guide 2.1.6 (June 30, 2011)

#### Financial Documents to be reviewed

Current projected budget (if under construction and built in legally declared phases, actual year-to-date)

Current balance sheet for existing projects

If projects existing for over 1 year, income and expense statement

Review of financial documents must determine that budget and operating results are sufficient and:

Includes allocations/line items sufficient to maintain & preserve all amenities and features unique to project

Provide funding and replacement reserves for capital expenditures & deferred maintenance of at least 10% of budget; and provides funding for insurance coverage and deductibles

VA VA Lenders Handbook, 16-B Other VA Requirements (7/1/2000) (D) Other Considerations, Item 1,e references an information brochure or public offering statement disclosing, “at a minimum”, “a projected budget for the community of at least one year at full buildout,” a component for reserves and replacements, if appropriate, and if the project is phased, over 200 units, or includes significant common area improvements, a multi-year feasibility budget with reserve table

16-B (A)(10) requires that if a maximum annual assessment is stated, it may be adjusted by the greater of 10% per annum, a CPI adjustment, or by a vote of the members paying the increase. Adjustments can also be made for increases in certain fixed costs like taxes and insurance.

If no maximum is set forth in the declaration, owners have to approve capital expenditures, other than repair and maintenance, for a fiscal year that exceeds 20% of the budget for common expenses during that fiscal year.

FNMA Fannie Mae Single Family/2011 Selling Guide B4-2.2-05, -06 & -09 (10/30/2009) requires an adequate Budget with reserve of at least 10% and funding for insurance deductible

For newly created conversions which are not “gut” conversions (where property is renovated down to its shell, including new HVAC and electrical) budget must contain adequate reserves (identified in a reserve study), funds to cover 100% of costs of any items identified in reserve study or engineer’s report that need to be replaced within 5 years, and a utility contingency of 10% of previous year’s utility costs if not separately metered. Fannie Mae Single Family/2011 Selling Guide B4-2.2-08 (12/01/2010).

See “Conversions”, above, for FNMA requirements for engineer’s reports and other requirements for conversions.

## Budget Requirements/Reserves (Continued)

**Freddie** Freddie Mac Single-Family Seller/Service's Guide 42.5(c) (08/16/10) and 42.6(c) (03/11/10) requires appropriate allocations for line items pertinent to type and status of project.

At least 10% of "operating budget" [for established project 42.5(c) (08/16/10)] for replacement reserves for capital expenditures and deferred maintenance based on remaining useful life and adequate funding for insurance deductible. [For new projects, 10% of "budget" 42.6(c) (03/11/10)]

For conversions, there must be an initially funded reserve consistent with the remaining useful life of the individual common elements Seller/Service's Guide 42.6(c) (03/11/10).

For mixed use projects, operating reserve must equal 3-months of operating expenses 42.7(d), 12 (04/01/11).

## Arrearages

**FHA** No more than 15% for more than 30 days, including bank-owned units. FHA Condominium Project Approval & Processing Guide (June 30, 2011)

Jurisdictional Homeownership Center can consider exception and go to 20% if:

Current fund balance and operating results evidence excess available funds in amount of outstanding arrearage

Financial statements and reserve account balance reveals HOA has sufficiently accounted for bad debt and arrearages

Current reserve study supports sufficiency of current assessments to meet component replacement needs, and HOA provides evidence of actions to collect

**FNMA** No more than 15% for more than 30 days. Fannie Mae Single Family/2011 Selling Guide B4-2.2-04 (12/01/2010) and B4-2.2-06 (10/30/2009)

**Freddie** No more than 15% for more than 30 days. Freddie Mac Single-Family Seller/Service's Guide 42.6(d) [new projects] (03/11/10) and 42.5(d) [established projects] (08/16/10)

## Assessment Requirements – Starting Date

**Freddie** For a new project, the assessments must begin on a specific date. Whether or not all units have been sold. Freddie Mac Single-Family Seller/Service's Guide 42.6(c) (03/11/10)



## FHA Concentration Requirement

**FHA** FHA will not insure any more than 50% of the units in a project. FHA Condominium Project Approval & Processing Guide 3.6 (June 30, 2011). Jurisdictional Homeowners Center can grant exemption.

