



The Special Assessment September 2023 Edition



Tips for Amending Governing Documents

By Michael A. Sottolano

The governing documents of a community association include the recorded covenants (often called the declaration, deed of restrictions, CC&Rs, etc.), bylaws and, if the association is an incorporated entity, its articles of incorporation. The governing documents and applicable law, such as the Virginia property owners' association, condominium and nonstock corporation acts, may also establish authority for the

association to adopt, promulgate and enforce rules, regulations and policies to assist with governance of the association and its members.

Over time, it may become necessary to amend or restate the association's governing documents or rules to address changing needs, technological advancements, legal requirements, or to clarify ambiguous language. Association rules can usually be changed by a majority vote of the board at a duly noticed board meeting (and subsequent notification to the members of approved changes).

The process of amending and restating recorded covenants (or recorded condominium bylaws), however, can be complex and often requires the approval of a set threshold of the association's members. The association's legal counsel can assist in the process of amending these governing documents by drafting language for the proposed amendments, preparing the documents necessary to facilitate amendment, and counsel the board of directors through the amendment process. Here are some general guidelines that community association boards might consider when approaching amending governing documents – these may vary, of course, depending on the nature and scope of the amendment project:

1. Identify the need for change: The board should first determine the reasons why an amendment or restatement is necessary. This might include the need to update outdated provisions, address conflicts, inconsistencies or ambiguities, add or remove restrictions that are problematic to enforce or not desired, or incorporate changes to the law. Clearly identifying the need for change early in the process will help focus the amendment efforts.

2. Seek legal counsel: Community association boards should consult with an attorney experienced in community association law when considering amending the association's governing documents. The attorney can provide guidance on the legal process, ensure compliance with applicable laws and regulations, and help draft the documents needed to facilitate amendment.

3. Use assistance of an ad-hoc committee: The board may consider forming an ad-hoc committee made up of board members and/or community volunteers to review the association's governing documents and generate a "wish list" of items that would be beneficial to include in the governing documents and a "strike list" of items that are of concern, outdated, or otherwise inapplicable to the community and may warrant removal from the governing documents. The board might also enlist this committee to help review proposed changes, gather input from the community, and provide input on whether the amendments align with the community's goals and needs.

4. Communicate with the community: The board of directors should communicate with the community regarding the proposed amendments and why the board is considering these changes to the governing documents. This could be done via a letter sent to the members or in an article published in a community newsletter and may include explanation of the reasons for the changes, provide opportunities for feedback, and address any concerns or questions known or anticipated from community members. Boards may also want to consider holding a special "townhall" style meeting to allow owners to voice their thoughts, opinions, concerns, and suggestions regarding the proposed amendments. Taking community input into account may help address any concerns or issues and ensure that the changes have broad community support, even if a handful of members object to some proposals. After receiving community input regarding the proposed amendments, the board may want to consider revising the language of the proposed amendments, ideally with the assistance of the association's legal counsel, to incorporate helpful suggestions and before soliciting members' formal approval of the amendments.

5. Draft the amendments and related documents: It is typically best to have legal counsel prepare language for the proposed amendments along with the documents needed to facilitate approval of the members of the proposed amendments. The amendment procedures for the applicable governing document(s) will dictate, procedurally, how to amend that particular document. Typically, recorded covenants and condominium bylaws may be changed via affirmative vote and/or written consent of some minimum threshold of the association's members or their voting interests. The association's legal counsel can review the association's governing document(s) and advise the board on how to amend in a manner that satisfies the requirements of the particular governing document and applicable law. Boards should be aware that it's important to be precise and clear in the language used for amendments and to strictly comply with the applicable amendment procedures required under the governing documents and applicable law in order to avoid successful challenge of the adopted amendment.

6. Approve the changes: Once the community has had a reasonable time to review and provide feedback on the proposed amendments, then the board can move forward with scheduling a meeting where a vote on the proposed amendments can take place (if affirmative vote is required to amend) and/or commence soliciting written consent from members of the proposed amendments (if written approval, rather than a vote, is required to amend). The board should clearly communicate the approval process and timeline for proposed amendments to community members to ensure a fair and transparent process.

