



Use Vote to Amend Papers (part 3)

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Today's column is the third part of our look at updating the legal documents for your community association. In the first two editions, we learned some basic definitions, discussed the functions of the constituent documents, and the procedure for presenting proposed amendments (Court Error on Side of Homeowner, August 4, 2005; Amend Documents With Care, August 11, 2005).

Today, we will focus on the required votes to amend association legal documents and what to do once the amendments have passed. As always, the first place to look is in your documents themselves.

Every constituent legal document should contain a clear statement about how it can be amended. In those rare cases where the documents do not contain an amendment clause, the governing statutes will provide a default level for amendments, at least for some of the documents.

With the exception of the rules and regulations, amendments to the constituent legal documents (declaration, articles, and bylaws) will almost always require a membership vote. Except in rare circumstances, these documents are not amendable by the board of directors, although some documents will permit the board to make amendments to correct errors. Conversely, most documents permit the board to amend rules, but there are exceptions and limitations here as well.

Although most people understandably wish to avoid "legalese" in writing their documents, it is important to remember that as legal documents, their ultimate interpretation will go before a court if people cannot agree about a document's meaning. Therefore, while writing documents in "layman's language" or "understandable English" is a laudable goal, there are some clauses which simply should be written in legal vernacular. The amendment clause is one of these provisions.

Most documents will state that they can be amended by a certain percentage vote, let us say two-thirds, for purposes of illustration. Let us also assume we are dealing with a one hundred unit community, for easy math. If a document states that it can be amended by a vote of "two-thirds of the unit owners," how do you count units that may have more than one owner, such as husband and wife? They are each "unit owners," but each of them would not be entitled to a separate vote.

Rather, the preferred verbiage is the statutory term "voting interest." Although "voting interest" is not a household term, it is a defined legal term which will eliminate ambiguity. The legal documents will typically assign one voting interest to each unit or parcel. Thus, in our hypothetical example, it is clear that 67 votes would be required for an amendment, regardless of how many units or parcels were owned by multiple individuals, since there are 100 "voting interests."

A greater source of confusion, and one of the most contentious issues in document amendments (and perhaps association governance as a whole) is how you interpret the required voting threshold.

Staying with our example, let us assume that the declaration for our hypothetical one hundred unit community states: “This declaration may be amended at a meeting of the association by a two-thirds vote.” As we all know, a quorum must be established at the meeting in order for a vote to be taken. In condominiums, the standard quorum is a majority of the voting interests (although the documents can provide a lower number), and state law sets the maximum quorum requirement for homeowner associations at thirty percent.

Let us assume in our situation that a meeting is properly called and 70 units (voting interests) are represented at the meeting, either in person or by proxy. Let us further assume that 60 vote in favor of the amendment, and 10 are opposed. Did the amendment pass?

The Division of Florida Land Sales, Condominiums and Mobile Homes, the state agency charged with enforcement of the condominium laws, addressed this exact issue several years ago in a dispute between a Fort Myers condominium association and one of its unit owners. An arbitrator ruled that the amendment required 67 votes, not simply two-thirds of those who voted (the actual number of units in the real case were different, but the point is the same). That ruling was upheld by a local trial judge, and also the Second District Court of Appeal.

Many associations face apathy and low voter turnout. When super-majority approval is necessary for document amendments, getting amendments passed can be challenging, to say the least. Using our hypothetical example, even though the amendment was approved by a six to one margin, it would have failed.

Although the vast majority of original documents drafted by developers provide for amendment based upon the entire population, many associations amend their documents to base approval on those who actually vote. After all, we elect the President of the United States based upon those who go to the polls, not the total number of registered voters.

A document which is amendable based upon the percentage of those who vote (as opposed to a percentage of the entire membership) might read something as follows: “This declaration may be amended by a vote of two-thirds of the voting interests, present in person or by proxy, and voting at a duly noticed meeting of the association at which a quorum has been established.” Keep in mind, however, that amending documents to lower the required voting threshold (from the entire population to a percentage of those who votes) still requires compliance with the original document, however it is written.

As discussed in last week’s column, there is a set format which must be followed when voting on document amendments. The condominium law requires the “strike-through” method of presenting proposed amendments, where proposed additions are underlined and proposed deletions stricken through. There is an exception when a clause is completely rewritten, where certain further disclosures are required. Owners must be afforded the opportunity to vote on amendments through a “limited proxy,” sometimes called a “directed” proxy. Although the law for HOAs does not impose these same requirements, they may be imposed by the governing documents, and are good practices to follow in any case.

I recommend, unless prohibited by the documents, that all voting be done in writing. For those who do not use a limited proxy, I recommend signed ballots. That way, “recounts” can be easily done, as there is significant opportunity for error during counting in the hub-bub that often surrounds association meetings.

