

## ACHIEVING COMMUNITY OBJECTIVES THROUGH REVISIONS TO GOVERNING DOCUMENTS *Reprinted from Community Update with Permission of Becker & Poliakoff, P.A.*

Many communities experience a degree of frustration as a result of weaknesses and loopholes in their condominium, cooperative or homeowners documents. Developers' attorneys often prepare the documents solely with their clients' interests in mind, with little or no regard for the ultimate long-range community operations. Some groups are able to anticipate problems they may face and seek to adopt amendments which are designed to prevent the occurrence of these problems or more effectively deal with them, if they should arise. Other associations only recognize the need for change after the problems have arisen. This article will briefly outline some of the revisions which a number of associations have adopted to address weaknesses in their original community association documents.

First, it is important to understand exactly what documents govern Condominiums and Homeowner's Associations and what aspects of the community these actually govern. Mainly two things govern all Condominiums and Homeowner's Associations: The Florida Statutes and the Governing Documents for the Condominium or Homeowner's Association. Governing Documents for Condominiums and Homeowner's Associations include the following: Declaration of Condominium (usually called the Declaration of Covenants in Homeowner's Associations), By Laws, Articles of Incorporation and Rules and Regulations. Generally speaking, the Declaration is a deed restriction and constitutes a covenant running with the land. It is usually the most widely relied upon authority for the governance of the community, since it normally contains basic property rights, defines ownership, use restrictions, insurance requirements, maintenance and repair responsibility, and other integral questions of community living. The Articles of Incorporation is sometimes called the Charter. It is the document that was originally filed with the Florida Secretary of State to create the corporate entity that operates the condominium, in other words, the Association. It is usually sparse in detail, but may also have important information regarding the governance of the Association. The By-Laws govern various aspects of operations of the Association. This normally includes the powers of the directors, the notice requirements for Board and Member meetings, the conduct of members' meetings, the election of directors, the conduct of board meetings, etc. . . Finally, the "Rules and Regulations" typically run the gamut of day-to-day restrictions and guidelines in the community. These typically include restrictions on use of the common elements like pools, community rooms, service elevators, etc. . . Depending on the rule making authority of the Board as allowed by the other governing documents, the Rules and Regulations might also govern issues like frequency of written inquiries by owners, record inspections, etc. . .

In discussing amendments to community association documents, the initial focus must be on the procedure to be followed in adopting such amendments. The documents often establish a rather high percentage vote of the total voting membership of the association for approval of documentary changes (e.g. 75% or 66-2/3%). For many communities with large numbers of absentee owners, such percentage participation is likely to be a difficult goal. A frequently requested change is one by which the amendment requirements are reduced to be a percentage of those voting members present and voting at a duly called meeting at which a quorum is present. This allows those owners who participate in the

voting process to have a greater say in deciding which changes are to be adopted, thereby, encouraging more owners to cast their vote on a given proposal.

One of the more important potential document amendments deals with what law applies to your condominium or homeowner association documents. These documents are seen as contracts by the courts. Both the Federal and State Constitutions contain express provisions which prohibit the Legislature from passing laws which retroactively impair the obligations of contracts. In order to avoid excessive legal analysis of what law applies to your community, you may want to consider redefining the law which applies to your community by changing references to applicable law to incorporate "as the same may be amended from time to time" language.

Regarding the quorum requirements for association meetings, most community association documents establish a quorum as being a majority of the total votes of the owners, represented in person or by proxy. One of the most frustrating experiences for the participating members of an association is to attend a members' meeting which cannot be properly convened because there is no quorum. Many groups attempt to deal with this problem by reducing the quorum requirement outright to a lower percentage (e.g. 33-1/3%) or reducing the quorum requirement for the reconvention of an adjourned meeting. Such an amendment will reduce the likelihood that the business of an association will be delayed because of the inability of its members to properly convene.

Of a more substantive nature are those amendments which are aimed at controlling the use and occupancy of the residential units. These are, perhaps, the most frequently debated proposals between resident and absentee owners. The controversy is often initiated by what the resident unit owners perceive to be the transient usage of units by absentee owners, their tenants and their guests. Most documents establish a right of first refusal in favor of an association in connection with sales and leases of units. However, such a provision does little to hinder the investor owner who seeks to maximize his return by repeatedly leasing his unit on a short term basis. Corresponding amendments should also be considered, establishing limits on acquisition or use of units owned by corporations, partnerships, and other non-personal entities or by multiple persons. To discourage purchase of units by investors, some associations have amended their documents to eliminate leasing completely, or to prohibit leasing during the first year or two of ownership.