7. Implement the changes: If the proposed amendments are approved, then the board should take, in conjunction and consistent with the advice of legal counsel, the necessary steps to implement the changes. This may include preparation and recordation of a recordable form of the amendment in the municipality's land records, execution by the association's principal officer (typically the president) and any other officers required (potentially the secretary as a witness) of documents which confirm the language of the amendment and that the procedural requirements to amend

were satisfied, notifying community members of the changes to the governing document(s), and updating the association's records and any relevant policies or procedures which may be impacted. Some governing documents (especially older ones) may require that the owners' signatures, or even notarized signatures, be attached to the recorded amendment instrument.

8. Review periodically: It is a good practice for associations to periodically review their governing documents to ensure they contain provisions that are relevant, enforceable, comply with applicable (ever-changing) laws, and help the board in fulfilling its duties and responsibilities to the association and its members. The board may also want to consider establishing a process for regular review and amendment, if necessary, of its governing documents and rules to address changing needs or legal requirements.

Amending the governing documents of a community association can be a significant undertaking that requires careful planning, legal expertise, and community involvement. Depending on the circumstances, the above guidelines can help a community's board of directors approach the process in a systematic and inclusive manner designed to produce updated and well-crafted governing documents that meet the needs of the community.

What to do if the Association is Sued

By Michael A. Sottolano

One of the most frustrating issues a community association board of directors has to deal with is what to do if the association, the board, or an individual director is sued. It is the duty of the board to act in the best interests of the association and make decisions that are consistent with the association's governing documents and promote the well-being of the community. Despite a board's best-efforts, instances may arise where the association or directors may be sued by an individual or group and, in such cases, boards should consider the following:

1. Contact legal counsel: As soon as a threat or notice of a lawsuit is received, it is important for the Board to consult with legal counsel regarding how to respond. The attorney can review the allegations, advise on the board's legal options, and guide the board through the legal process. Be aware, there are deadlines for the association to respond to a lawsuit, and it is important to involve legal counsel early in the process so that counsel has enough time to prepare and file a timely response to protect the association's best interests and preserve available defenses to the association.



2. Notify the association's insurance provider: Inform the association's insurance carrier about the lawsuit promptly after receiving notice of the suit. In addition, some insurance policies may also require you to provide prompt written notice of demands or threats that might lead to a lawsuit. Depending on the allegations of the lawsuit and what insurance the association possesses, there may be coverage for defense costs for the claim and/or any damages that may be awarded. For example, if the claim involves injury or damage that occurred on the common areas or common elements, then the association's general liability policy may cover, subject to any applicable deductible, the cost for legal counsel to defend the Association and any amounts that may need to be paid in order to resolve the claim (either pursuant to the order of the court or a settlement reached between the parties). The insurance carrier can guide the board through the claims process and, if defense coverage is available, coordinate appointment of legal representation.

Boards would be well served to inquire of the association's insurance carrier (or agent) before the need for a claim arises whether it has in place insurance defense coverage for *non-monetary claims* (such as injunctions or requests for declaratory relief) and for fair housing discrimination claims. Oftentimes in the community association context, a lawsuit may be filed by an owner requesting a court take certain action, such as to invalidate the results of an election or declare unenforceable a rule adopted by the board, but not necessarily that it award monetary damages. Some insurance policies will not provide coverage of the cost of defense if there are no monetary damages claimed by the plaintiff or for discrimination claims; however, in such instances, if the sued board, officer or director wishes to contest the lawsuit, it would still incur costs associated with defending itself against the claims. This is why it is important to check with the association's insurance carrier before the need to file a claim arises to *ensure that the association has in place the broadest available coverage for the costs of defense*.

3. Retain all records and documents: The association, officers and directors should preserve all records, documents, and correspondence related to the issue or incident which the lawsuit (or threat of lawsuit) involves when it is served with or receives notice of a lawsuit. This includes emails, board meeting minutes, contracts, financial records, and any other relevant documents. These records may be crucial in building a defense or responding to the lawsuit and, if relevant information possessed by the association or an officer or director is destroyed and cannot be produced, this can be detrimental to the association's case and may result in sanctions being imposed by the court.