FHA concentration can be increased to 100% if all requirements for project approval are met and:

100% complete all construction completed for 1 year, as evidenced by final or temporary CO for last unit

100% sold and no entity owns more than 10% (except for eligible governmental or nonprofit programs)

Control turned over

Budget provides funding replacement reserves for capital expenditures & deferred maintenance of at least 10%

Owner-Occupancy ration at least 50%

Gut-rehabilitation (as well as proposed and under-construction projects) not eligible

## Ownership of multiple Units by one owner

**FHA** FHA Condominium Project Approval & Processing Guide 2.1.4 (June 30, 2011)

One investor/entity may not own more than 10% of the Units (not counting unit investor occupies)

Developer's unoccupied units are not counted, but includes units she rents

Eligible non-profit government housing program not subject to 10% limitation. 24 CFR 203.41

**FNMA** No single entity – the same individual, investor group, partnership or corporation other than the developer during the initial marketing period, may own more than 10% of the total units in the project. Fannie Mae Single Family/2011 Selling Guide B4-2.2-05 (10/30/2009).

If less than 10 units, no more than one can be owned by one party.

**Freddie** No single entity owns more than 10% of units (or, if less than 10 units, no one owns more than one unit). Freddie Mac Single-Family Seller/Service's Guide 42.3(I) (06/16/10)



## Developer Control

**FHA** Later of (1) 120 days after 75% units conveyed; (2) 3 years after 1<sup>st</sup> conveyance; OR (3) requirement of state or local condominium law. FHA Condominium Project Approval & Processing Guide 1.9 (June 30, 2011)

**VA** Earlier of 120 days after 75% units conveyed OR 3-5 years (5-7 if phased) after first conveyance 38 CFR 4359 (a)(1)

BUT VA Lender's Handbook, Exhibit A "Other VA Requirements" Item (A),4,(b) states the second item as "7 years from the date of recording the declaration or, if a phased project, 5 years after recordation of the most recently recorded annexation document."

Relinquishing control includes not having right to veto any action of members or board 38 CFR 4359(a)(1)

Declarant is prohibited from retaining the right to veto actions of the Association (except to the extent that declarant's development rights are affected). Item (D),2,(c) of VA Lender's Handbook, Exhibit A "Other VA Requirements".

**FNMA** "The developer or sponsor should provide for and promote the unit owners' early participation in the management of the project." Fannie Mae Single Family/2011 Selling Guide B4-2.2-05 (10/30/2009). No specific time frames referenced.

For established projects, control has been turned over to the owners. Fannie Mae Single Family/2011 Selling Guide B4-2.2-06 (10/30/2009).

**Freddie** Additional Condominium Warranties include that "the developer has transferred or will transfer control of the HOA to the home owners within a reasonable period of time. Freddie Mac Single-Family Seller/Service's Guide 42.11(a) (10/09/09). No specific time frames referenced.

does not apply to Detached Condominium Project where mortgaged unit is primary or secondary home of unit owner. Seller/Service's Guide 42.11,2

## Amenities (ownership and leasing)

**FHA** Lease of recreational or parking areas or facilities unacceptable unless HOA has right of termination, without penalty, on up to 90-day notice. FHA Condominium Project Approval & Processing Guide 1.8.10 (June 30, 2011)

**VA** VA Lenders Handbook, 16-B, Exhibit A,(D)2 (7/1/2000) references rights reserved by the declarant, its affiliates, “or other party,” which are not acceptable unless reviewed by VA, includes

Lease of the common area to the association or accepting leases from the association except in connection with development related offices such as marketing, sales or construction office for the project

Accepting franchises or licenses from the association for the provision of central television antennae service, cable television or like services.

If parking is not provided within each unit, documents must:

Assign specific spaces to each unit

Assign a specific area to a specific group of units, or

Make other provision assuring parking in compliance with local requirements

OR declarant is to provide other evidence of compliance with local ordinances VA Lenders Handbook, 16-B, Exhibit A,(A)16 (7/1/2000).

