

## AMENDING CONDOMINIUM DOCUMENTS

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### I. INTRODUCTION

The following is intended to provide you with an overview of the process involved in amending your condominium documents. As you will see, this is a complex and time consuming task but one that will usually be well worth the time and effort as well as the expense. You may not need to amend all of your documents and in many cases, it is not necessary to completely rewrite one or more of them.

Please read this article in its entirety before we meet to review a checklist of specific amendment items. This will help you organize your thoughts and answer some of the questions you probably already have in mind. Next I suggest you read through your document package and look for specific items discussed in this article. Once this is done, we can have a productive meeting to move forward with your amendment goals.

### II. WHY SHOULD WE CONSIDER AMENDING OUR DOCUMENTS?

Your documents were written by the developer's attorney. He or she probably never visited your site and the plans that were available at that point in time were probably only proposed and did not reflect the project as it was actually built. Thus, the drafter of your documents lacked all of the relevant facts and details.

Further, the attorneys who draft documents for developers tend to work only for developers and are largely unaware of association administration issues or what life in a condominium is like. Their client had very different objectives in mind when that attorney was retained since developers are primarily interested in selling the units and completing the project.

On January 2, 2001, and again on May 9, 2002, certain parts of the Condominium Act were revised and we need to consider changes in your documents as a result of these new laws.

You have probably become aware of instances where your documents are:

Unclear

Incomplete

Contradictory

Out of touch with reality

Out of date

Just plain wrong

Before exploring specific changes, it is wise to be aware of the requirements which must be fulfilled to amend your documents.

### III. REQUIREMENTS

In order to understand which requirements apply and what they consist of, you need to be aware of the fact that most condominium document packages contain four separate but interrelated documents:

Master Deed

Condominium Bylaws

Association (Corporate) Bylaws

Articles of Incorporation

Each of these documents will have separate amendment requirements. Generally speaking, there are three types of requirements:

- A. Voting/Consent
- B. Recording/Filing
- C. Distribution

None of your documents can be amended solely by vote of the Board of Directors. Rather, the co-owners must always vote on the proposal and in some circumstances, the persons or firms holding mortgages on the units must also vote. The specific voting requirements are listed in each of the four documents, usually near the end. Please be aware that the Michigan Condominium Act has voided amendment provisions that require unanimous approvals. Instead, the Act substitutes its own formula which is 2/3rds of the co-owners in number and in value plus, in some limited instances, 2/3rds of the mortgagees (mortgage holders). Therefore, in some cases, we will use the Act's procedure and in others, we will use the amendment procedure set forth in your documents depending on which is easier.

Unless the amendment is proposed as a result of a petition brought by the co-owners (usually 1/3<sup>rd</sup> of them must sign such a petition), the proposal is sponsored by a majority vote of the Board of Directors to get things started. This should be reflected in your minutes.

The Master Deed and Condominium Bylaws are recorded with your County Register of Deeds and thus are matters of public record. Any amendments to these documents must also be recorded. Association or Corporate Bylaws are usually not recorded with the County. Articles of Incorporation are not recorded with the County but are on file with the State of Michigan and therefore, amendments to the Articles of Incorporation must also be filed with Lansing. Wayne County recording fees are usually \$13.00 for the first page plus \$3.00 for each additional page and the surrounding counties are \$9.00 for the first page plus \$2.00 for each additional page. Lansing will exact a small fee for amendments to your Articles of Incorporation.

Once you have successfully crossed all of these hurdles, you must distribute copies of the amendments. Copies must be supplied to each co-owner and in many instances, to each mortgage holder. Once distribution has been completed, the amendments finally become legally effective.

#### **IV. WHAT SHOULD WE TRY TO ACCOMPLISH BY AMENDING OUR DOCUMENTS?**

First of all, it is usually desirable to dump all of the provisions relating to the developer that are no longer necessary. Some references will have to be kept but a fair amount of verbiage is no longer needed once the developer is out of the picture.

