

Governing Document Review and Revision – Winter Edition

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Over the past several weeks, I have fielded a particularly large number of questions and requests from clients related to reviewing and updating condominium documents. “Scott,” goes the typical inquiry, “our governing documents are from the early ‘80s and we haven’t done much with them since then. Is it time to re-write them?” The answer I almost always give to this is query is: probably not.



A comprehensive restatement of governing documents is rarely necessary, often cumbersome and expensive, and possibly impractical (depending on the voting requirement and your community’s appetite to implement the changes). Instead of rewriting documents, I suggest that my clients “triage” their concerns (if they have any), or provide me with a “wish list” of provisions or restrictions they would like to address. I also offer, of course, to review their governing documents and provide my own input as to potential areas for revision or improvement. While there is some truth to the adage “if it ain’t broke, don’t fix it” when it comes to governing documents, there are also many provisions – particularly in older documents – that are worth updating.

In any event, these requests got me to thinking: as the days get shorter, and we start spending more time indoors, what better activity for board members and managers than to sit by a fire (or television), dust off their condominium documents and settle in for some reading? Annual meetings and fair-weather projects are mostly behind us, budget season is coming to a close, now is a good time to reacquaint oneself with your governing documents and consider whether any changes are warranted. Now, I understand that most people do not get much joy out of reading condominium documents, so I thought I would offer a “cheat sheet” of sorts, to ease your review. Since an exhaustive list of potential updates/revisions is beyond the scope of this short article, I decided to focus on those provisions of typical governing documents that tend to be more relevant in colder weather, or when the snow starts to fly. Without further ado, here are my thoughts for those board members and managers looking to revisit their governing documents:

How to Avoid Frozen Pipes

Burst pipes are a perennial pain for many of the associations and managers we represent. A unit that is not properly heated, particularly during sustained deep cold periods, present a real threat of damage not only to the unit, but to the common areas and other units as well. Oftentimes this situation results in the case of the “absentee” owner or perhaps just an owner who fails to properly maintain the unit. In order to avoid these situations, there are a few provisions associations should consider incorporating in their documents. First, many of the newer documents that we draft include a minimum temperature requirement during colder months – that is, unit owners are obligated to keep the thermostat set at a certain temperature to avoid freezes. Failure to comply with this directive would subject the owner to the enforcement provisions of the documents (fines, assessment of fees, legal action, etc.). Second, it may be worth updating the Board’s right of access provision to address potential threats. The more robust the access provisions in the governing documents are, the more likely the association will be able to effectively step-in (perhaps literally) before damage is done. Third, while washing machine hoses and water heaters are not necessarily a significant freeze risk, many of our clients have adopted resolutions to mandate replacement of these elements on a regular basis (in the case of heaters, prior to the expiration of any applicable manufacturer’s warranty) so as to guard against the threat of water damage.

But if they Still Freeze...

Since there is no way to draft your way out of all risks, however, you should also plan for the worst. In the context of your document review, this means taking a close look at your insurance provisions and the respective obligations of the individual unit owners and the association when it comes to damages. Insurance is, or at least, will usually be, the first line of defense in the event of a casualty or loss situation. Board’s should be in touch with their agents at least annually to review and understand their coverage, and to ensure that the coverage in place is consistent with the requirements of the documents. One of the most common areas of recommended change that I refer to when asked about updating condominium documents is the insurance language in the trust or association bylaws. Take a look at your insurance provisions to make sure that owners are required to obtain their own insurance policies (HO6 policies) – many older documents do not require this, and the absence of individual coverage can create significant “gaps” given the typically high amount of master policy deductibles. You should also consider incorporating language in the documents which expressly authorizes the Board to allocate deductible amounts to one or more particular owners (either because their units sustained the damage, or because they were responsible for the damage). We have relied on these provisions to shift risk or liability to appropriate parties in the past. Finally, many of our clients with older governing documents have faced challenges associated with a specific cap on the amount of the master policy

deductible. Unfortunately, in an atmosphere of rising deductibles, it may not be possible or prudent to limit your coverage options to policies that have a deductible of four figures or less. Amending your documents to allow the board to determine the deductible affords the association maximum flexibility to shop for coverage.

In addition to the insurance provisions, you would do well to review the respective maintenance and repair obligations of the individual owners and the association. Many times, these provisions are unclear, ambiguous or incomplete, and a dispute over “who pays for it” may result in frustrating delay and expense in the wake of a loss. The boundaries of the units, limited common areas and common areas also come into play in this regard, and many times we have seen situations where the master deed and trust or bylaws do not square neatly as to certain elements (particularly when it comes to elements such as windows, doors, decks and other unit appurtenances). It is best, of course, to proactively address any such inconsistencies so as to avoid confusion and cost.

These are just a few of the more common areas of the documents that I typically consider when I’m asked to provide guidance to my clients. There are obviously many other issues or concerns that one could address, and since most documents are different – at least in some respects – the recommendations will vary from community to community. Still, you could do worse than to spend a few hours targeting just these few areas and implementing a plan for necessary updates. It may even warm the heart on those cold, dark days to think that you’ve put your community in a better place for your efforts.