**FNMA** Unit owners in the project must have the sole ownership interest in, “and rights to the use of” (-06) [“and have rights to the use of,” (-05)] the project’s facilities, common elements, and limited common elements. The developer may not retain any ownership interest in any of the facilities. The amenities and facilities – including parking and recreational facilities – may not be subject to a lease between owners or the association & another party. Fannie Mae Single Family/2011 Selling Guide B4-2.2-05 & -06 (10/30/2009).

**Freddie** When control is turned over, the owners must be the sole owners of all buildings, roads, parking and amenities, and developer must not retain any ownership interest in the common elements. The common elements, including amenities such as parking and recreational facilities, must not be subject to a lease between the unit owners, the association and any other party. Freddie Mac Single-Family Seller/Service’s Guide 42.2(g) (03/11/10)

## Management Arrangements

**FHA** Any management contract, employment contract, or any contract to which Declarant or an affiliate is a party is unacceptable unless HOA has right of termination, without penalty, on up to 90-day notice. FHA Condominium Project Approval & Processing Guide 1.8.10 (June 30, 2011)

**VA** 38 CFR 4358(a), in a section titled “examples of reserved rights of declarant, sponsor or affiliate of declarant which are usually unacceptable” includes binding the association to any management contract unless it is terminable without penalty on no more than 90-days notice.

38 CFR 4360a(f) (07/01/93), in a section titled “appraisal requirements”, provides that the “management agreement must be terminable for cause upon 30-days notice, and run for a reasonable period of from 1 to 3 years and be renewable with consent of the association and the management. (Management contracts negotiated by the declarant should not exceed 2 years.)”

VA Lenders Handbook, 16-B, Exhibit A,(D)2(c) (7/1/2000) prohibits the declarant, its affiliates, the sponsor “or other party” from retaining the right to enter into management agreements which extend beyond the declarant control period unless those contracts are: (i) limited to 2 years or (ii) permit the owner-controlled board to terminate the contract.

The declaration should provide that the majority of eligible mortgagees can demand professional management. VA Lenders Handbook, 16-B, Exhibit A,(A)17,h (7/1/2000)

**FNMA** Fannie Mae prefers that the project be professionally managed. Management contract must be for a “reasonable term” and must “include equitable provisions for termination” Fannie Mae Single Family/2011 Selling Guide B4-2.2-05 (10/30/2009). The management contracts termination provision must not require a penalty payment or advance notice of more than 90 days. B4-2.2-06 (10/30/2009)

**Freddie** Management contract must be for a “reasonable term” and must “include equitable provisions for termination” (must not require the payment of a penalty or advance notice of more than 90 days). Freddie Mac Single-Family Seller/Service’s Guide 42.11(i) (10/09/09)

**Developer Contracts (other than Management Contracts) (see also “Amenities”)**

**FHA** Any management contract, employment contract, lease of recreational or parking areas or facilities, or any contract or lease (including franchises and licenses) to which Declarant or an affiliate is a party is unacceptable unless HOA has right of termination, without penalty, on up to 90-day notice. FHA Condominium Project Approval & Processing Guide 1.8.10 (June 30, 2011)

**VA** In 38 CFR 36.4358, the section titled “examples of reserved rights of declarant, sponsor, or affiliate of declarant which are usually unacceptable” includes binding the association to any contract or lease to which the declarant is a party unless it is terminable without penalty on no more than 90-days notice.

38 CFR 36.4358 spells out reserved rights which are usually acceptable include, provided they are for a reasonable period of time and are subject to a concomitant obligation to restore include:

- (1) easements provided for in declaration, over common elements (not units) for completing improvements, but only if access otherwise not reasonably available;
- (2) easements over common elements (not units) for making repairs; and
- (3) rights to maintain facilities (identified in declaration) reasonably necessary to market units, including sales and management offices, model units, parking areas and advertising signs.

**Maintenance Responsibilities**

**VA** Responsibility for maintenance and repair of all portions of the condominium property shall be set forth clearly. §38 CFR 36.4357(d)(1)

If association maintains areas it does not own (such as within a public right of way for landscaping or signage or storm water management), [does this include areas within units? After all, technically, the association doesn't own anything.] attorney must provide a description and rationale. VA Lenders Handbook, 16-B, Exhibit A,(A)8 (7/1/2000).

