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AMENDMENTS TO GOVERNING DOCUMENTS WILL IMPROVE ASSOCIATION OPERATIONS

By: Lilliana M. Farinas-Sabogal, Esq.
lfarinas@becker-poliakoff.com



Perhaps one of the most difficult aspects of dealing with Community Associations in our practice is working with communities that have antiquated documents. This is particularly so when the documents have never, or infrequently, been amended over the years. When this is the case, very often there is no remedy for a number of situations that commonly arise in community associations. Telling a client that, while it is true that there is a no leasing policy in the governing documents, it is impossible to prove that an owner's "cousin" who has been "visiting" for months at a time is not a "tenant", is very difficult. This is but one of numerous examples of cases where there may very well be a violation, but by virtue of a loophole that wasn't considered many years ago, or by virtue of a circumstance that no longer applies 20 years after the documents were originally drafted, it is nearly impossible to enforce. Other issues arise when perhaps that community used to be populated by mostly retired people who thought it would be a great idea for their annual meeting to take place every third Tuesday in April at 2:00 p.m., yet the current owners mostly work full time, making it impossible to meet their documents' requirements regarding the date and time of the annual meeting. So, what is an association to do? Many times owners, managers and administrators believe that there is no option except to comply with these antiquated documents and deal with the problems that continue to exist. Not so. There is another option: **Amend, amend, amend.**

Understanding the Role of Each Governing Document

First, it is important to understand exactly what documents govern Condominium and Homeowners' Associations and what aspects of the community these actually govern. Mainly two things govern all Condominium and Homeowners' Associations: The Florida Statutes and the Governing Documents for the Condominium or Homeowners' Association. Governing Documents for Condominium and Homeowners' Associations include the following: Declaration of Condominium (usually called the Declaration of Covenants in Homeowners' Associations), bylaws, 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 are 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 bylaws 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

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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.

Amendment Procedures

Normally, each governing document has in it the method by which it can be amended. Typically, a board of directors proposes an amendment and it will need to be approved by the vote of a certain percentage of the owners. In cases where a particular governing document does not explain a method by which it may be amended, the law will state the method. For example, Florida Statutes Section 718.110(1)(a) states: "If the declaration fails to provide a method of amendment, the declaration may be amended as to all matters except those listed in subsection (4) or subsection (8) if the amendment is approved by the owners of not less than two-thirds of the units..."

In any event, once you determine what percentage (if any) of owners need to approve your amendments, it is important to decide what amendments are possible. Most everything in the governing documents can be amended with the approval of the board and a particular level of owners. However, some documents have restrictions on amending certain portions of the documents. It is possible that the approval of the developer, institutional mortgagees or lenders, or the holder of a 99 year recreational lease is required for amending a particular provision or provisions. Fortunately, Section 718.110(11), Florida Statutes, was amended last year to address lender consent requirements.

Perhaps the best way for a community association interested in "revamping" its documents to proceed is to first ask the Association Attorney to review them and advise what restrictions, if any, exist to amendments. Once this is known, there are several possible courses of action:

"Spot" Amendments

The first is "spot" amendments. In other words, the Association's documents may not be so old as to require extensive amendments, but rather only to update certain portions of it, or to address a persistent issue. In this case, the Association can contact its attorney to draft the needed amendments and the meeting documents, to the extent necessary.

Integrated Documents

The next type of amendment project is usually a good idea when the Association's condominium documents have been

amended several times throughout the years. What results is quite a disjointed set of documents inasmuch as the provisions that are amended are, obviously, not incorporated into the main text of the documents. It becomes cumbersome and difficult for persons to refer back to the governing provisions since so many other subsequent pages need to be checked to be sure there is no amendment that overrides the original text. Sometimes, there have been amendments to the same provisions over and over. In these cases, the Association attorney can prepare a "restated" set of condominium documents. This would be a retyped set of documents whereby all of the past amendments would be incorporated into one set of governing documents. Additional amendments could be prepared and proposed to the owners prior to such a project and, if they pass, can be included in the "restated" set. This would also allow the Association to have their documents in an electronic format, would resolve the problem with difficult to read documents, and would offer a cleaner, easier-to-review set of governing documents to all owners.

