



UPDATING GOVERNING DOCUMENTS WITHOUT A MEETING

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The number of New Jersey community associations has grown exponentially over the 45 years that have elapsed since the adoption of the New Jersey Horizontal Property Act in 1963. Today, it is estimated that the total number of condominium, cooperative and homeowners association communities in New Jersey ranges between 6,000 and 7,000. Presumably, even a greater number of community associations exist in New Jersey when one considers that many of the larger common interest communities are served by multiple associations.

Clearly, the governing documents for many of the more mature associations need to be updated to reflect current law and practice and to address problem areas which have surfaced periodically due to faulty draftsmanship, changing times and a variety of other reasons. Moreover, one would suspect that a key deterrent for many associations to address this issue on a timely basis is the perceived difficulty of obtaining sufficient votes to amend the governing documents, which amendments frequently require a super majority for adoption.

In recent years, however, the utilization of the consent procedure set forth in the New Jersey Non-Profit Corporation Act (N.J.S.A. 15A:5-6b) has been utilized with increasing frequency to effect the adoption of governing document amendments. Specifically, the statutory provision states:

b. Except as otherwise provided in the certificate of incorporation or bylaws and subject to the provisions of this subsection, any action required or permitted to be taken at a meeting of members by this act, the certificate of incorporation, or bylaws, other than the annual or biennial election of trustees, may be taken without a meeting upon the written consent of members who would have been entitled to cast the minimum number of votes which would be necessary to authorize the action at a meeting at which all members entitled to vote thereon were present and voting, if (1) the corporation provides to all other members advance notification setting forth the proposed action consented to, (2) the proposed action is not consummated before the expiration of 10 days from the giving of the notice and 20 days from the giving of the notice in the case of any action taken pursuant to chapter 10 of this act, and (3) the notice sets forth the existence of such 10-day period. [Emphasis added]

While it should be noted that there is no provision in the Act which expressly permits or contemplates any action by the association members to amend the master deed for a condominium or a declaration establishing a planned development, the author believes that this statutory consent provision should be broadly construed to permit such amendments, both as a matter of public policy and in light of

N.J.S.A. 15A:5-18a which does not impose a requirement that there be authority for the proposed action by the members in the Act, the certificate of incorporation or bylaws in order for members of a non-profit corporation to vote on any matter, either by proxy or by consent without a meeting. Nevertheless, if a master deed or declaration does contain the authority for the members to consent without a meeting to any action by the association, including an amendment to the master deed or declaration, as is often the case, the issue rendered moot.

The obvious advantage to using this consent procedure is that it eliminates the necessity for setting an arbitrary deadline, such as a single meeting date for the casting and counting of the votes necessary to effect the amendments to the governing documents. Rather, the required number of consents can be gathered over an extended period of time. Generally, this can be accomplished through the combination of an initial mailing to all unit owners of the proposed amendments with the appropriate consent forms and a subsequent individual follow-up with those association members who did not return the consent form. Thereafter, once the required number of consents is obtained, the statute requires at least ten (10) days prior notice to the non-consenting members of the association before the consummation of the proposed action, (i.e. the effective date of the proposed amendment to the governing documents). In addition, an important caveat about the implementation of the process is that properly drafted consent forms should only afford the members with the opportunity to approve the proposed action and not to cast a negative vote. This approach enables the continued solicitation of everyone who has not consented, including those unit owners who might otherwise have cast a negative vote if they had been given the opportunity.

Finally, some of the more common provisions which need to be updated in many governing documents include:

- Elimination of developer's rights and other references to the developer where transition is complete and all units have been sold.
- Inclusion of tort immunity provisions as contemplated by N.J.S.A. 2A:62A-12, et seq.
- Authorization to levy and collect a capital contribution, membership fee or other charge.
- Establishment of a fine procedure.
- Permission to charge late fees, fines and reasonable attorneys fees.
- Incorporation of a requirement for both unit owners and tenants to obtain liability insurance policies.
- Provision for a collateral assignment of rent proceeds for investor units as security against delinquent assessments.
- Incorporation of higher monetary thresholds for special assessments and capital improvement projects.

The list of potential updates could continue ad infinitum. However, the bottom line is that many governing documents do not address many of the items set forth above or are otherwise flawed. Arguably, the trustees or directors of those associations which have deficient documents have a fiduciary duty to attempt to update them periodically to reflect the current laws and best practices applicable to community associations. Experience has proven that the utilization of the consent procedure described above is an effective way to make this happen.