**Insurance – Hazard Ins. - What's Covered (Must Association Policy include “Walls-in” coverage?)**

**FHA** Does not require Association to carry “walls-in” coverage, but requires borrow to obtain a walls-in policy (HO-6) if master policy does not include interior coverage, including replacement of interior improvements and betterments. FHA Condominium Project Approval & Processing Guide 2.1.9 (June 30, 2011)





**Insurance – Hazard Ins. - What’s Covered (Must Association Policy include “Walls-in” coverage? (continued)**

**FNMA** The Lender must review the entire condominium project insurance policy to ensure that the association maintains a master or blanket policy. If the Association has either a “Single Entity” or “All-In” policy, it must cover fixtures, equipment and replacement of improvements and betterments that have been made inside the unit being financed.

“If the unit interior improvements are not included” in the association’s “Single Entity” or “All-In” policy, or if the association has only a “Bare Walls” policy, then the borrower must obtain “an HO-6 policy with coverage, as determined by the insurer, which is sufficient to repair the condo unit to its condition prior to the loss claim event.” Fannie Mae Single Family/2011 Selling Guide B7-3-04 (12/20/2011).

For detached projects FNMA [see Fannie Mae Single Family/2011 Selling Guide B4-2.2-03 (06/28/2011)] requires property to be covered by either:

the type of hazard and flood insurance coverage required for single family detached structures, if the condo unit consists of the entire structure as well as the site and air space, OR

the project’s master hazard and flood insurance policies if the condo unit consists of only the air space for the unit and the improvements and site are considered to be common limited common areas

If condo covered by master policy that combines insurance coverage for multiple condo projects or other residential or substantially residential projects that are unaffiliated.

Coverage must be higher of 50% of total insurable replacement value for all projects or 150% of replacement value for largest project (but no more than 100% of total value for all projects); and

Per occurrence limit re-established after each loss; and see other requirements in Fannie Mae Single Family/2011 Selling Guide B7-3-04 (12/20/2011).

Notice required 10 days before cancellation to association AND to each first mortgage loan holder named in mortgage clause. Fannie Mae Single Family/2011 Selling Guide B7-3-04 (12/20/2011).

**Freddie** Building and structures, fixtures, machinery equipment and supplies maintained for the service of the condominium project. Freddie Mac Single-Family Seller/Service’s Guide 58.2(c) (10/06/06)

fixtures, improvements, alterations and equipment within the individual units, regardless of ownership, unless unit owners are required by the governing documents to insure those items. *Ibid*

If units are in a detached project, Freddie will accept insurance that meets the requirements for 1 to 4 unit properties. Freddie Mac Single-Family Seller/Service’s Guide 58.2(c) (10/06/06)

## Flood Insurance

**FHA** The Association, not the borrower, is to maintain flood insurance under the National Flood Insurance Program (“NFIP”) on buildings located in a Special Flood Hazard Area (“SFHA”) for replacement cost, up to \$250,000 per unit. Mortgagee is responsible for determining if any part of project is in a 100-year flood plain. FHA Condominium Project Approval & Processing Guide 2.1.10 (June 30, 2011). Mortgagee may acquire this information from a third party only to the extent that the third party guarantees the accuracy of the information [(National Flood Insurance Act of 1968 §1365(d)]

**VA** If in special flood hazard area, flood insurance for lesser of loan amount or maximum available. 38 CFR 36.4326

**FNMA** If “any part of the improvements are within a Special Flood Hazard Area (“SFHA”) & if flood insurance is available under National Flood Insurance Program (“NFIP”), (if not available, your out) “association must obtain a Residential Condominium Building Association Policy for each building that is located in an SFHA.” The amount of coverage has 3 components: (1) building coverage of 100% of insurable value including machinery and equipment; (2) contents coverage of 100% of insurable value of contents owned by association; and (3) coverage for each unit of lesser of \$250,000 or replacement cost. Max deductible \$25,000. Fannie Mae Single Family/2011 Selling Guide B7-3-07 (12/30/2009).

If the association does not purchase the complying policy, unit owner is required to get one for his unit, for the “lower” of: (a) 100% replacement cost of the insurable value; (b) maximum available from NFIP (“which is currently \$250,000 per dwelling”); or (c) unpaid principal balance of mortgage. Max deductible \$5,000.

