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Time to Bring Your Documents in for a Check-Up!

The Top Five Amendments Every Association Should Consider

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When we think of the assets of a community association, we rarely think to include the governing legal documents for the community on that list. Although the documents for a community do not carry a monetary value, the declaration, bylaws and rules and regulations of an association can be either a liability or a community's most valuable asset. These governing legal documents form the foundation for the community, establish the community values, and create the covenants and restrictions by which all members are bound. Just like any other asset of a community association, the governing legal documents for the community need maintenance and repair from time to time.

When it comes to community associations, things are rarely static. Community association law and practices are constantly changing, often in response to the realities of today's economy and environment. Boards of directors should include, as part of their checklist of duties, an annual review of the legal governing documents to ensure that the documents remain current and to take advantage of the change in community association laws and practices. The recommended changes for an association's governing documents can vary greatly based on the actual documents and the needs of the association. However, there are some common issues and amendments that associations should be aware of and should keep in mind when reviewing their governing legal documents.

1. Foreclosure Administration Fees. Bank foreclosures have had a significant impact on community associations in the past few years. Although we would all like to believe that the housing market is getting better, bank foreclosures are likely to continue to plague associations for years to come. Bank-foreclosed properties pose numerous problems for communities, not the least of which is the thousands of dollars an association can lose in delinquent assessments when a home forecloses. Not only are associations often forced to write-off significant amounts as bad debt, they often have to spend valuable time and resources tracking the foreclosure and the new owners, compounding an already difficult situation for associations.

The foreclosure administration fee is a fee that is charged to any person or entity that buys a property at a foreclosure sale. Typically set at $500-$750, the foreclosure administration fee is a specific assessment designed to help

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an association recoup the costs associated with monitoring for, responding to, and managing foreclosures in the community. Several communities have amended their governing documents to adopt foreclosure administration fees, lessening the impact of foreclosures on these communities.

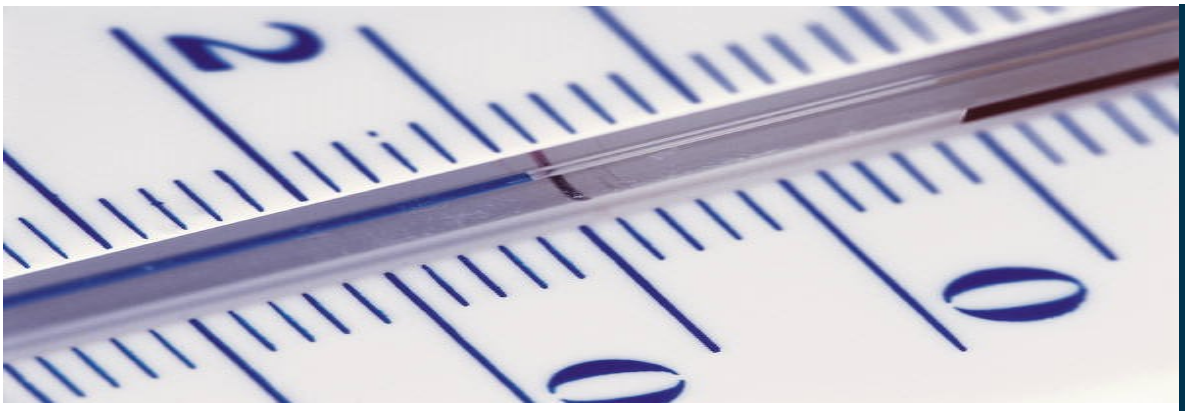
In 2011, legislation was proposed in the Georgia legislature that would have greatly impacted the application of foreclosure administration fees, and even initiation fees or capital contribution fees, by community associations. The proposed legislation would have prohibited associations from charging a foreclosing entity any fees associated with the transfer of property through foreclosure, whether it be by non-judicial foreclosure or deed in lieu of foreclosure.

The legislation did not pass, but it remains pending in the upcoming 2012 session. If it is passed, it is not clear at this time what the impact will be for communities that already have adopted a foreclosure administration fee provision in their covenants. Communities who have adopted the fee or adopt it before any new legislation is adopted, may be exempt from any new law. Regardless, the foreclosure administration fee provision will still apply to any entity other than the foreclosing lender who purchases property out of foreclosure.

