

HOA GOVERNING DOCUMENTS EXPLAINED

March 2010 – HOA gurus freely banter about the terms “CC&Rs,” “bylaws,” “rules and regs,” and “governing documents.” But what exactly are those documents, and which are the most and least powerful?

Here we lay out what constitutes each governing document and sort out which ones have more authority than others. For instance, do rules and regs trump CC&Rs? No, and here we explain why.

Confusion Common Over HOA Governing Docs

“I see people confused about their governing documents all the time,” says Michael S. Hunter, an attorney and partner at Horack Talley Pharr & Lowndes PA in Charlotte, N.C., who represents associations. “People all the time talk about bylaws, saying, ‘Our bylaws say this,’ and what they really mean is their CC&Rs. I know it’s really more of a matter of semantics, but a lot of board members don’t grasp the concept that their association is a corporation and needs to be operated as such.”

Jenny Key also sees befuddlement over that bundle of association legal documents. “I see confusion, particularly among homeowners,” says the Austin, Texas-based vice president of RealManage, a Dallas, TX, association management firm that oversees properties in Arizona, California, Colorado, Florida, Louisiana, Nevada, and Texas. “Usually board members have some understanding of the governing documents by the time they’re interested in serving on the board. But even then, people may call the governing documents different things, like ‘the documents,’ ‘the use restrictions,’ or ‘the rules and regs.’”

Where do misunderstandings come from? “The big issue, unfortunately, is that a lot of people don’t read them,” says Ben Solomon, an attorney and founder of the Association Law Group in Miami Beach, Fla., who advises more than 500 associations and also represents developers through his second law firm, Solomon & Furshman LLP. “Boards operate in a way that’s practical and the way they have in the past, but they don’t read the governing documents. A lot of times clients will say, ‘What do our documents say?’ A lot can be understood just by reading the documents. Governing documents aren’t all the same, and you need to pay attention to what yours say.”

What You Should Know About Each Governing Document

Hunter has prepared a detailed summary of each homeowners association governing document. Here are just a few highlights:

CC&Rs—“The declaration of covenants, conditions, and restrictions (CC&Rs) are recorded with the register of deeds in the initial phase of development of a townhome or planned community,” he explains. “The CC&Rs govern what an owner may, may not, or must do with respect to the real estate. In them, you’ll typically find things like a description of the property covered by the CC&Rs, language establishing an HOA, a protocol for levying annual and special assessments for common expenses, and a description of the common areas and amenities.”

Bylaws—“Most HOAs are set up as non-profit corporations,” says Hunter. “Like any other corporation, an HOA needs bylaws to set forth how the corporation will be run. In the bylaws you’ll typically find things like a description of the various classes of membership and their voting rights and provisions for calling and holding annual and special meetings of the members.”

Rules and Regulations—“The purpose of rules and regulations typically is to interpret, clarify, and assist in the administration of the CC&Rs,” says Hunter. “Rules and regs can’t be any more restrictive than the CC&Rs. Sample rules and regs include things like regulations on the use of common areas and architectural guidelines.”

Governing Document Hierarchy

Which governing document carries the most heft? None. State or federal statutes trump any homeowners association governing documents, says Hunter. But what’s next on the hierarchy?

“In Florida, we generally have a declaration, and that would either be a condo or HOA declaration,” explains Jed L. Frankel, a partner at Eisinger, Brown, Lewis, Frankel & Chaiet PA in Hollywood, Fla., who advises community associations. “Then under the declaration, you have the bylaws, and then the rules and regulations.

“The best analogy I can give is that the declaration is the equivalent of the U.S. constitution,” adds Frankel. “Bylaws are like laws passed by Congress, and that leaves the rules and regs. In the federal government, we have all these administrative agencies, like the Food and Drug Administration, which make up rules and reg. That’s the hierarchy of things. When you look at that hierarchy, rules are way down at the bottom, and any rule contrary to a bylaw or declaration is unenforceable, just like courts are all the time invalidating laws that are contrary to the U.S. Constitution.”

Key likes to explain that it’s easy to remember which documents carry more heft by thinking about when the developer recorded them. “Generally, I let homeowners know that it starts with whatever document is recorded first,” she explains. “When the developer starts to plan the development, he’s going to record the plat. That will have the highest authority, but it doesn’t usually contain much information. Generally, the declaration is filed next. Then will come the articles of incorporation and later the bylaws and the rules and regs, if an association has them. Not all associations have filed rules and regs, and board policies would come later.”

There’s one more way to remember the authority of each governing document. “I also explain that the harder it is to adopt and change a set of documents, generally that means it’s more authoritative,” says Key. “The CC&Rs—in Texas, people put a ‘D’ in and call them ‘DCC&Rs,’ with the ‘D’ standing for declaration)—generally take about two-thirds of the owners to make changes. With the bylaws, sometimes the board can change them, or that may require a percentage of owners. Rules can be generally changed by the board.”

Where Conflicts Arise

Even with thorough governing documents, conflicts can arise. “Let’s say a declaration says pets are permissible,” explains Frankel. “That’s the constitution. What about people who want to start regulating pets? They decide they want only dogs under 50 pounds. That’s a problem because it runs afoul of the declaration. In that case, you’d get into something like a constitutional analysis. Is the rule protecting the health of the association’s members? Is the rule reasonable to meet that aim? And does it run afoul of the declaration provision? An association would have a hard time trying to regulate through rules and regs something that’s contrary to the declaration.

“That’s not to say there can be no rules governing pets,” adds Frankel. “Let’s say the board had incidents of a particular breed of animal attacking people that could be documented. It says, ‘We’re going to protect residents. So you can’t have a pit bull unleashed, and it must be muzzled.’ That would

probably be permitted. But to say no pits would probably go too far when the declaration says dogs are allowed."