

Managing The Governing Document Amendment Process

By: *Chad A. Johnson, Esq.*

Your community association's governing documents are confusing, outdated, and fail to provide you the rights and powers necessary to effectively govern your community association and its homeowners. Your community association's board of directors decides that a governing document amendment is necessary, but has concerns that the process will be overwhelming.

Governing document amendments pose a time-consuming challenge to community associations. Successful governing document amendment projects employ proper process management, which allows the community association's board of directors to minimize its time commitment while maximizing the project's success.

A governing document amendment project begins with an analysis of the problems created by the current governing documents. What is wrong with the current governing documents, and how does the community association want to see them improved? Common issues with existing governing documents include the following: maintenance obligations; leasing restrictions or

prohibitions; architectural controls and community standards; rules and regulations; enforcement penalties, sanctions and other remedies; insurance coverage; assessment powers; ambiguous language; and generally outdated governing documents.

During the analysis phase of the project, many community associations will appoint a governing document amendment committee to analyze the current governing documents; others will have the board of directors undertake this part of the project. The committee approach is advantageous from the standpoint of minimizing the time commitment of the current board of directors. The appointed committee may be comprised of current and former members of the board of directors, who understand the difficulties presented by the current governing documents, and may also include interested homeowners. The committee approach will not be advantageous in situations where the community association is unable to find willing committee members, or when the board of directors wishes to keep the governing document project under its control.

The initial analysis of the current governing documents will result in a list of issues and goals for the governing document amendment project. Once the community association's board of directors (or its committee) identifies the issues with the current documents and the goals to be achieved through the

governing documents amendment process, the next step is to retain a community association law attorney to analyze the existing governing documents, with the community association's identified issues and goals in mind.

The community association's attorney reviews the existing documents to ensure that the identified issues can be resolved and the identified goals can be met through the governing documents amendment process. If not, the community association's attorney may suggest alternative methods for addressing the identified issues and achieving the stated goals. If there is nothing to improve, there is nothing to gain through the governing document amendment process, and the community association saves the time and expense of the governing document amendment process by focusing on the alternative methods of reaching its goals or accepting that its goals cannot be met.

Assuming that the community association's goals may be met by a governing document amendment, the community association's attorney will identify the

governing documents to be amended. Depending on the circumstances, the amendment process may include amendments to one or all of the community association's governing documents (articles of incorporation, bylaws, declaration, and rules and regulations).

The next step in the governing document amendment process is to begin drafting the required amendments to the existing governing documents. Some community associations address this phase of the governing document amendment process by drafting changes to the governing documents and providing them to the community association's attorney. However, the better approach from a time management standpoint leaves this task to the community association attorney, with review and comment on the drafted documents by the community association's board of directors and/or the committee formed for the governing document amendment project.

Once the initial drafts of the governing document amendments are received by the community association, its board of directors (or committee) reviews the provided documents to ensure that the identified issues are covered, and that the amendment language makes sense from a content and procedural standpoint. The community association provides comments to the attorney, who makes revisions to address the identified


concerns. The community association's board of directors should now have a set of governing document amendments for approval.

Once the governing document amendments are approved by the board of directors, the community association proceeds by providing the approved documents to its homeowners for review and comment. If there is strong support for the governing document amendments, the community association may immediately proceed with homeowner approval. However, most community associations find a homeowner informational meeting to be helpful in achieving final approval. The homeowner informational meeting is typically conducted with the community association attorney available for homeowner questions and comments. Depending on the issues raised by homeowners, additional drafting may be necessary to improve the documents or make them more likely to be approved by the homeowners.

Once the amendment documents are in final form, a meeting of the homeowners is conducted to vote on the applicable amendment. For example, amendments to the articles of incorporation, bylaws and declaration typically require homeowner approval, but an amendment to the rules and regulations typically does not. Amendments to the articles of incorporation and bylaws are commonly voted upon by the homeowners at a special or annual

meeting. Depending on the amendment provisions of the existing declaration, an amendment to the declaration will be voted upon by the homeowners at a special or annual meeting, or the requisite number of homeowners will sign the amendment document. Some governing documents require first mortgagee approval. Once homeowner approval is obtained, first mortgagee approval is sought whenever necessary.

As soon as all approvals are obtained, some amendments are required to be filed to be effective. A declaration amendment must be filed with the county in which the property is located, and a bylaws amendment may be similarly filed when required by the existing documents. An amendment to the articles of incorporation is filed with the Minnesota Secretary of State.

By following the above guidelines, your community association will effectively address the issues with its current governing documents, and achieve a governing document amendment in the most time and cost effective manner. 

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Home Affordable Foreclosure Alternatives Program Effective as of April 5, 2010

By Nancy T. Polomis, Esq.


In response to the “mortgage meltdown” and meteoric rise in mortgage foreclosures and delinquencies, the federal government established the Home Affordable Modification Program (HAMP), under which homeowners can modify their mortgage loans to allow them to retain ownership and make timely monthly payments. In the fall of 2009, Home Affordable Foreclosure Alternatives (HAFA) was expanded to include provisions and incentives for mortgage servicers to allow short sales as an option for homeowners who wish to avoid foreclosure. Since short sales affect the ability of all lien holders—including associations—to collect the sums due, associations should be familiar with the program in order to make informed decisions as to whether to participate in short sales under the HAFA program.

Under HAFA, a first mortgagee can receive a “servicing bonus” of \$1,500.00 for completing a short sale, and displaced homeowners (sellers in a short sale) can receive a “relocation bonus” of \$3,000.00 to offset the costs of moving. Additionally, junior lien holders may receive up to six percent (6%) of the unpaid principal balance, up to an aggregate total of \$6,000.00 (i.e., the \$6,000.00 is shared among all junior lien holders). In exchange, the

lien holders agree to release their lien and fully release the borrower from personal liability. As such, an association that participates would not be able to sue a delinquent homeowner for the unpaid amounts. Where the association is the sole junior lien holder, such an option may be the association’s best option to recover at least a portion of the unpaid assessments. Where the association is but one of several junior lien holders, this may not be the best option. Participation by junior lien holders such as associations is not mandatory.

Short sales processed under HAFA are scheduled to be processed far more quickly than has been the case to date. Under HAFA, first mortgagees must advise the homeowner of its acceptance or rejection of the short sale offer within ten business days of receipt of the offer.

While participation in a HAFA short sale may initially result in a loss to the association, it will also facilitate getting a “paying” homeowner into the home more quickly, thereby presumably reducing association losses long term.

Short sales are complex transactions. The HAFA program is designed to simplify those transactions, but is, in itself, not “simple.” Analyzing whether participation in a HAFA short sale is in your association’s best interest requires consultation with experienced legal counsel. 

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