2. Capital Contribution Fee. Another common amendment which is highly beneficial to communities is a capital contribution fee amendment, also known as an "initiation fee" amendment. The purpose of this amendment is to charge a one-time, non-refundable assessment to any person or entity that buys or acquires property in the community. Typically, these provisions exempt conveyances to the spouse of an owner or the heir of a deceased owner, and some legal documents require that mortgage holders be exempt if they foreclose on properties. The capital contribution fees can be specifically earmarked for the community's reserves, or allocated to general operating expenses. The capital contribution fee can help communities build reserves, and possibly minimize assessment increases and special assessments.

The legislation proposed in 2011 would have, had it passed, prohibited an association from assessing capital contribution fees to a lender or financial institution who obtained title to a property out of foreclosure or deed in lieu of foreclosure. The legislation may pass in 2012, but communities who already have adopted the provision or do so before any new law is approved, may be exempt from the new law. And, the proposed legislation currently does not prevent associations from charging such a fee on any other transactions.

3. Default Voting. Community apathy may be one of the biggest problems affecting community associations. The

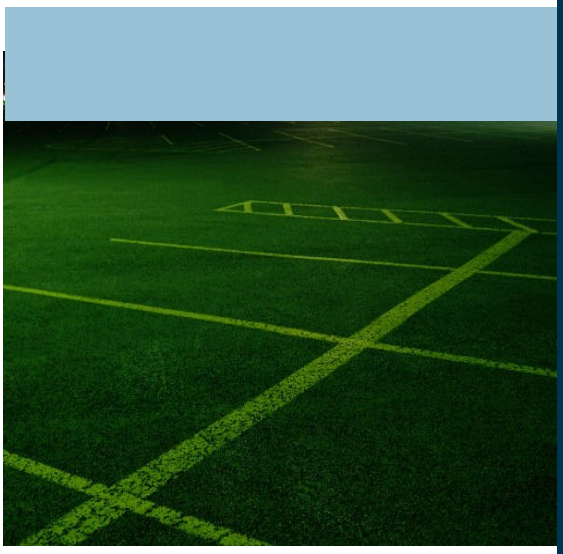


failure of members to participate in community matters, such as board elections, can greatly impact an association's ability to conduct important association business. Amending the governing documents is no exception. The governing documents for most communities require a vote of at least 2/3 of the owners to approve amendments to the documents, which can be an insurmountable threshold to meet when the membership fails to participate. As a result, many associations are unable to pass important amendments that are necessary to the health of the community or which are legally required.

A default voting amendment amends the amendment provisions of an association's governing documents to allow an association to either (1) treat an owner's failure to vote as a "yes" vote; or (2) to count the non-responses in the same percentage as the votes received. The default voting amendment creates a voting procedure which gives owners ample opportunity and means to participate in the vote prior to an owner's failure to vote is counted as directed by the amendment. This amendment has proven to be highly beneficial to those communities who have adopted it, allowing those associations to proceed with other important amendments that formerly were impossible to pass due to apathy.

4. Stronger Enforcement and Suspension Powers. The typical governing documents for most associations will provide for the suspension of delinquent owner voting rights and common areas use rights. However, most community governing documents miss or lack many useful suspension powers to deal with delinquent or violating owners. Here are some common examples:

- **Suspension of Voting**. Most association documents provide that an owner who is shown on the association books to be more than 30 days' delinquent in the payment of assessments or other charges is suspended from the right to exercise his or her vote on association matters.



This suspension may be automatic, but in some documents, the suspension is not automatic; the association must send notice to the owner and/or offer the owner a right to a hearing with the board of directors prior to suspending the right to vote. Any documents with these procedural requirements should be amended to make the suspension automatic.

Even with the standard suspension of the right to vote, most governing documents fail to take it to the next step. Under most governing documents, delinquent owners can still serve as proxy holders for owners in good standing, still count towards quorum, and, in some

The legislation may pass in 2012, but communities who already have adopted the provision or do so before any new law is approved, may be exempt from the new law.