4. Timely respond to the lawsuit and cooperate with legal counsel: In order for the association to best protect its interests and avoid a default judgment being entered against it in the lawsuit, it must timely respond to a lawsuit once it is served. In the case of *complaints* filed in a *Virginia circuit court or DC Superior Court*, a responsive pleading must be filed no later than 21 days after service of the complaint or else the court may enter a default judgment against the association. In regards to a *warrant in debt* filed in a *Virginia general district court*, an appearance must be made by or on behalf of the association at the first hearing scheduled in the case (time, date, and location of which is listed on the warrant) in order to dispute the claim and request the court set for trial.

The board should work in conjunction with counsel to ensure appropriate pleadings are timely filed to lawsuits and that the association will be represented at necessary hearings. It is beneficial for the Board to cooperate and work closely with legal counsel during the pendency of the lawsuit and provide necessary information and documents requested by the attorney, as well as follow counsel's advice regarding legal strategy.

One or more designated representatives of the association should also be available, if needed, for appearances at hearings or trial to serve as a witness and/or be a decision maker on behalf of the association. It may be necessary for the board, or a designated representative, to attend court hearings and/or mediation sessions and potentially participate in settlement discussions if the opportunity arises.

5. Inform the community: To the extent recommended by the association's legal counsel, and consistent with counsel's recommendations and any requirements in the association's governing documents, the board may want to inform the community about the lawsuit. Transparency and communication with members are important to maintain trust and provide reassurance during a potentially challenging time. Also note, disclosure of the lawsuit and status thereof may need to be included in resale certificates issued by the association pursuant to the Virginia Resale Disclosure Act or the D.C. Condominium Act, if applicable.

6. Follow the attorney's guidance: Throughout the process, follow legal counsel's guidance and advice. They will have the expertise and knowledge to navigate the legal proceedings and protect the best interests of the community association board of directors.

7. Learn from the experience: After the lawsuit is resolved, take the opportunity to reflect on the experience and identify any areas where improvements can be made. It may be necessary to review policies, rules or procedures, enhance communication and transparency among the board and members, and make changes to prevent similar issues from arising in the future.

Dealing with a lawsuit can be a stressful and challenging experience for a community association board of directors. By seeking legal advice, working in concert with the recommendations of counsel, timely notifying insurance, and keeping good records of important documents and information, the board can work towards a resolution that protects the best interests of the association and its members.

Jerry Wright Honored for Highest Level of Service to Practice of Community Association Law and Receives National Recognition as a CCAL Fellow



Jerry M. Wright, Jr., Esq., a shareholder with CWMEB, has been granted fellowship in the College of Community Association Lawyers (“CCAL”). More than 4,000 lawyers practice community association law in the United States, yet only approximately 200 attorneys nationwide can distinguish themselves as CCAL fellows. Jerry is the seventh Chadwick Washington attorney to be accepted into this elite group of community association practitioners from around the nation.

CCAL was established in 1993 by CAI, providing a forum for the exchange of information among experienced legal professionals working for the advancement of community association governance. Its goals include promoting high standards of professional and ethical responsibility, improving and advancing community association law and practice, and facilitating the development of educational materials and programming pertaining to legal issues.

Jerry is a graduate of James Madison University and the University of Richmond, T.C. Williams School of Law. He is an active member of the Community Associations Institute (“CAI”) in several chapters, including the Central Virginia Chapter of Community Associations Institute (“CVCCAI”). Jerry serves on CAI’s Virginia Legislative Action Committee, recently concluding his 6-year term as Chair. VALAC is a cooperative joint effort among the four CAI Chapters in Virginia, coordinating CAI’s legislative efforts with the Virginia General Assembly each year. Jerry also sits on the Virginia Housing Commission’s Local Land Use and Community Living Work Group, as well as the Virginia State Bar’s Common Interest Community Subcommittee. Jerry frequently teaches classes on community association law and legislation, including seminars for the CAI National Conference, the Virginia Leadership Retreat, and all four CAI Chapters in the Commonwealth.

