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FIVE COMMON PROBLEMS WITH CONDOMINIUM DOCUMENTS THAT LEAVE CONDOMINIUM ASSOCIATIONS AND THEIR MEMBERS EXPOSED

By: Christopher L. Pope, Esq.
Board Certified by the Florida Bar in both Construction Law and Condominium and Planned Development Law

The governing documents of condominium associations, which include the Declaration of Condominium, the Articles of Incorporation, the Bylaws, and any Rules and Regulations, are often outdated, inconsistent with Florida Law, or do not meet modern standards for a condominium.

The condominium documents inevitably become outdated because the Florida Statutes are frequently amended, Court Cases are decided, and the social norms of society evolve over time. Even 15 years ago, the document drafters could not have foreseen the challenges of room sharing services such as VRBO, the demand for electric charging stations for automobiles, electronic meeting notices and voting, or, more recently, emergency powers for a pandemic like COVID-19.

Furthermore, the original documents are often drafted on behalf of a developer and are less restrictive, because the developer is trying to cast a wide net to sell the units as quickly as possible without objection. If a condominium is still operating under original developer documents well after the time of turnover or just old documents, the condominium association would be wise to have them reviewed to determine if they need to be amended and restated to bring them in line with the expectations demanded for a present-day condominium.

Below is a list of only five of the many common problems with outdated governing documents:

1. No right to approve tenants or occupants; or charge transfer fees

A condominium association has no right to screen, approve, or disapprove tenants or occupants unless such rights are stated in the governing documents. Many associations are unaware of this until it is too late and there is little they can do to quickly remove a problem tenant or prevent an unapproved tenant from moving in. With fewer places to live for people that would not pass a background check (such as violent criminals and sexual predators), word that a condominium has no approval restrictions can quickly spread, and the condominium can

become a magnet for people that would not otherwise pass a background check, which drives down the value of the units.

Another problem is that it is not uncommon for condominium associations and their managers to be unwittingly screening tenants and charging fees without any authorization. Condominium associations should be aware that any attempt to enforce such rights without authorization in the governing documents may subject the association to legal liability to the owner and tenant or occupant.

Furthermore, pursuant to Section 718.112(2)(i), Florida Statutes, a condominium association can only charge a transfer fee in connection with the sale, mortgage, lease, sublease, or other transfers if it is required to approve such transfer and the fee is provided for in the Declaration, Articles, or Bylaws. The amount of the fee may not exceed $100 per applicant, regardless of the cost the association is obligated to pay its management company. Note that spouses and dependent children are considered as one applicant.

The solution to these problems is likely to amend the Declaration to require the association to approve unit transfers and leases, and charge the maximum transfer fee. It can be easy to garner the necessary membership support to amend the Declaration when the risks for doing so are explained.

2. <u>No entitlement to late fees or maximum interest for delinquent assessments</u>

No owner wants to pay late fees and interest when they miss a payment, but late fees and interest help make the condominium association whole for the expenses it incurs when a unit owner does not pay on time and becomes delinquent. However, the association is only entitled to collect an administrative late fee if it is provided for in the Declaration or the Bylaws, and, if so, can charge up to the greater of $25 or 5% of each delinquent assessment. If your condominium association's Declaration or Bylaws do not provide for a late fee or has a late fee lower than what is allowed by the statute, they should be amended to reflect Florida law.

Similarly, delinquent assessments bear interest at the rate provided in the Declaration. If no rate is provided in the Declaration, then interest accrues at the rate of 18% per year. If your Declaration specifies an interest rate lower than 18% percent, the provision needs to amended or deleted so that the association can collect the maximum interest.

3. <u>No specific maintenance schedule for unit owners</u>

There are several items that, if not timely maintained or replaced, will fail and cause water damage to the condominium's common elements and other owners' units. If the unit where the failure occurs is vacant, the damage is exacerbated.

Examples of common items that are often ignored include water heaters, washing machine water supply hoses, and the condensation lines for air conditioners. A water heater has an approximate useful life of 7 years and the supply hose of a washing machine is approximately 5

years, so the governing documents should specifically state how often these items should be replaced. The Declaration should require the condensation line to be checked and cleared every six months by the unit owner if it is not the association's responsibility. Moreover, unit owners should be required by the Declaration to turn off the water to their unit whenever it will be vacant for 48 hours or more.