**Freddie** Freddie Mac Single-Family Seller/Servicer’s Guide 58.3 (08/20/09) If any portion of building is in a special flood hazard area designated as Zone “A” or “V” and community participates in NFIP (if they don’t, your out) then you must have either:

A building coverage of lower of replacement cost or \$250,000 x number of residential units in building plus contents coverage of lower of value of contents owned by association or max available for content’s coverage from NFIP  
with maximum deductibles allowed by NFIP

OR B Unit Owner Coverage at the lowest of: (a) 100% replacement cost of the insurable improvements; (b) maximum available from NFIP; or (c) unpaid principal balance of mortgage  
with maximum deductibles allowed by NFIP

## Fidelity Insurance

**FHA** FHA Condominium Project Approval & Processing Guide 2.1.9 (June 30, 2011) require that if condo is over 20 Units, bond required for officers, directors, employees and all other persons handling or responsible for funds. No less than 3 months of assessments plus reserve funds.

Management co needs to have bond for its officers, employees and agents handling or responsible for funds of, or administered on behalf of, HOA.

(1) Name association as an obligee; (2) Maximum of funds, including reserves, in custody of HOA or management agent; (3) Not less than 3 months of assessments plus reserve funds unless state law requires a maximum amount

**VA** Recommends, but does not require, association to purchase bond (3 months + reserves) 38 CFR 36.4359(e)(2).

**FNMA** Over 20 Units, blanket fidelity ins. required for any one who either handles or is responsible for funds. Management co needs to have bond if it handles funds. Amount of maximum funds in custody of HOA or its management agent at any time. Fannie Mae Single Family/2011 Selling Guide B7-4-02 (10/30/2009).

Lesser amount (3 months of assessments) permitted if condo documents require one of the following:

Separate bank accounts for working and reserve accounts with statements sent directly to assn.

Management company maintains separate accounts for all associations it represents and does not have authority to draw checks or transfer funds from association's reserve account, OR

Two board members must sign checks on reserve account.

Notice required 10 days before cancellation to association AND to each servicer who services a Fannie Mae held or serviced loan. Fannie Mae Single Family/2011 Selling Guide B7-4-02 (10/30/2009).

**Freddie** Over 20 Units, bond required for loss from dishonest or fraudulent acts committed by directors, managers, trustees, employees or volunteers who manage funds. Management co needs to have bond if it handles funds. Amount of maximum funds handled, with minimum of 3 months of assessments plus reserves. Freddie Mac Single-Family Seller/Servicer's Guide 58.5 (03/01/08)

Lesser amount (3 months of assessments) permitted if condo documents require one of the following:

Separate bank accounts for working and reserve accounts with statements sent directly to assn.

Management company maintains separate accounts for all associations in represents and does not have authority to draw checks or transfer funds from association's reserve account, OR

Two board members must sign checks on reserve account.



Insurance - Priority of Mortgagee to collection of insurance proceeds

**FNMA** No provision of condo docs can give the unit owner or any other party (association?) priority over any rights of the first mortgage holder (under its mortgage) in the case of payment to the unit owner of insurance proceeds or condemnation awards for losses to or a taking of condo units and/or common elements. Fannie Mae Single Family/2011 Selling Guide B4-2.2-13 (10/30/2009).

Availability of Records

**VA** Association is required to make records available (at least available for inspection upon request, during normal business hours and under other reasonable circumstances) to owners, lenders, holders & insurers and guarantors of first mortgages: Declaration, By-laws, Rules & other books, records and financial statements. 38 CFR 4357(c)(3)

VA Lenders Handbook, 16-B, Exhibit A “Other VA Requirements, (A),17 (7/1/2000) requires that the declaration contain a provision guaranteeing mortgagees and agencies the right to inspect association documents and records on the same terms as members, and, granting the majority of eligible holders of first mortgages the right to demand an audit of the association’s financial records.

Likewise, the handbook, at 16-B, Exhibit A, (B),8 requires that the bylaws contain provisions requiring the association to keep records (i) of its governing documents (i.e., association documents, rules and regulations and design standards); (ii) its actions (board resolutions, meeting minutes, etc.); and (iii) its financial condition (receipts and expenditures affecting finances, operations and administration of the association, budget, financial statements, etc.)

