Amending and Revising Your Association Documents

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Check out our blog: www.vaca.org
Don’t Get Lost in the Bermuda Triangle
Everything in your Association. . .
. . . has a Useful Life!
Your Association’s Entrance Sign

Before
Your Association’s Entrance Sign

After
Your Association’s Pool
Before
Your Association’s Pool

After
Your Association’s Clubhouse

Before
Your Association’s Clubhouse

After
But What About...
Your Association’s Governing Documents?
Yes!
Your Association’s Governing Documents

Happy Trails
Owners’ Association, Inc.

Bylaws
Remember, All Authority is Derivative

- Statutes
  - Property Owners’ Association Act § 55-508, *et seq.*

- Governing Documents
To evaluate the need to amend you must understand the purpose of each Governing Document
Your Governing Documents

- Declaration of Covenants and Restrictions
- Articles of Incorporation
- Bylaws
- Rules and Regulations
- Architectural Guidelines
Declaration

- The Declaration is the backbone, which legally supports the developer’s vision and master plan
- Deemed a Contract
- Expansion – picture a puzzle with each of the pieces representing one phase of an expandable project
- Owner’s Association – Covenant of Membership; basic structure
- Common Area / Common Elements
Declaration (cont’d)

- Covenant to pay Assessments
- Architectural Review Board Control
- Use Restrictions
- Easements
- Period of Developer Control
- Authority to Adopt Rules & Regulations
Articles of Incorporation

- Corporate Charter filed with the SCC
- Instrument used to formally incorporate under Virginia Law (usually a Nonstock Corporation)
- Equal footing with Declaration
- Indemnification of Board Members
- Establishes Classes of Membership
Bylaws

- Rules of governance and corporate operating procedures
- Notice, quorum, procedures, officers, directors, elections
- Authority to appoint committees
Rules & Regulations

- Authority reserved in Declaration
- Govern conduct
Architectural Control

- Authority reserved in Declaration
- Govern exterior features, landscaping, construction and exterior alterations
“But Where Do I Start?”

3 Threshold Questions

1. Is each of the Governing Documents effective?

2. Does each document accomplish its purpose?

3. If not, why not?
Then Ask Yourself

- Are identified problems the result of inadequate documents?
  
or

- Problems with enforcement / administration?
  
or

Both?
Does Applicable Law Address the Problem(s)?

3 Major Virginia Acts:

- Condominium Act (as to Condominiums only)
- Property Owners’ Association Act (“POAA”) (does not apply to Condominium Unit Owners’ Associations)
- Nonstock Corporate Act (applicable to all incorporated associations)

NOTE: Don’t forget local zoning and other applicable ordinances.
Evaluate

- Are there actions that can be taken short of amending the applicable documents?

**Example:**
Can the Board enact a rule or adopt a policy to address the issue?
Resolutions v. Amendments

- Resolution
  - Action by Board of Directors

- Amendment
  - Action by Members
Questions to Consider

- Do your documents create procedural obstacles to the orderly administration of the Association?
  - Are some of the provisions obsolete, unenforceable or absurd?
- Do your documents meet the financial needs of your Association?
Questions to Consider (cont’d)

- Do your documents lack typical restrictions/provisions found in similar communities?
- Do your documents address modern technological advances? (e.g. satellite dishes)
- Is the Association considering applying for a bank loan, or D&O/liability insurance?
- Does the Association have the easements it needs to perform its duties?
Questions to Consider (cont’d)

- Are you baffled by your Bylaws?
- Are there conflicting provisions in your documents?
- Do your documents comply with all applicable laws?
- Do you find yourself repeatedly consulting with legal counsel for interpretations of the same provisions?
- Are there special problems unique to your Association?
If the Answer to **Any** of These Questions is **Yes**, it may be time to Amend
But how do I know what authority we have?
Rules & Regulations

- Check your Governing Documents for **RULE MAKING AUTHORITY** granted to the Board of Directors

1. As to the Common Areas / Common Elements
2. As to Owners’ lots / units and/or conduct

See Code of Virginia § 55-513 (as to Property Owners’ Associations)
Architectural Control

- Check your Governing Documents for **ARCHITECTURAL REVIEW AUTHORITY**

- By what party?
  - Developer?
  - Board of Directors?
  - Architectural Review Board/Committee?

