



Amend Documents with Care (part 2)

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By Joe Adams

jadams@becker-poliakoff.com

TEL (239) 433-7707

FAX (239) 433-5933

Today's column is the second part of our look at updating the legal documents for your community association. In the first part, we looked at some basic definitions and the functions of the constituent documents (see Courts Err On Side Of Homeowner, August 4, 2005).

Today, we will look at some practical and legal aspects of amending the documents for both condominiums and homeowners' associations.

The community's constituent legal documents have been called a contract by Florida's courts. The contract exists between the developer and unit purchasers; between the association and individual unit owners; and between the unit owners themselves. Like most contracts, the terms can be changed with the consent of the affected parties. However, unlike most contracts, not every party to the contract needs to agree before it can be changed. Stated otherwise, if a hundred different unit owners in a condominium are subject to the terms of the same condominium documents as a contract, some lesser number can change the contract for all one hundred.

Even though times change, human nature for some is to resist change. Some feel "if it ain't broke, don't fix it", and some say they would rather deal with the devil they know than one they do not. For these reasons and others (voter apathy being a major contributor as well), many associations find it exceedingly difficult to get voter support for document changes. Because

of this, it is my opinion that associations are well advised, before a formal vote is ever taken, to have the rank-and-file members of the association feel like they are part of the amendment process.

There are several ways an association can accomplish this, not all of which are necessary in every case, nor will necessarily work in each community:

- **Establish A Committee:** While finding people willing to roll up their sleeves and spend hours pouring over tedious legal documents is certainly a challenge, having an independent committee provides some degree of insulation against criticisms that the board is trying to grab too much power, or otherwise upset the apple cart. For example, one of my association clients has a committee of non-board members who are past presidents of the association. They obviously command great respect and legitimacy.
- **Give Owners The Opportunity To Comment Before The Vote Is Taken:** There are different ways to accomplish this objective. Some associations hold a series of workshop meetings that are open to members where the documents are worked on. Others hold "town hall" meetings to discuss the final product, before it is submitted to a formal vote. Other associations provide owners with the opportunity to make written comments about proposed changes, or changes that owners perceive need to be made.

• **Proceed Deliberately:** A common mistake made by many associations is thinking they can find a boilerplate set of governing documents used by the community next door, change the names, and update the documents in a few weeks. Each community has its own needs, its own perception of appropriate regulation, and its own history of issues that may need to be addressed.

In addition to the practical and political sides of the amendment process, there is also a legal aspect which needs to be followed. This is one area where I find that do-it-yourself boards wanting to save legal fees usually end up spending several times more in correcting technical problems, or attempting to defend documents that were not properly adopted.

The first area which needs to be considered in this regard is how amendments are to be presented. The procedure is dictated by law for condominium associations, and is usually specified in the governing documents for the HOA. Let us assume, for example, that the association wants to amend the bylaws to change the required annual meeting date from the fourth week in December to a time during the first quarter of each year determined by the board. While some associations may be tempted to send out a mail-back ballot saying: “Do you want to change the annual meeting date from the fourth week of December to a date during the first quarter of the year selected by the board?”, such an amendment would be invalid for condominiums, and many HOAs as well. Rather, the condominium law requires the text of proposed amendments to be included in the notice of a meeting where an amendment will be considered. The proposed amendment must underline proposed additions, and strike through proposed deletions. Therefore, using our example, a properly worded amendment would read:

The association’s annual meeting shall be held each year ~~during the fourth week of December~~ during the first quarter of each year, at such date, time, and place determined appropriate by the board of directors.

Amendments to legal documents can be considered at the association’s annual meeting, although many associations find it preferable to call a special members’ meeting for the purpose of voting on document changes, so as not to consume the time allotted for the annual business gathering with discussion and voting about potentially lengthy or controversial document amendments.

In either case, in order for the amendments to stand up to challenge at a later time, all proper meeting procedures must be followed. This will include mailing the notice and proposed amendment to the owners sufficiently in advance of the meeting (usually fourteen days, some by-laws may provide lengthier notice requirements). The Association should also permit owners to vote on the amendments by a “limited” or “directed” proxy (again, required by law for condominium associations, recommended for homeowners’ associations).

Some associations choose to amend documents without a formal member meeting, using what is known as “members’ action without meeting”, sometimes referred to as “members’ action by written agreement.” This is a permitted procedure in some circumstances, although it can be more cumbersome and complicated than a meeting procedure.

Next week, we will explore how to interpret the documents to understand the required vote for amendment, and what actions must be taken after the amendments have been approved to ensure their legal enforceability. ■

Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners’ associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm’s Naples and Ft. Myers offices.

