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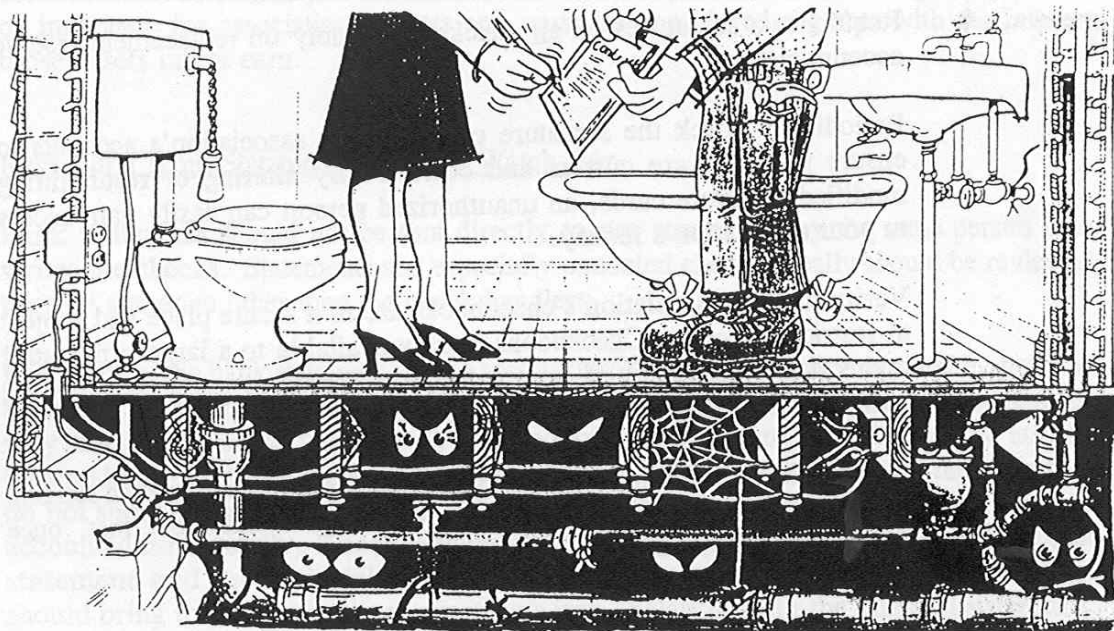
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Understanding Your Governing Documents



ARE YOUR GOV' DOCS ALL WET ?

Are they part of the solution
or part of the problem?

- Well Defined Common Area
- Well Defined Unit Area
- Exclusive Use Areas Specified
- Maintenance, Repair & Replacement Duties Spelled Out
- Insurance Deductibles
- Architectural Alterations
- Decay
- Alternative Dispute Resolution Detailed
- Scheduled for Amendment



UNDERSTANDING YOUR GOVERNING DOCUMENTS

By: Glenn H. Youngling, Esq.

What Are Governing Documents?

The documents setting forth the rights and duties of an association and owners are known as Governing Documents. These include the Articles of Incorporation, if the association is incorporated, the Bylaws, the Declaration of Covenants, Conditions and Restrictions (CC&Rs), policies, rules and any other documents which govern the operation of the association.

Articles of Incorporation

For corporations, this is generally a brief document with the primary objective of describing the corporation's purpose. For community associations it is a document rarely referred to.

Bylaws

This document sets forth the procedural and housekeeping rules by which the association operates. The focus should be process, not substance. Bylaws typically incorporate mandatory statutory standards, as well as variations where statutes permit flexibility. Statutory provisions are often supplemented to address the particular needs of an association.

Declaration of Covenants, Conditions and Restrictions

Also known as the Declaration or CC&Rs, this document typically sets the balance of rights and duties for those with an interest in the property. The rights and duties of each owner, resident, the association and secured lenders should all be set forth here.

Policies and Rules

An association may adopt policies and/or rules to educate owners, provide consistency over time and fill in details not covered by other governing documents. Generally the board, by majority vote and with prior notice to owners, can adopt policies and rules consistent with the other Governing Documents. There is flexibility here to "fill in the gaps" in the other Governing Documents.