The three benefits of having a specific maintenance schedule in the Declaration are: 1) it puts the owners on notice of the maintenance that needs to be performed, 2) the association can take preventative action, such as sending reminders and requiring that the maintenance or replacement be performed, and 3) it is much easier for the association to hold an irresponsible unit owner accountable for any out of pocket costs that otherwise have to be paid by innocent parties, such as the association and other affected unit owners.

With respect to out of pocket costs, according to Section 718.111(11)(j)(1), Florida Statutes: "A unit owner is responsible for the costs of repair or replacement of any portion of the condominium property not paid by insurance proceeds if such damage is caused by intentional conduct, negligence, or failure to comply with the terms of the declaration or the rules of the association by a unit owner, the members of his or her family, unit occupants, tenants, guests, or invitees, without compromise of the subrogation rights of the insurer." However, it is difficult to use this statute unless there is a violation of the terms of the Declaration or Rules, because it is not easy to prove negligence or intentional conduct for most water leaks.

By establishing a specific maintenance schedule in the Declaration, the association will have an easier time applying the statute because it will only need to show a failure to comply with the Declaration, rather than negligence or intentional conduct. For example, if the Declaration requires water heaters to be replaced every 7 years, it is easier to prove that an owner failed to timely replace an 8 year old water heater than it would otherwise be to prove the unit owner was negligent. In fact, absent specific and objective maintenance timelines, a derelict unit owner is unlikely to pay for the damage he or she caused, and the other owners will end up paying out of pocket, whether for damage to their unit or their share of a common expense of the association.

On a final note, the responsibility for drying out the unit and any resulting mold is not often addressed in the condominium's governing documents. The association can limit its exposure by specifically addressing these items in the Declaration.

4. <u>Outdated insurance provisions</u>

Florida law regarding the insurance requirements has evolved and been revised many times over the years. As such, we often see older governing documents with maintenance and insurance provisions that are not aligned with current law. In addition, the insurance policies could also be in conflict with the Declaration, the law, or both, and when there is conflict and uncertainty the likelihood of litigation increases significantly. As a result, the Declaration's insurance provisions must be reviewed and updated regularly so that the owners and the condominium association have a clear understanding of their obligations and rights, to ensure

that neither inadvertently relies on an outdated provision, exposing them to liability. This is an area the association's Board of Directors must get correct, because the Board has a fiduciary obligation to the unit owners to protect them by reducing the likelihood of protracted litigation over insurance coverage or maintenance obligations.

5. <u>High amendment voting threshold</u>

Many older condominium documents require an unreasonably high number of votes to make general amendments to the documents, some as high as 80% of all unit owners. When a voting percentage is based on all unit owners, by default an automatic "NO" vote is cast by owners that do not participate or that do not care about the condominium and its affairs. If a condominium cannot amend its documents with a reasonable number of votes of the membership, it will be plagued with the issues discussed above, causing apathy and hopelessness toward improving the condominium. The resale value of the units inevitably falls and the market may not make it easy for the association to collect the assessments it needs to even maintain the status quo.

The condominium can change its trajectory by passing an amendment to change the voting percentage to only those unit owners present at the meeting, either in person or by proxy, and voting. Doing so will give those owners who participate in the meetings of the association a voice and untether the future of the condominium from those who are disinterested or indifferent. Passing the amendment to change the voting threshold may seem like a daunting task, but an experienced condominium attorney can offer successful strategies for getting it done.

A note to the reader: This article is intended to provide general information and is not intended to be a substitute for competent legal advice. Competent legal counsel should be consulted if you have questions regarding compliance with the law.

Questions regarding the content of this article may be emailed to Christopher Pope at christopherpope@paveselaw.com. To view past articles, please click "Publications" on our firm website. Mr. Pope is Florida Bar Board Certified in both Construction Law and Condominium and Planned Development Law. He is a partner and an experienced construction and real estate attorney with the Pavese Law Firm, 1833 Hendry Street, Fort Myers, FL 33901; Telephone: (239) 336-6208; Telecopier: (239) 332-2243.