The association is not required to keep such records longer than 3 years, unless otherwise required by applicable law.

Documents, books and records kept on behalf of the association are to be available for examination and copying by a member or such members authorized agent during normal business hours and upon reasonable notice and for a reasonable charge except for privileged or confidential information.

## Leasing Restrictions

**FHA** Housing and Economic Recovery Act of 2008 authorized FHA to insure loans under National Housing Act section 203. FHA has determined that the requirements in FHA regulations at 24 CFR part 203 applies to mortgage loans for the purchase of condominium units. (See “Waiver of Federal Housing Administration Regulations at 24 CFR 203.41 (a)(3)” issued March 18, 2011).

Units cannot be subject to legal restrictions on conveyance 24 CFR 203.41(b), which includes leases 24 CFR 203(a)(3), but FHA permits restrictions:

establishment of a maximum number of rental units (not to exceed % which would exceed FHA owner-occupied requirements)

prohibitions against leases for less than 30 days or in excess of maximum allowable term (e.g. 6 months or 12 months)

requirements that leases be in writing and subject to declaration and by-laws

right of association to request names of all tenants and family members who will occupy the unit

Association may not require that tenant be approved by association, including but not limited to meeting creditworthy standards. FHA Condominium Project Approval & Processing Guide 1.8.9 (June 30, 2011)

**VA** Under 38 CFR 36.4358(c)(6), There shall be no prohibition or restriction on a unit owner’s right to lease his unit except in the following two circumstances:

Minimum initial term of up to 1 year; OR

Age restrictions or restrictions imposed by state and local housing authorities

According to VA Lenders Handbook, 16-B, Exhibit A,(D)3 (7/1/2000), the following restrictions on alienation are not permitted:

- b. Right of prior approval of either a prospective purchaser or tenant;
- c. Leasing restrictions which amount to unreasonable restrictions on use and occupancy of a unit; or
- d. Any minimum lease term in excess of 1 year.

**Freddie** Freddie Mac Single-Family Seller/Service’s Guide 42.11(b) (10/09/09) requires that amendments of a material adverse nature be agreed to by mortgagees representing at least 51% of unit votes. Examples of actions which require mortgagee consent include: “Imposition of any restriction on the leasing or rental of units.”

## Rights of First Refusal

**FHA** FHA Condominium Project Approval & Processing Guide 2.1.2 (June 30, 2011) permits a right of first refusal unless it violates discriminatory conduct prohibitions under the Fair Housing Act regulations. 24 CFR 100.

**VA** For declarations recorded on or after 12/1/1976, no right of first refusal or right to prior approval of a purchaser is permitted.

For declarations recorded prior to 12/1/76, a right of first refusal or a right to provide a substitute buyer is permitted so long as the price is not lower than the owner is willing sell, the terms are just as favorable, the association has 30 days to respond, and the notice and election is required to be by certified or registered mail. 38 CFR 36.4350(b)(5)(ii)

Permitted exceptions include restrictions that are part of a government program:

- (A) to assist low or moderate income purchasers (and other conditions); or
- (B) a program to protect older people 38 CFR 36.4350(b)(5)(vi)

**FNMA** Fannie Mae Single Family/2011 Selling Guide B4-2.2-05 (10/30/2009) provides:

Right of First Refusal or first option to purchase can not be exercised:

in any way that could be interpreted as unlawful or discriminatory OR  
would impair the marketability of units

Rights of first refusal won't impact foreclosure, deed-in-lieu of foreclosure, or lease or sale of a unit acquired by a mortgagee or assignee. Selling Guide B4-2.2-13 (10/30/2009)

**Freddie** Freddie Mac Single-Family Seller/Service's Guide provides

Right of First Refusal or first option to purchase can not be exercised:

in any way that could be interpreted as unlawful or discriminatory OR  
would impair the marketability of units 42.11(k) (10/09/09).

Rights of first refusal won't impact foreclosure, deed-in-lieu of foreclosure, or lease or sale of a unit acquired by a mortgagee or assignee. 42.2(e) (03/11/10)

## Deed Restrictions and Transfer Fee Covenants

**FHA** Housing and Economic Recovery Act of 2008 authorized FHA to insure loans under National Housing Act section 203. FHA has determined that the requirements in FHA regulations at 24 CFR part 203 applies to mortgage loans for the purchase of condominium units. (See “Waiver of Federal Housing Administration Regulations at 24 CFR 203.41 (a)(3)” issued March 18, 2011).