The Importance of Governing Documents in Community Association Living

California Supreme Court Justice Joyce Kennard wrote:

"Providing ... homeowners with substantial assurance that their development's recorded use restrictions can be enforced ... promotes the stability and predictability so essential to the success of any common interest development. Persons who purchase homes in such a development typically submit to a variety of restrictions on the use of their property. In exchange, they obtain the security of knowing that all other homeowners in the development will be required to abide by those same restrictions. "

(From the majority opinion in the case of *Nahrstedt v Lakeside Village Condominium Assn.* (1994) 8 Ca1.4th 261, 389)

The Art of Interpretation: Tips You Can Use

- Attempt to see the intent of the provision in context.
- View the words in their ordinary sense unless a technical sense or special meaning is expressed. Be sure to check the definitions. Review the definitions section of the Davis-Stirling Act at Civil Code § 1350.
- Don't bend or push a meaning to cause mischief or absurdity.
- The document should be interpreted as a whole and in conjunction with the other Governing Documents.
- Determine how the association and owners have interpreted the provision in the past.
- Give significance, if possible, to every word or part, and harmonize the parts by considering a particular clause or section in the context of the whole.
- Keep in mind that the legislature, at Civil Code §1370, endorses liberally construing the declaration in order to facilitate the operation of the association.

Legislative Supplementation and Preemption

The legislature has enacted certain statutes to assist associations with old or unworkable Governing Documents. Most of these are located in the Davis-Stirling Act (starting at Civil Code § 1350) and the Corporations Code (starting at Corporations Code §7110). To put these statutes into context with Governing Documents, they should be read with three concepts in mind:

- **Governing Documents Come First.** With one approach, the statute will alert the reader that it applies only if the existing declaration does not address the subject. You may see words such as "Unless the declaration otherwise provides ..." This means you look to the declaration first, and only if it fails to address the subject do you look to the statute for authority. This approach is also used in Corporations Code to fill in gaps in bylaws.
- **The Statute Comes First.** With the other approach, the statute will alert the reader that it preempts the declaration or other Governing Document. You may see words such as "Notwithstanding any provision of the governing documents to the contrary ..." Under this approach, if does not matter what your document says, you follow the statute.
- **No Guidance Provided.** Most of the Davis-Stirling sections do not refer to how they relate to the Governing Documents. This leaves the reader to decide on a case-by-case basis which is likely to be controlling.

Typically documents drafted after enactment of the Davis-Stirling Act in 1986 include the text of many of those statutory provisions. Be cautious, however, with documents more than a few years old. Annually the legislature revises these statutes. Changes are not often readily apparent so especially on matters of importance, the two should be carefully compared.

The legislature's propensity to change the rules poses a dilemma in drafting new Governing Documents. Ideally, in a good set of Governing Documents, there are few cross-references to authorities outside of the association's set. Being self contained is very helpful but may gradually pose a growing problem. By integrating the text of statutes into the Governing Documents, the documents are vulnerable to becoming outdated as the legislature continues

to amend the laws applicable to community associations. Thus the more complete the documents, the faster they may become outdated.

To prolong the life of revised declarations or bylaws, statutory cross references may be provided in lieu of the full text. Full text may be provided but with a notation such as "see generally Civil Code § xxx." Some revised documents give the Board, without a vote of the members, limited authority to update the document to reflect changes in statutes that would preempt the old declaration provision. Safeguards to this extraordinary Board power may include such requirements as (a) procuring opinion letters from legal counsel or a C.P.A., (b) advance notice to owners of the Board's intended action and the proposed changes and/or (c) unanimous Board approval.

Amending Declarations and Bylaws

The need to revise bylaws and declarations is one that usually grows gradually over time. Changes in statutes, case law, aging buildings, changes in owner preferences and environmental changes may influence the growing need to amend or revise. The departure of the developer and collective experience of the association may also prompt change. Specific reasons may include:

- Elimination of complicated legalese and use of plain English
- Deletion of outdated developer references and provisions
- Descriptive headings and a comprehensive Table of Contents to assist in finding relevant sections
- Addition of provisions which clarify those "gray areas" where it is unclear whether the owner or association is responsible for maintenance, repair and/or replacement of building components
- Addition of provisions to deal with such subjects as insect infestations, telephone wiring, and window and exterior door maintenance
- Addition of provisions requiring notice of sale or lease of the property
- Insertion of step-by-step due process procedures for dealing with governing document violations, which include enforcement options
- Specification of allocation of responsibility for insurance deductibles
- Inclusion of provisions addressing the risk of earthquakes, insurance and deductibles
- Addition of the power to fine and new ways to ensure payment
- Addition of clean procedures for creating, implementing and enforcing rules
- Provision of new tools for architectural enforcement
- Changing the number of directors and/or staggering terms
- Enhancement of liability protection for directors
- Creation of a document package more impressive to lenders and prospective purchasers.

Whatever the reasons for amendment or revision, the process should be carefully thought through in advance. From funding to recordation will likely take months and several thousand dollars. Development of a timeline for activities and target dates will make the process smoother and more efficient.

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