

## Review Your Amendment Procedures

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Today's column continues our ongoing look at updating the community's governing documents. Today's issue, the amendment clause.

As explored in previous segments, the governing documents for a condominium or HOA typically consist of a declaration, articles of incorporation, bylaws, and rules and regulations. Each of the documents serves a specific function, although there is occasionally overlap. Typically, each of the documents will have a separate amendment clause.

When updating the documents, understanding the amendment clause is important for two reasons. First, the Association needs to know how many votes it has to get to pass the new documents. Secondly, an update of the governing documents is often a good time to also look at changing how amendments are handled.

This is one area where there is no consistency between one association and the next. Some associations require the same vote for all documents, some establish a hierarchy, and many documents conflict with each other on the exact point. It is important to recognize that there is a commonly accepted hierarchy of the documents, starting with the declaration, then articles, then the bylaws, then the rules and regulations.

In my experience, most associations grant the board rulemaking authority when updating the documents, and this is by far the most common modern practice, as opposed to requiring the owners to approve rules and regulations. However, be careful about nuances in the current documents, which I covered in a previous part of this series.

As for declaration amendments, most documents require some super-majority, either two-thirds, seventy-five percent, and I have seen some documents that even require ninety percent approval. In fact, some older documents still require one hundred percent approval for amendment. In my opinion, two-thirds or seventy-five percent is a reasonable standard to shoot for.

The more difficult question is whether voting should be based upon the entire membership of the Association, or only those who vote at a meeting where a quorum is established. In my opinion, the latter policy (basing amendments on those who vote) is the most democratic method of handling voting. After all, we do not elect the President of the United States based on the total number of registered voters, only those who go to the polls. When rewriting documents, I have found that most associations seek to implement this standard.

However, remember the "chicken and egg." If the current documents are based upon the entire membership, then that is the level of approval that you must obtain until you can get the clause changed.

Amending articles and bylaws is a matter of choice. Some associations seek a lower percentage vote than required for the declaration (for example, a majority standard if the declaration requires two-thirds vote to amend), and some prefer to keep all documents amendable by the same percentage vote, for simplicity sake. I have found that the latter approach usually works better.

The only constant in life is change. Make sure that your documents can change with the times.

## Who Pays for Condo Repairs Depends on Documents

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**Question:** My Condominium Association has asked that I replace the door frame around my front door on the basis that “doors and windows” are the unit owner’s responsibility. Our condominium documents do state that the doors and windows are the unit owner’s responsibility, but I do not think that the door frame is part of the door. I think it should be the Association’s responsibility. Do you agree? C.T. (via e-mail)

**Answer:** It all depends on the exact wording of your condominium documents. Unfortunately, many condominium documents are poorly written and it can be difficult to determine whether something is a unit owner responsibility or an association responsibility. The first thing you should look at is the unit boundaries in the declaration of condominium. Typically, everything “outside” of the unit is a common element. The unit is the maintenance responsibility of the unit owner, except that sometimes the Declaration will require the Association to maintain certain parts of the unit. The common elements are the maintenance responsibility of the Association. However, if something is designated a limited common element, the unit owner may be required to maintain it if the Declaration so provides. You may be right that the door frame is part of the common elements, but without looking at the specific language in your Declaration, I could not say for sure. You might suggest that the Board ask for a legal opinion so that it can have a standard policy when this issue comes up again.

**Question:** Our homeowners’ association documents contain a provision regarding easements. Basically, the Declaration creates a nonexclusive easement over, through, and across sidewalks, paths, walks and lanes, and paved areas, except that the easement does not give or create in any person the right to park upon any portions of the common areas except those areas specifically designated for such purpose. Does that mean that vehicles are permitted or not permitted to park on the streets? W.K. (via e-mail).

**Answer:** The language in the Declaration indicates that the purpose of the easement is for

ingress and egress for pedestrian and vehicular traffic. By its own terms, the easement does not grant to any person the right to park on the common areas. Therefore, the easement language does not confer any rights that would supercede another provision in the Declaration or the rules and regulations of the Association prohibiting parking on the streets.

**Question:** Our homeowners’ association governing documents provide that the Board has the right to levy a Resale Capital Assessment upon the transferee of a conveyance of every Lot or Living Unit, provided that all Lots or Living Units similarly situated are assessed at a uniform rate. Our Board adopted a resolution whereby new owners (who are not current owners in the community) will be assessed a Resale Capital Assessment of \$1800. However, if the person already owns a home in the community and is buying another home, the assessment will only be \$1200. I do not believe this should be allowed because the owners are not being assessed a uniform rate. Do you agree? J.W. (via e-mail).

**Answer:** First, there is nothing in the Homeowners’ Act (Chapter 720) which limits the ability of a homeowners association to charge such a fee. (In condominiums, however, the fee may not exceed \$100). The question, therefore, is what does the language in your governing documents mean when it refers to Lots or Units that are “similarly situated” based upon what you have quoted. I would interpret that language to mean that the Board could impose one assessment amount for two-bedroom homes and a higher assessment amount for three-bedroom homes. Imposing an assessment amount depending on whether the purchaser is a new owner or a current owner does not seem to be related to the Lots or Living Units being similarly situated. Rather, the assessment is being based on the purchasers being “similarly situated.” However, I would categorize this one as a close call.

**Question:** Are there any arbitrators that a condominium problem can be taken to rather than hiring a lawyer and going to court? M.G. (via e-mail).

**Answer:** The Condominium Act provides for mandatory non-binding arbitration for certain condo-