Substantial Revision and Restatement of Documents

Finally, another option is to have the Association attorney draft a whole new set of governing documents for the community. Instead of voting on individual amendments, the owners (as may be necessary) would vote on adopting the entirety of the new documents. These new documents could update the old documents, address new and past concerns of the Association, and ensure compliance with laws that may have changed over the years, among other things. This

option would also offer the documents in an electronic format, would resolve the problem with difficult to read documents, and would offer a cleaner, easier-to-review set of governing documents to all owners. Additionally, it allows the Association to propose innumerable amendments all at once, without concern as to some being adopted while others are not. Since the documents would be approved or rejected as a whole, the Association would have certainty one way or another.

Issues to Address by Amendments

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:

- Language regarding future development or the Developer could be removed.

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- Removal of unnecessary definitions and provisions relating to the powers of the Association. Other sections can be simplified.
- 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.
- Clarification of the size of the Board of Directors. Many documents provide a range and do not reflect the actual number.
- Clarification or addition of language regarding assessment obligations, late fees, interest chargeable and lien priority.

- Clarification or addition of language regarding liability limitations.
- Revision of the quorum provisions and allowing adjournment of meetings, even when a quorum exists, would be appropriate.
- Including the ability to provide notice by electronic transmission (e-mail) if so desired by an owner.

Again, it is imperative to understand that every community is different and what may work for one has nothing to do with what may work for another. Additionally, this is not meant to be an all inclusive list of possible amendments. Instead, it is meant to just give an idea as to the extent of possible amendments in the arena of community associations.

The next time you see your neighbor leaving his garbage can in front of his lawn or in the middle of the common area hallway and wished there was something in your governing documents that explicitly prohibited this, consider amendments to your documents. Your community's governing documents should reflect the needs of the current owners and via appropriate amendments, this can be achieved. ■

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DID YOU KNOW?

LIFE ESTATES

There are many different forms of ownership of real property. One form of ownership is through a life estate. While less common these days, a life estate is an estate held only for the duration of a specified person's life, usually the possessor's, with a remainder interest granted to another individual or entity whose ownership automatically commences after the life estate terminates. When this occurs in a community association setting, the question arises whether the individual with a life estate may become a board member or vote on matters which come before the community.

In the case *Sauls v. Crosby*, 258 So. 2d 326 (Fla. 1st DCA 1972), the Court held that "in this jurisdiction a tenant for life or a person vested with an ordinary life estate is entitled to the use and enjoyment of his estate during its existence. The only restriction on the life tenant's use and enjoyment is that he not permanently diminish or change the value of the future estate of the remainderman [the person who will receive the property after the life estate ends]." This case was

cited by the Division of Florida Land Sales, Condominiums and Mobile Homes and put into a condominium context in the arbitration decision, *Spevack v. Plaza Del Prado Condominium Association, Inc.*, Arb. case 04-00-2794, Summary Final Order (March 30, 2004). The Association's governing documents required an individual to be a unit owner, as defined by the Condominium Act, in order to be eligible for a seat on the Board. Section 718.103, Florida Statutes, defines "unit owner" as the "record owner of legal title to a condominium parcel." The arbitrator, citing *Sauls v. Crosby*, held that in his capacity as a life estate holder the individual was entitled to the use and enjoyment of his unit, which included rights provided to the unit owners via the governing documents, including the right to vote on association matters and eligibility as a board member. The arbitrator pointed out, however, that this did not hold true for the remainderman who had no right of possession until the life estate terminates.

If your Association is faced with a unit owner wishing to create a life estate, please consult with your Association's legal counsel to determine if such types of estates are permitted under your governing documents. ■

TIMESHARING, BY ANY OTHER NAME, SUCH AS FRACTIONAL OWNERSHIP—IS IT STILL THE SAME?