Units cannot be subject to legal restrictions which would cause a conveyance 24 CFR 203.41(b), which includes leases 24 CFR 203(a)(3), by the borrower to:

Be void, or voidable, by a third party

Be the basis of contractual liability of the borrower

Terminate, or subject to termination, the borrower’s interest in the property

Be subject to consent of a third party

Be grounds for accelerating or increasing the interest rate on an insured mortgage

Be subject to limits on the amount of sales proceeds a borrower can retain

With regard to this last point, the Community Association Institute believes that this language from FHA Condominium Project Approval & Processing Guide 1.8.8 (June 30, 2011) means that FHA will not fund loans in condominium projects with deed-based transfer fees.

**FNMA & Freddie** The Federal Housing Finance Agency has proposed the following Rule for Fannie Mae and Freddie Mac. They should not purchase or invest in any mortgage encumbered by private transfer fee covenants which require a transfer fee payment to a third party (examples: developer or its trustee, a homeowner association, affordable housing group or another community or non-profit group) upon the resale of the property. The revised proposal would exempt fees paid to homeowners’ associations where the fees are used for the “direct benefit” (maintenance, improvements and amenities benefitting) the encumbered properties or adjacent properties. Federal Register February 8, 2011, Volume 76, Number 26 at page 6702. The proposal would apply to covenants created after the publication date of the proposed rule.

## Ownership Percentages

**VA** acceptable methods of allocating interests include

Equal / Square Footage / Fair Market Value / Other method that is “equitable and reasonable” 38 CFR 36.4357(b)



## Voting Percentages

**VA** 38 CFR 36.4358(c)(2) acceptable methods of allocating votes:

Equal/Following % interests/Square Footage/Fair Market Value/Other method that is “equitable and reasonable”

Declarant’s voting rights may not be “weighted beyond 3 to 1 in the Declarant’s favor (based on the total number of units planned.)” VA Lenders Handbook, 16-B, Exhibit A,(A)4(b) (7/1/2000). [this provision does not appear to negate the developer’s right to appoint directors during the period of developer control. 16-B Exhibit A, (A)5.]

**Freddie** Can’t have multiple classes of unit owners and with a commercial entity as manager over the entire project. Freddie Mac Single-Family Seller/Service’s Guide 42.7(d),1 (04/01/11).

Commercial owners can’t override residential on issues involving residential units. Freddie Mac Single-Family Seller/Service’s Guide 42.7(d),9 (04/01/11).

## Priority of Common Expenses

**VA** Units which will be subject to a VA-guaranteed loan will not be subject to delinquent assessments in excess of 6 months in any case in which the association has not brought enforcement action against the current owner. VA Lenders Handbook, 16-B, Exhibit A,(A)12 (7/1/2000).

**FNMA** Fannie Mae Single Family/2011 Selling Guide B4-2.1-06 (04/01/2009) allows up to 6 months of regular common expense assessments to have priority over Fannie Mae’s mortgage lien. Fannie Mae will not be liable for any fees or charges related to the collection of the six months of unpaid assessments that accrued before acquisition of title to the unit. Will not purchase a loan in a jurisdiction that allows for more than six months of regular common expense assessments to have priority over Fannie Mae’s lien.

Fannie Mae Single Family/2011 Selling Guide B4-2.2-13, Condo Project Review and Legal Document Requirements (10/30/2009) adds “If the condominium association’s lien priority includes costs of collecting unpaid dues, the lender will be liable for any fees or costs related to the collection of the unpaid dues.

**Freddie** Any first mortgagee that obtains title pursuant to remedies in the mortgage or through foreclosure will not be liable for more than 6 months of regularly budgeted assessments or charges accrued before acquisition of title. If the Association’s lien priority includes costs of collecting unpaid assessments, the Seller will be liable for any fees or costs related to the collection of the unpaid assessments. Freddie Mac Single-Family Seller/Service’s Guide 42.11(e) (10/09/09).