About Community Associations Institute

Since 1973, Community Associations Institute has been the leading provider of resources and information for homeowners, volunteer board leaders, professional managers, and business professionals in the nearly 350,000 homeowner associations, condominiums, and housing cooperatives in the United States and millions of communities worldwide. With more than 41,000 members, CAI works in partnership with 36 legislative action committees and 64 affiliated chapters within the U.S., Canada, South Africa, and the United Arab Emirates as well as with housing leaders in several other countries, including Australia, Spain, Saudi Arabia, and the United Kingdom. A global nonprofit 501(c)(6) organization, CAI is the foremost authority in community association management, governance, education, and advocacy. Our mission is to inspire professionalism, effective leadership, and responsible citizenship—ideals reflected in community associations that are preferred places to call home.

Chadwick Washington Zoom Webinar Series



Chadwick, Washington, Moriarty, Elmore & Bunn, P.C., is pleased to host and invites you to attend one or more of its educational Webinar Series for 2023 highlighting topics relating to community association law and governance. Each Webinar is one hour, with two topics presented by CWMEB attorneys followed by Q&A Sessions in separate Zoom breakout rooms staffed by CWMEB attorneys. The waiting room for the Webinars will open about 15 minutes before the sessions begin at 7:00 p.m., with the Q&A Breakout Rooms opening at approximately 7:40 p.m.

Topics this season include Tips for Handling Difficult Board Members; Best Practices for Holding “Due Process” hearings; Avoiding Pitfalls When Planning a Membership Meeting; Tips for Reviewing Architectural Applications; What to Look for When Hiring a Management Company; How to Deal with Vendor Breaches and Other Contract Problems; Basics of Bankruptcy and Assessment Collection; Defending Associations from Lawsuits and Other Claims; a Virginia legislative update (June sessions); and many more.

The firm’s next educational Zoom Webinar will be held on **Monday, September 25, 2023, at 7:00 p.m.** and will include presentations regarding **Planning a Membership Meeting – Avoiding the Pitfalls** and **Defamation, Assessments & Other Issues**. If you are interested in registering, you may do so directly [here](#).

We look forward to seeing all of our clients and guests during our 2023 Webinar Series and encourage you to register early for those topics and presentations you don’t want to miss. The schedule listing the dates, times and topics for the 2023 Webinar Series is posted [here](#). Clients, managers and guests can also register for the Webinar(s) of choice directly [here](#). Additionally, more information can be found on the Seminar Series page of our website at www.chadwickwashington.com.

Firm Happenings



Wil Washington was a featured speaker for the Community Association Institute’s (CAI) webinar on Practical Considerations for EV Chargers on July 23, 2023.



On August 22, 2023, **Sara Ross** moderated the Community Association Institute (CAI) Business Partners Council’s online Business Partners Open Forum: Ep. 1- *What’s In It For Me*. Sara is also the 2023 Chair of the CAI Business Partners Council.



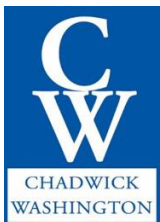
Michael Sottolano recently presented training to a group of community association managers and executives at the Goodman Management Group 2023 Thrive Leadership Conference on August 3, 2023.



Olga Tseliak's article, *Not My Circus, Not My Monkeys! Or... Is it? Condominium Casualty Losses and Insurance Issues* is featured on the Common Interest Community Board Ombudsman's website under its News & Publications [here](#). You can also find Olga's article, *Blurred Lines: Maintenance v. Alterations/Additions and Improvements and Why It Matters*, in the upcoming September 2023 edition of WMCCAI's Quorum magazine.



The article *May I Have Your Attention, Please? Will the Real Volunteers Please Stand Up? Receiverships in Community Associations* by **Tiago Bezerra** and **Melissa Payne** will appear in the upcoming September 2023 edition of WMCCAI's Quorum magazine. **Tiago** also recently spoke on insurance issues at the CAI 2023 High Rise Managers' Workshop with Jessica Knutsen of USI Insurance in Charlotte, North Carolina on July 18, 2023.



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