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cases, can even still run for the board of directors. In fact, it is common in the governing documents for many communities that board members who are delinquent may be removed from the board by a board vote, but there is no corresponding provision prohibiting delinquent owners from even running for the board.

Association members and directors alike are often surprised to find these loopholes exist in their documents. An amendment can close these loopholes for delinquent owners and strengthen the suspension authority for delinquent owners.

- **Suspension of Common Area Use Rights**. Likewise, it is a standard provision for most governing documents to suspend the use of the common areas by owners who are 30 days or more delinquent in the payment of assessments or other charges. Again, this suspension can be automatic, or the documents may require the association to provide the owner with notice and/or the right to a hearing with the board of directors. However, many poorly drafted legal documents severely limit the association's suspension remedies. For example, some documents will allow for suspension of the use of amenities, but do not allow for the suspension of other general common areas. This can prevent an association from exercising parking suspensions for delinquent owners.

Other legal documents may allow for common area use suspension, but do not allow for or address the towing of vehicles parked in violation of the suspension provisions. If an association has the right to suspend common area parking, the authority to tow should also be clearly outlined in the documents.

The governing documents for many associations also contain another drafting error which can potentially affect an association's ability to suspend delinquent owner rights. Both the Georgia Condominium Act and the Georgia Property Owners' Association Act allow an association, to the extent provided in their governing documents, to suspend the use of the common areas, so long as such suspension does not *deny* ingress or egress to the owner's property. Unfortunately, many association documents are drafted so that an association can suspend the common areas, so long as such suspension does not *limit* ingress or egress to the property. This deviance from the terms of the GCA and the POA has allowed delinquent owners to successfully argue that suspension of their right to use the common area roads or parking has limited their access to their unit, thereby defeating the purpose of the suspension provision.

- **Suspension of Other Membership Rights**. Few association governing documents allow for suspension of all other membership rights, such as the right to request and receive approval for an architectural modification, or the right to lease. Also, in townhome or condominium communities where the association maintains a master policy on the structure of the units, most documents do not allow an association to keep the insurance proceeds to satisfy delinquencies when claims must be filed on delinquent owner units.

  Clearly, when faced with a situation where a delinquent owner is forcing the entire membership to subsidize his or her costs to the association, an association should have every remedy available to it. These are some of the more common holes in the typical governing documents when it comes to suspension authority. All of these issues can be remedied with an amendment to the governing documents.

5. Leasing. In an environment rife with bankruptcies and foreclosures, community associations are also having to deal with new challenges presented by old and inflexible leasing provisions. Communities that never had an issue with rentals all of a sudden are finding themselves flooded with leasing requests, while other communities with leasing restrictions are all of a sudden finding it a challenge to uphold their leasing restrictions while balancing the needs of the homeowners. The problem is that what worked in a good economy doesn't work in this one. As a result, many communities are having to adjust their community regulations on leasing to find a happy medium.

A common problem with the standard leasing provision for many associations is that the provisions are drafted so there is no movement on the waiting list. Specifically, many of the older provisions provide that, once an owner is permitted to lease, he has the right to lease until such time as he either sells the home or fails to lease the home for 90 consecutive days. The effect of this provision is that the same handful of owners end up leasing their homes for years, while those who need to lease are stuck on the waiting list indefinitely.

As a solution, associations are having to amend the current provisions to limit the duration of leasing permits or revoke permits of delinquent owners. Associations can place other conditions on the granting of permits, such as requiring owners to have lived in the community for a certain number of years prior to being eligible to lease. This helps cut down on the number of investor owners looking to snap up properties. Yet other options are to amend to allow for a fluctuating cap on the number of units that may be leased at any one time, based on market conditions or to include a limit on the total number of years any one owner may lease his or her property.

The foregoing is just the tip of the iceberg when it comes to leasing issues. The good news is, however, that with a little creativity, a community's leasing restrictions can be amended to address its specific problems. If you think it is time to take your governing legal documents in for a check-up, please contact us. We would be happy to review your documents and propose specific changes for your community that will help strengthen and update your documents.

Contact Us:

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