

## Trends in Governing Document Drafting

Ironically, and somewhat appropriately, I am dictating this article at four in the morning while driving to St. George to meet with clients and discuss issues concerning their governing documents. Unfortunately, Utah is notorious for poorly drafted governing documents. That is not to say that some very well drafted documents don't exist. However, the point is that many developers recycle a set of documents which was at one time drafted for a particular association, but is now being used repeatedly over and over for newer subdivisions to which the same governing terms, provisions, and procedures do not apply.

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Likewise, it is not uncommon for a planned unit development to have condominium language contained in their covenants, conditions, and restrictions. This is a negative trend that must cease immediately and I ask all readers of this article to seriously contemplate reviewing their governing documents to make sure that they are adequately drafted to suit their community's needs. Furthermore,

it relies on builders and property managers to make sure that their governing documents are current with changes in the law and drafting styles.

In my opinion there are eleven areas that should be well addressed whether you are a condo or a planned development.

1. There should be clear definition and distinction between “units,” “living units,” and “common areas.”

2. There must be a clear assignment of maintenance responsibilities between owners and the association with respect to the units and common areas.

3. There must be an association created which is vested with the necessary authority in powers to effectively administer and manage the common needs of owners; including sound voting and meeting procedures.

4. The association must have the authority to levy regular, special, and other needed assessments to cover costs of common expenses; including reserves to fund long term maintenance items.

5. There must be adequate collection authority to collect unpaid assessments and fines; including the right to file and foreclose a lien, seek a money judgment from the delinquent owner, and recover costs and

attorney fees occurred with the collection matter.

6. There must detailed insurance requirements for the common property and what areas owners are responsible to insure.

7. The covenants must be unambiguous and easily understood.

8. The association should have rule making authority, the ability to levy a fine for violations thereof, and the ability to collect a fine as an unpaid assessment.

9. There should be an entire article dedicated to the enforcement authority of the association including; levying fines, filing a lawsuit, entering the unit or property to correct violations such as completing unfinished landscaping and so forth.

10. There should be provisions protecting mortgagees as the community's needs so require and to appeal to the secondary mortgage market.

11. There must be reasonable amendment thresholds and procedures for the declaration and bylaws to be modified.

Taking these eleven areas into consideration there

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are some specific trends in document drafting that have evolved over the last couple of years. First and foremost there is a trend to make the governing documents easier to read. This is accomplished by shorter paragraphs, spaces, breaks between major concepts and themes, and simple numbering. Formatting the document to please the eye, such as with newspaper column formats, with pictures and diagrams, and definitions of legal terms, proves very helpful.

With respect to rule making, the practice has always been to provide that the board or the management committee may, unilaterally, adopt reasonable rules and regulations, and establish violations for infractions thereof. The current trend, however, is to permit the

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owners by a stated percentage to overturn a rule that they do not deem to be in the communities best interest. For example, the board may unilaterally adopt a rule, but 67% of homeowners may repeal the rule without board input.

Another trend in drafting is to control renters. While there is nothing wrong with a renter per se, there are special issues that arise with high rental populations. Consequently, drafting trends have been to reduce, or at least limit in some

measure, the number of units that can be non-owner occupied at any given time.

Another trend in drafting is to incorporate the Nonprofit Corporation Act provisions in the association bylaws. If bylaws are silent and the association is incorporated, it may rely on provisions contained in the Nonprofit Corporations Act. However, rather than having a separate code section to refer to in addition to your bylaws, the current trend is to place those provisions of the Nonprofit Act directly in your bylaws so there is no need to refer to additional documents or codes for guidance. For example, provisions regarding actions without meetings, provisions regarding the use of proxies, and provisions regarding the use of written ballots, should all be contained in bylaws rather than relying on the Nonprofit Corporation Act.

A somewhat controversial trend is for documents to contain a provision that says, “In the event that the association is required to enforce any terms of the declaration, bylaws, or rules and regulations of the association, whether or not a legal action is filed, the association shall be entitled to recover its costs in attorney fees incurred in the enforcement thereof.” This language is understandable, however, it may result in abuses of attorney fees and charges levied against the homeowner.

Another issue that should be addressed which is not necessarily a trend in drafting but should be brought to the reader’s attention is that Utah’s laws are continually evolving and changing regarding both condominiums and planned unit developments.

Several changes have been made in the last three years.

Surprisingly, some documents do contain the changes that are now found in the statute, however most do not.

Therefore, I strongly suggest that documents be reviewed and revised to reflect the powers now granted to associations in the statute. These powers are primarily related to the collection of unpaid assessments and remedies the association can utilize to help insure that payments get made in a timely manner, or if the owner is a non resident, that rents can be received from the tenants to pay an unpaid assessment bill.

The [Community Association Institute](#) encourages associations to review and revise their documents every ten years. I second this opinion. With the frequency of changes in Utah law and national trends, most associations are in need of at least a document review pointing out the strengths and weaknesses of their governing documents and further pointing

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out those areas subject to interpretation or differing interpretations, resulting in potential litigation.

Lastly, the documents should be reviewed to make sure they can utilize the recently adopted provisions of both the Condominium Act and Community Association Act here in Utah.

Remember your declarations and bylaws constitute the “constitution” of your community. Any ambiguities or invalid provisions will only result in increased attorney fees, community disharmony, and a general sense of disorganization among the homeowners.

The purpose of this article is two-fold, first, to primarily make homeowners and board members aware that documents need to be reviewed frequently to take advantage of changes in the law. Second, to encourage you to demand that a higher standard in document drafting be initiated by developers across the state so that there will be less time spent interpreting documents and more time spent on effectively administering your communities needs.

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