- As to:
  - New construction?
  - Exterior alterations?
  - Landscaping?
NOTE:

1. If Architectural review authority is not reserved in the Declaration, you typically cannot impose these controls by the exercise of the Board’s general rulemaking authority.

2. See § 55-79.80 of the Condominium Act regarding authority of the Board and/or Committee to grant or withhold approval of proposed changes to exterior appearance of a Unit.

3. If the Declaration reserves architectural review authority, but only to be exercised by Developer, determine if there are limitations on the Developer’s rights to assign its rights to the Association.
Now Let’s Dig Deeper into some of the “Questions to Consider”
Do your documents provide procedural obstacles for the orderly administration of the Association?

**Common areas of concern:**

- quorum requirements
- notice provisions
- proxies
- internal conflicts
- voting rights
- due process appeals
- conflicts with applicable laws

**NOTE:** In addition to the Condominium Act and the POAA, the Nonstock Corporation Act may provide relief, particularly when your documents are silent.
Do your documents address technological advances?

**Examples:**

- satellite dishes and antennae (OTARD)
- exterior building materials such as vinyl, vinyl decking and fencing, vinyl-clad windows, hardi-board?
- solar panels / green building options
- faxes, email, and computer technology

**NOTE:** In not, applicable laws or local ordinances may control and/or grant some relief.
Does the Association have the easements it needs to perform its duties?

**Examples:**

- access to BMPs?
- drainage?
- environmentally protected areas?
- maintenance?

**NOTE:** Easements must be granted or reserved by Deed, Declaration or Plat reservation. Real Estate Law controls, so consult a lawyer in in doubt.
Are there special problems unique to your Association?

Examples:

• high percentage of absentee owners?
• owners who make proprietary use of Common Areas / Common Elements?
• unruly meetings?
• too many “variances?”
Do your documents comply with applicable laws?

**Common Areas of Concern:**

- Federal and State Fair Housing Laws and Regulations
- satellite antennae and dishes (OTARD)
- restrictions on an Owner’s right to sell or lease a Lot/Unit
- restrictions on For Sale signs
- flags
- “Single Family” definition
- procedural requirements
You’ve Decided to Amend. . .

. . .Now What?
How to Properly Amend

- Determine which document(s) need(s) to be amended
- Determine amendment provision of each specific document
- Determine whether amendment provisions of Articles/Bylaws comply with the minimum requirements of the Nonstock Corporation Act
When Reviewing Amendment Provisions

- Pay close attention to whether a vote is permitted, as opposed to signed “consents and ratifications,” as opposed to notarized signatures of Owners
- Watch out for Mortgage/Lender protection provisions (often set out in separate section)
- Watch out for Federal Mortgage Agency consent requirements
- Determine whether prior consent of local governing body (i.e. City or County) is needed
- Determine whether Developer consent is needed
What if the amendment provision requires a **super majority** vote?

- Consider amending the amendment provision
Who should prepare the actual Amendment?

- **Always** consult an Attorney to prepare
- Avoid the Unauthorized Practice of Law
- Avoid personal liability as a board member and rely on a professional
How often should you evaluate whether Amendments are necessary?

- Rules & Architectural Guidelines – ongoing

- Declaration – every 5 years if well-drafted and no intervening conditions/events

- Bylaws – every 2 years
What if you need too many Amendments?

- Consider “Amending and Restating” your documents, rather than adding numerous amendment

- Weigh cost of Amending and Restating against long-term logistical problems associated with numerous amendments in addition to the cost of reproduction

- Some law firms will Amend & Restate for a cost-efficient “flat fee” if your Association will use their preferred set of documents
Case Study

- Large Master-Planned Community with 20+ year old Governing Documents
- Like all large communities, community has one or two detractors, haymakers
- Bylaws allowed for nominations from the floor for Director seats at the Annual Meeting
- Haymakers showed up each year and are nominated from the floor
- No aspiration of being elected, their goal was to simply make more hay
Case Study

- Result = Long and contentious Annual Meetings

- Annual Meetings required the presence of legal counsel and security = $$$
Case Study

- The Association’s Options
  - Maintain the status quo
  - Amend the documents to address and overcome the issues

- The Association opted to amend and restate its governing documents in their entirety

- Amended and restated Bylaws no longer permit director nominations from the floor

- Result = A short and sweet, harmonious, 30 minute Annual Meeting
Questions???
Thank You for Attending

For additional information visit our blog:

www.vaca.org