Condominium development in Michigan began with the 1963 Horizontal Real Property Act. It was repealed in 1978 and replaced by the Michigan Condominium Act. That Act has been amended a number of times. Most of the changes in the law automatically apply to your condominium but not all of them. Some that do apply should be written into your documents so that you and future directors and co-owners will be aware of them. Also, your Association is a non-profit corporation and as such is subject to the Non-profit Corporations Act and to some extent, the Business Corporation Act. There are provisions in these laws that should appear in your documents so that you will have their full protection and that you will be aware of them. Also, from time to time, we run across restrictions in Condominium Bylaws which are actually illegal as a result of changes to state and/or federal laws, usually those pertaining to anti-discrimination of one variety or another.

Over the years a particular format has evolved for organizing the subjects dealt with in condominium documents. This is the result of the fact that most developer's attorneys are copying from some of the earlier efforts. We will try to make your documents consistent (if they are not already) with this emerging norm since it will make them easier to understand by lenders, insurers and those familiar with other condominium projects. A table of contents is a big help to most when it comes to finding a particular topic without trudging through the entire stack. To the extent possible, we will try to simplify the wording of your documents. Also, if you have had past amendments, they will be merged into the re-written documents whenever possible.

Most documents are riddled with problems that can usually be easily resolved via the amendment effort. These include topics that are not covered, contradictions between the documents and just plain bad drafting. We will review your opinion letter history and interview you to discover items you have become aware of over the years in addition to carefully reviewing all of your existing text. We often find that documents fail to mention some construction features (Can you find fireplaces mentioned in your documents?) or seem to assign repair duties to both the Association and the co-owners (windows?). Finally, your documents may have hidden liability traps (Is the Association liable without limit for all damages caused by the common elements regardless of fault?). Some documents have illegal or unenforceable restrictions such as age requirements, bans on pets based on weight, resale restrictions, etc.

We will also make changes in your documents to make them more flexible as well as the procedures used to govern your association's affairs. One example would be to eliminate the use of a specific date for the annual meeting and replace it with a provision which allows the board to pick a date, time and place each year. This is usually a big help when scheduling these events. Other provisions relating to the operation of board meetings and the giving of notice for board meetings will also be included to increase flexibility.

## **V. ARE ANY PORTIONS OF OUR DOCUMENTS “OFF LIMITS” TO AMENDMENTS?**

We are often requested to draft amendments to revise or eliminate the percentages of value assigned to each unit. This cannot be done without the consent of every co-owner whose percentage is to be changed. As you can imagine, changing one percentage usually results in a change to all of the other percentages and thus, this type of change is not generally possible. Other proposed changes are so emotionally charged that co-owners will reject an entire package of documents because of their concerns about one specific issue.

In certain situations, some registers of deeds will refuse to accept revised Master Deeds without new subdivision plans which can be prohibitively expensive to obtain. We can evaluate whether or not that is a risk once we get further into your amendment project.

## **VI. HOW DO WE PROCEED?**

To start, we need a complete set of all of your documents including all past amendments. While we are reviewing these, you should do the same while keeping track of the specific changes you feel are needed. Next we will need to meet with you to go over the checklist, all of our change ideas and to answer your questions.

Once the initial homework has been done, we will prepare a draft which will include a guide to the revisions. People sometimes ask for a line by line comparison of old and new text. This is only possible (or even helpful) if we are making a small number of changes. If this will be a rewrite project, it is best to use the guideline approach. The board will consider the draft, we will make final editing changes and then you will be ready for the board to adopt a sponsoring resolution.

Once the board has approved the draft amendments package, it should be sent to each co-owner along with an appropriate cover letter. Each document being revised should have a guideline to help the co-owners understand what changes are being proposed. Many times it is helpful or necessary to schedule an informational membership meeting to present the package and answer questions, usually with my participation.

Amending your documents can be a challenging task but it usually is well worth the effort. Most amendment proposals are approved by the co-owners and when necessary, by the mortgagees. It may take some time and effort however, so plan to be patient and persistent.