

By Saul Feldman - Topics in condominium documents that are often amended by condo trustees and unit owners

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Condominium documents are drafted by the attorney for the condominium developer or the attorney for the condominium converter whose main goal is to draft documents that maximize flexibility of marketability and minimize liability. Usually little or no consideration is given to whether the documents cover operational matters properly. For that reason, it is often beneficial for condominium trustees and unit owners to review and amend the documents.

In this article, I am going to address the topics in the documents that are often amended.

Compliance with FHA; Mortgagee Sections of the Documents. As 30-40% of all home loans are now FHA loans, it is important that condominium documents comply with the requirements of the FHA. Also, attention should be paid to compliance with Fannie Mae and Freddie Mac. Portfolio loans which are held by the original lender are becoming the exception rather than the rule. In the past, lawyers would put language in the condominium documents that the documents were intended to comply with FHA, Fannie Mae and Freddie Mac. I never really understood why this was done or what it really accomplished. If the documents violate FHA and other agency requirements, such self-serving language does not correct the violation. Rather, the documents need to be reviewed and, if necessary, amended to actually comply with FHA and the other players in the secondary mortgage market. This is most important with respect to the FHA given its large market share and the new FHA regulations that have been announced this year.

Insurance Coverage. Insurance coverage has become important. The documents should describe what the Master Insurance Policy must cover as well as the deductibles and the types of insurance the unit owners could or must get on their own.

The insurance provisions, therefore, need to be carefully reviewed. For example, many documents provide for a fidelity bond. A fidelity bond is more expensive than fidelity insurance. The documents should be amended to allow for either a fidelity bond or fidelity insurance.

Quorum. Quorum requirements are often too high. This makes it difficult to hold a meeting of the unit owners. The quorum requirements should be lowered.

Many condominiums require 50% of the unit owners (based on percentage of ownership in the condominium) present in person or by a written proxy in order to have a quorum. It is often difficult, if not impossible, to obtain 50%. Documents should be amended to require a smaller percentage, such as 25% or 30%.

Leasing. Leasing is often a troublesome matter in a condominium. The documents should be reviewed and amended to conform with the wishes of the owners. Documents that permit tenants, for example, could be amended to prohibit tenants. Attention should be paid to FHA requirements as to tenants.

Tax Abatements. The issue of real estate tax abatements is always a difficult issue. One approach

may be to allow the condominium trustees to file for abatements on behalf of the unit owners. An owner would have to sign an authorization for this but, assuming that unit owners are willing to authorize the trustees to file an application for abatement on their behalf, this is a good way to coordinate the process of obtaining tax abatements for condominium units.

Working Capital. Documents sometimes fail to cover the need for a working capital reserve. The documents may cover the reserve for capital replacements. The documents should be amended to provide for a working capital reserve as well.

Special Meetings. The documents may cover in detail the annual meeting but only briefly mention special meetings, which can be more important than the annual meeting and should be addressed in detail in the documents.

Date of Annual Meeting. Documents always state a date for the annual meeting. The stated date often is not the appropriate date for the meeting. An amendment stating that there shall be an annual meeting of unit owners once a year but leaving the selection of the date to the trustees may make more sense for many condominium communities.

Floor Plans. A helpful provision which I am now using is to provide in an amendment to the Master Deed that, in the event of a conflict between the Master Deed and the floor plans, the floor plans shall control.

De Facto Condominiums. Sometimes the condominium form of ownership is used to obtain an enhanced floor area ratio which allows a developer to build more units. Other times the condominium form of ownership is used because the municipality will not allow a subdivision. The result is a condominium, but in reality the unit owners want to be as independent of each other as possible. Documents can be amended and restated to accomplish this goal.

There are many other items that could be covered in amendments of the condominium documents. The documents, for example, could be amended to provide for a home office which would be ancillary to the residential use of the Unit. Another area of concern is security. The documents could strengthen the powers of the management company to provide security for the unit owners. Other current areas of concern involve litigation, bed bugs, pets, parking, and smoking. Smoking in particular has become a very controversial area. Unit owners and trustees are attempting to amend documents to ban smoking completely - in the units as well as in the common areas.

Amendment and Restatement. A piecemeal approach to document amendment is not the best approach if many changes are indicated. By amending and restating the documents, e.g., the condominium trust which normally also includes the by-laws and rules and regulations, we create one document which is easier to read and comprehend than a series of amendments. Instead of a first amendment, second amendment, and third amendment, each of which addresses 3 or 4 paragraphs of the by-laws, for example, it is better to have one document.

In this article, I have deliberately not discussed the procedure for amending the condominium documents, as the procedure is vastly different depending on the size of the condominium. The procedure to amend a 3 unit, self-managed, dysfunctional condominium is not the same as the procedure for amending a 100 unit condominium that is managed by a competent and experienced management company. I have also not discussed what percentages of the unit owners and unit mortgagees are needed to amend. I will save the subject of the procedure of document amendment for another day and another article.

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