Assuming that the amendments are approved, amendments to the declaration, articles, and bylaws need to be recorded in the county land records. Amendments to articles of incorporation also need to be filed with the Division of Corporations in Tallahassee. Amendments to rules and regulations do not need to be recorded or filed, although it is typically recommended to do so if the pre-existing rules have been recorded in the land records.

One of the most common mistakes committed by associations is to record amendments

without the assistance of legal counsel. Typically, the certificates must be executed with the formalities of a deed, and certain disclosures must be made so that the amendments appear in the “chain of title” for future buyers. This is definitely one of those areas where an ounce of prevention is worth a pound of cure.

Next week, we will get into some of the nuts and bolts of amendments, starting with a focus on what is often the most controversial amendment, rentals in the community. ■

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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.

Don't Withhold Payment of Assessment as Protest

Question: I own a Florida condo unit. Our association has told us that our maintenance fee is going up because there are repairs that have to be made, and we are short of money. They also recently imposed an assessment of one thousand dollars per unit. Can they just do that? They had a meeting stating their case, and mailed us the notices. We feel that mismanagement of the fees must have occurred for things to get to this point. Do we have a right to withhold payment until we get some answers? A.D. (via e-mail)

Answer: First, under no circumstances should you withhold payment of an assessment. In almost every case I have seen, “rent strikes” backfire. Florida’s courts have consistently held that a condominium owner cannot withhold duly levied assessments as a protest against some other claim, such as mismanagement. You would subject yourself to potential default, which could include the levy of interest, late fees, attorney’s fees, and the ultimate foreclosure of your home.

The fact that the association is increasing maintenance fees, or needs to levy an assessment, is not an indication of mismanagement in and of itself. In

fact, I have found that some of the most badly managed associations are those who skimp on required maintenance, in the interest of keeping the monthly maintenance fee low. While this may generate some self-congratulation in the early years, we are seeing more cases of people being forced from their homes because they cannot afford assessments for the tens of thousands of dollars necessary to rehabilitate seriously neglected property.

A condominium association’s board may levy a special assessment if authority to do so is provided in the condominium documents, which should be easy to check. The board must give a fourteen day notice about the need for the assessment, and follow certain procedures. Once the board levies the assessment, a second notice must be sent out indicating when the assessment is due, the amount, and again notifying the owners what the assessment was for. The assessment can only be used for the purpose for which it was levied, and thereafter must either be returned to the unit owners or issued as a credit against future assessments.

Unit owners who do not like yearly budget increases do have a remedy for that issue. If your assessment

exceeds the previous year's by more than fifteen percent, there is a procedure where you (and a certain percentage of your neighbors) can petition the board to have the budget re-examined and voted on by the unit owners. This procedure is found in Section 718.112(2)(e)2.a. of the Florida condominium statute, which is available on-line.

However, note that non-recurring expenses are not counted toward calculating the fifteen percent.

Question: Do amendments or additions to existing rules and regulations of a condominium association have to be filed with the State of Florida or be recorded in Lee County records to be effective and enforceable? (G.L.)

Answer: An association does not have to file or record rules adopted by the board. Amendments to the rules and regulations of a condominium are valid even though they are not recorded, unless the superior recorded documents require them to be recorded.

It is important, however, to ensure that the Board is empowered to adopt rules. That authority is not conferred by law, only by the superior governing (recorded) documents.

If the current rules and regulations are recorded, however, it is recommended that the Association record subsequent amendments.

Question: I am writing about the waiver of reserves for a condominium association. In your August 4 column, you stated that the waiver of reserves was sufficient if approved by a majority of those who voted at a meeting. I believe that a majority of all unit owners must approve the waiver of reserves. I contacted the Florida Office of the Condominium Ombudsman regarding this ques-

tion, and they agreed with me. As an associate at the Ombudsman's Office said, "if you only had two people show up at a meeting, you wouldn't want that small minority making the decision for the entire association." Who is right? M.L. (via e-mail)

Answer: You were either informed incorrectly or misunderstood what was told to you. For example, two members could not vote to waive reserves unless you lived in a three unit condominium, you must have a quorum for a meeting to be held.

Section 718.112(2)(f)2 of the Florida Condominium Act states that reserves may be reduced or waived "by a majority vote at a duly called meeting of the association." Although the statute should be written more clearly, the Division of Florida Land Sales has consistently interpreted the law in the manner set forth in my previous column. For example, although technically applicable only to multi-condominiums, Rule 61B-22.005(8) of the Florida Administrative Code specifically states that reserve voting is based upon "a majority of those present in person or by limited proxy."

This is also what the State of Florida teaches condominium board members and unit owners in its educational materials. For example, in the State's book called "Budgets & Reserve Schedules Made Easy – A Self-Study Training Manual for Beginners" page 45 says: "[Pursuant to] the Condominium Act, once a quorum at a unit owner meeting is established, the vote required to waive or reduce the funding of reserves is the approval of the majority of the voting interests who are present at that meeting. A quorum is a majority of the total voting interests unless a lower number is set forth in the documents." I don't know what could be clearer than that.

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