Send questions to Joe Adams by e-mail to jadams@becker-poliakoff.com This column is not a substitute for consultation with legal counsel. Past editions of this column may be viewed at www.becker-poliakoff.com.

Question: I am the treasurer for our condominium association. I am trying to rectify an inequitable situation. All of our owners pay the same monthly maintenance fee, even though some have assigned garage spaces (while others do not) and some have huge patios with three times more glass than others. Naturally, the bigger units sell for a higher price, even though we all pay the same maintenance fee.

I would like to change our condominium documents to base assessments on relative value between the units, or square footage, plus add a fee for the garages. Unfortunately, about half the owners enjoy the current free ride, so we probably cannot get the required two-thirds vote.

Am I correct in my views on this subject, and do any other laws apply which might help me? G.L. (via e-mail)

Answer: Condominium living is unique. I always respond to questions like yours with a reminder that those who live on the first floor still have to pay when the elevator needs to be fixed, just like those who cannot swim must pay to keep the pool in order.

Your question is not uncommon, and your point of view is shared by many. Unfortunately (at least for goal), this issue is strictly regulated by Florida's condominium statute, Chapter 718.

First, Chapter 718 provides that assessments can only be shared in one of two different ways, either equally, or based upon the relative square footage of the units. There is an exception for older condominiums, where the documents can provide a different method of sharing expenses. Therefore, you could not change to a market value-based method of sharing assessments.

In order to change from equal assessments to assessments based on square footage, you would need one

hundred percent of all unit owners to consent, as well as any holders of liens or encumbrances against the units, such as mortgage holders. A two-thirds vote would not be sufficient, unless your original documents provide for amendment of this issue on less than unanimous approval, which would be rare indeed.

If the garage spaces are considered "limited common elements", your declaration of condominium can be amended to make only those who are assigned garages responsible for paying to maintain them. In my opinion, this would not take one hundred percent, but whatever the "regular" procedure is for amending your declaration of condominium.

With respect to other maintenance items, you need to determine whether they are considered common elements by the documents. If, for example, the balcony glass is part of the common elements, it must be maintained by the association, as a common expense, and (in your case) all owners would have to share the costs equally, even if some feel that there is a "free ride" involved. After all, the method and percentages by which you share expenses is a contract which was presumably part of every purchaser's decision, and is one of the contract terms which the law requires unanimous approval to change.

Question: Who is responsible to maintain the driveways in a condominium, is it the unit owner or the association? Our driveways look terrible, with oil and rust stains. I.A. (via e-mail)

Answer: It depends.

In most condominiums, the unit boundaries are within the physical structure of the buildings, and the driveway would be part of the "common elements." If that is the case, the association is responsible for maintenance.

One exception to this rule may apply if the driveway is described as a "limited common element", meaning

that it is reserved to the exclusive use of one or more units, to the exclusion of other units, and is listed as such in the declaration of condominium. If that is the case, the declaration of condominium may address the matter in one of three ways. First, the declaration can require the unit owner to maintain the limited common element. Secondly, the declaration can require the association to maintain the limited common element, and for all unit owners to share in the expense. Thirdly, the declaration can require the association to maintain the element, but only at the expense of the benefiting owner or owners.

Conversely, if the driveway is part of the “unit”, you have a “land condominium.” In this case, the unit owner would be responsible for driveway maintenance, unless otherwise provided in the declaration.

Question: I live in a golfing community that is called a “country club.” However, we call our board a “master association”, and they manage the affairs of the golf course, clubhouse, restaurant, pro shop, etc. Our community consists of both condominiums and single family homes.

As a reader of your column, I am aware that Chapter 718 addresses how condominium associations must operate, and that Chapter 720 is the guide for homeowners’ associations. My question is what, if any,

Florida statute would influence our type of association. B.F. (via e-mail)

Answer: Based upon the information you have provided, it is likely that your association is a “homeowner’s association”, and is governed by Chapter 720.

First, you have to determine whether membership in the association is mandatory for either the individual homeowners, or their constituent neighborhood associations.

Secondly, the master association must have the right to file a lien for unpaid assessments.

If these two tests are met, and assuming that the “single family” properties are not regulated by the condominium law, the HOA law (Chapter 720) applies. However, if your “single family” section is a “land condominium”, and all members of the master association are also condominium unit owners, then you are what is called a “condominium master association”, and are governed by Chapter 718.

I would ask this question of your board’s president. I am sure that it has come up in the past. It is a fundamental question, and the association’s legal counsel and board should know the answer from the top of their heads. ■

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