Obviously, some communities will favor more restrictive use and occupancy provisions than others. It is, therefore, impossible to generalize so as to suggest documentary revisions which will reap equal benefits for all community associations. All associations will benefit from a careful review of their documents to determine whether same are designed to meet community objectives. The board should examine deficiencies in the existing documents and explore the possibilities for correcting these deficiencies.

One of the more effective tools for collection of unpaid assessments is a provision which allows the board to require payment of all outstanding assessments for the balance of the year if an owner is delinquent on any payment. This right of acceleration is particularly useful in the first half of the fiscal year, although it must be used with caution. Therefore, the decision of whether or not to accelerate assessments must be made on a case by case basis. Your documents should also be reviewed in order to determine the penalty for unpaid assessments. Interest on delinquent assessments should be changed to provide that such delinquent payments bear interest from the date due until paid "at the highest rate allowed by law." Frequently, documents indicate that unpaid assessments bear interest at some fixed rate which is substantially lower than the 18% the law allows. Use of the general language also gives the association flexibility if the applicable law changes.

Associations frequently ask whether late fees on delinquent assessments are enforceable. In the association context, there is no appellate case on point. However, late fees for delinquent payments under commercial contracts are recognized as being valid under Florida law, if the contract provides for such a fee. The Condominium, Homeowners' and Cooperative Acts allow for late fees in an amount not to exceed the greater of \$25.00 or 5% of each installment of the assessment for each delinquent installment that the payment is late. However, authority for such late fees must exist in the declaration of condominium (or the cooperative documents) or the bylaws.

Your association may also wish to consider "housekeeping" amendments to bring the documents up-to-date by eliminating provisions which are no longer relevant or are no longer enforceable. For example, you may wish to eliminate rights reserved by the developer, if the developer no longer owns units and is not otherwise involved in the community.

Of course, every community has its own separate and isolated set of issues that should be addressed as is fit for that community, and the following is by no means a one size fits all list. However, some popular areas of requested amendments (in either of the above referenced forms) include the following:

- Removal of language regarding future development or the Developer could be removed.
- Removal of unnecessary definitions and provisions relating to the powers of the Association.
- Clarification or addition of restrictions on floor coverings could be revised to reflect what exists or should exist within the Condominium.
- Clarification or addition of restrictions regarding the appearance of the exterior of the building, patios, balconies, terraces, etc. . .
- Revision of voting requirements, like those to amend the Declaration, should be revised to allow for the possibility of amendment (as opposed to overly repressive documents that require unattainable percentages of approval).
- Clarification or addition of board rights to levy special assessments or borrow money when necessary to meet unexpected shortfalls in the operating budget.
- Clarification or addition of language allowing the Board to approve alterations to the common elements, thereby making the ability to change things an easier process.
- Revision of restrictions on sales and leases to allow the Association a right to approve sales, as opposed to what used to be very popular, a simple right of first refusal which limits the Association's ability to turn down someone who may not be an appropriate member.
- Addition of the ability to charge a transfer fee in connection with any sale or lease, to recover costs incurred in background checks and other screening efforts made by the Association.
- Revision of restrictions on members. Restrictions that no longer make sense or are illegal (such as limitations on children under a particular age) should be modified or deleted.
- Revision of the provisions regarding insurance to reflect the current obligations and limitations contained in the Florida Statutes and perhaps to remove language regarding the requirement for an Insurance Trustee.
- Clarification or addition of language allowing the collection of a security deposit from a proposed tenant to protect against damage to the common elements.
- Clarification or addition of the power to fine for violation of the Condominium documents and Rules and Regulations.
- Clarification or addition of language that will allow the Association to charge for use of common elements that will be used exclusively by any owner at any given time, like a party room or gazebo.

An association that wishes to consider amending its documents must also consider the impact some amendments may have on the availability of financing for units within the community. Lenders which Becker & Poliakoff, P.A.; [www.becker-poliakoff.com](http://www.becker-poliakoff.com); [www.hurricane-recovery.com](http://www.hurricane-recovery.com); (954) 987-7550; This article is for informational purposes only and should not be construed as legal advice. This information may not reflect recent developments in the law. Becker & Poliakoff, P.A. is not responsible for any errors or omissions in this material. Readers should not act or refrain from acting based on this information. If you have any questions, please consult with an attorney licensed by the Florida Bar.

are involved in the secondary mortgage market will avoid offering loans in communities which do not meet the qualifications established by the Department of Housing and Urban Development, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation, and/or the Veterans Administration.

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