By: Mary R. Harvey, Esq.
mharvey@becker-poliakoff.com

In this climate of record foreclosures on homes, lackluster sales of new homes, inflated prices of homes, and other problems faced by everyone because of the plummeting real estate market, some developers of new areas or even some existing homeowners are attempting to sell new homes as “Fractional Ownership” homes. Are some trying to portray this as something other than what it really is—a fancy word for “Timesharing Ownership”? Why? If you look at many governing documents, “timesharing” is prohibited. In Florida Statute 718, the Condominium Act, for example, in order for a timeshare estate to be created this form of estate must be clearly allowed in the declaration by a conspicuous statement and details so that everyone will know that a home can be sold in time intervals to multiple owners. Also, it is important to note that many counties do not allow timesharing operations in a traditional residential area such as a homeowners’ or condominium development. The counties generally will consider timesharing as a nonresidential use. Also, many codes limit timesharing, if it is classified a nonresidential use, to commercial areas, not residential areas. Also, in this market some owners of existing homes in established associations may want to sell their property using a “fractional ownership” approach.

Generally, Timeshare arrangements are governed by Florida Statute 721, unless, as with some clever plan, the periods sold (the fractional ownership sold) is less than seven (7) periods. Another way some plans seek to circumvent the Statute is to have multiple owners all on the deed as co-owners, each owner has an undivided interest in the entire property, which looks good, but usually there is a separate agreement for the specific periods of time that make up the fractional

ownership and define the “use” of the home. This makes it difficult to uncover but we recommend that where a developer is concerned you look at the advertising of the sale of homes. Generally, timeshares are sold in week increments whereas fractional ownership is sold in bundles of time, for example, 1/4th of the time or 13 weeks. So, for example, if the fractional ownership is 1/4 of the time then most likely there are going to be 4 owners of the property and again, it will most likely be a side agreement that will define the fractional ownership so that this scheme is not easily detected by the association or county that prohibits this scheme.

Of concern to our existing associations, is when a developer is selling new homes, with fractional ownership, in areas already established, as it may change the face of the community impacting the use of recreational facilities, increasing traffic and use of the roads, use of water and electricity for common areas, difficulty determining the identity of multiple owners and controlling use of facilities. Similar concerns of congestion and overuse of the facilities develop if an owner in an existing community tries to sell the property to multiple owners under a fractional ownership sale. If your association’s governing documents already prohibit timesharing then it appears that an existing home in your development cannot be sold as a fractional ownership; however, if your association is concerned, it may want to amend its declaration to specifically prohibit “fractional ownership” in addition to timesharing. Even with this amendment, you will have to do your due diligence to uncover and keep up with the creativity surrounding fractional ownership sales. ■

...some developers of new areas or even some existing homeowners are attempting to sell new homes as “Fractional Ownership” homes. Are some trying to portray this as something other than what it really is—a fancy word for “Timesharing Ownership”? Why?



FREE WIND INSPECTIONS

MY SAFE FLORIDA HOME

The My Safe Florida Home Program offers free wind inspections of single family detached site built homes in Florida. The Florida Department of Financial Services will have a qualified inspection firm or inspector call you to schedule your free inspections upon receipt of your application for free wind inspection. The inspection report that you would receive will "outline improvements that may be made to your home to increase resistance to hurricane wind damage, provide an estimate of how much each improvement would cost to complete, provide an estimate of insurance discounts that may be available (if you provided insurance information at the time you applied), and offer a hurricane resistance rating that shows the home's current ability and future ability with improvements, to withstand hurricanes." All applicants should know that, with the exception of the insurance information

provided at the time one applies for an inspection, the information on the application and in the inspection report is considered public information and available upon request. Grant funds may be available for certain improvements that an owner makes upon recommendation in his or her inspection report. Information, and applications for the free wind inspection, can be obtained by calling the My Safe Florida Home help line at 1-866-513-6734.

Although mobile homes, manufactured homes, apartments, condominiums, multi-family dwellings and businesses are not eligible for free home inspections, you may contact one of the wind inspection firms directly and pay the \$150.00 wind inspection fee yourself. More information is available at www.mysafefloridahome.com. ■



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