

# Amending Your Condominium Documents

The Cape Condominium Association

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# Amending Your Condominium Documents

- What are the Association's governing documents?
- Brief overview of the amendment process and previous amendments
- Amendment goals – What should be changed, and Why? (generally and specifically)
- Overview of the FHA Certification Process and its importance
- Question and Answer Segment

## What are the Association's Governing Documents?



- Master Deed – The legal instrument that the developer recorded with the County Register of Deeds to create the project. Of primary interest, it includes:
  - Legal description of the land in the project.
  - Definition of the unit, general and limited common elements
  - Allocations of the duties of maintenance, repair and replacement of the common elements.
- Bylaws – Attached as “Exhibit A” to the Master Deed. This document includes everything required by the Condominium Act and the Nonprofit Corporation Act. In short, it creates the framework for administration of the shared ownership interests including governance, funding and restrictions.
- Subdivision Plan – “Exhibit B” to the Master Deed. Its drawings include a project survey, depictions of all utilities, easements, buildings and other improvements (pools, tennis courts, etc.)

## What are the Association's Governing Documents? (Continued)



- Articles of Incorporation – The legal instrument filed with the State of Michigan to establish the Association as a Michigan nonprofit corporation. It states the requirements for membership and the corporate purposes.
- Association Bylaws – Some older associations were established with a second set of bylaws that may be labeled “Association Bylaws” or “Corporate Bylaws.” These were never recorded (corporate bylaws do not need to be). However, the better practice is to move the topics from the old Association Corporate Bylaws into the new Condominium Bylaws to reduce confusion and the problems that result when nobody can locate the original (unrecorded and unfiled) Association Corporate Bylaws.

## Overview of the Amendment Process



1. Attorney reviews all existing documents
2. Attorney prepares initial draft amendment package for Board Review
3. Board reviews initial draft, suggests changes and gives its input to attorney
4. Initial drafts then distributed to membership via mail for review and discussion at informational Association meeting (optional)
5. Finalized draft package distributed via mail to membership for voting (with ballots), and official voting meeting is held
6. Upon passage, attorney records and files new documents
7. New documents distributed to all co-owners

## Have our Documents Been Amended Before?



- Master Deed, Bylaws and Condominium Subdivision Plan:
  - The original Master Deed was amended 3 times, then rewritten into one Consolidating Master Deed recorded on February 18, 1982
  - The Consolidating Master Deed was itself amended once in 1989 (to adopt the current version of the Condominium Bylaws)
- Articles of Incorporation:
  - Amended twice:
    - June 26, 1989 – changed the name from Lake Point Village Condominium Association to The Cape Condominium Association
    - October 5, 1998 – added text to shield volunteer directors from certain liabilities
- Corporate Bylaws:
  - Amended twice – in 1972 and 1989

## General Amendment Goals – Why Amend?

1. Reflect changes in the law. The last update to the Consolidating Master Deed, Condominium Bylaws and Condominium Subdivision Plan was done in 1989. The Articles of Incorporation were last amended in 1998. The documents conflict with new/updated laws (e.g., restrictions based on familial status now illegal under Fair Housing Act, FCC rules against satellite restrictions).
2. Consolidate Documents. It used to be customary to have two separate documents for the Condominium Bylaws and the Association Corporate Bylaws. You still have two documents, but we can simplify them into one concise document.
3. “Show Me!” We add Bylaws text that explicitly re-states existing law – some co-owners may refuse to comply with the law unless the Bylaws explicitly re-state what the law itself provides in regard to the issue at hand (e.g., rights of the disabled under MCL 559.147a)).

## General Amendment Goals (continued):

4. Improvement. D. Douglas Alexander has been practicing in the field of condominium law for over 33 years. He has attended a vast number of board and membership meetings, and solved every imaginable type of problem confronted by his associations. Thus a host of changes can be made to take advantage of this expertise and experience to improve the functioning of your documents.
5. Customization. The existing restrictions may have been found wanting over the years in light of how things actually can/should work at your Condominium. You can customize your documents to better suit the current needs of the membership, based on your day-to-day experience in living at the Condominium.
6. FHA Project Certification. A number of specific text changes must be made in order for the Bylaws to satisfy HUD’s requirements for FHA Project Certification. Most involve technical, obscure points that few co-owners will care about (more later).

## Bylaws – Why Amend?

Some specific examples of text that can either be improved or should be changed to comply with the law:

- Article II – Association of Co-owners
  - Combines too many important topics into one hodgepodge of an Article e.g., establishment of the Association, Membership Requirements, Voting, and Board of Directors.
  - The text (Sec. 3 (g)) does not allow voting by written (mail-in or absentee) ballots, which is allowed by Michigan law.
  - Sec. 4 *requires* annual audits, which are expensive. This could be changed to annual reviews or compilations by a certified public accountant, which the Act allows.



## Why Amend? Specific Examples (cont'd):

### Article II (cont'd):

- The entire section on directors is inadequate and fails to include several key items, such as: eligibility to serve, liability insurance for Board members, employee dishonesty insurance, the right to go into executive sessions to discuss sensitive matters, and conflicts of interest.
- Article III – Assessments:
  - Sec. 3 (a) contains a 25% cap on Board's power to impose additional assessments without a vote:
    - "Additional assessment or assessments shall not exceed the original assessment by twenty five (25%) percent without the prior approval of at least sixty (60%) percent of all Co-owners in number."



## Why Amend? (cont'd)



### Article III – Assessments:

- The cap could *significantly* hinder the Association's ability to maintain the Condominium's common elements, since the funds needed to do so may not be available if the vote does not pass
- This is addressing assessments just to *maintain* what the Condominium already has (not talking about adding any new improvements to the Condominium)
- Late Charges:

"Assessments in default shall be subject to a late charge of ten (\$10.00) dollars for payments postmarked later than the tenth day of the month in which due."

Late charge should be at least \$25.00 and made subject to increase in future by the Board as needed

## Why Amend? (cont'd)



### Article III (cont'd):

- The Association has no right to recover interest on delinquent accounts (7% per annum is standard)
- The text would need to be changed if the Association ever wanted to borrow money (e.g., assign right to levy assessments as collateral for loan)
- Text is not FHA-compliant (does not mention co-owner in default's right to ingress/egress to and from unit, land contract vendor/vendee liability for assessments or foreclosing lender's liability for assessments from acquisition of title onward) – text that fails to comply with Michigan law is not FHA-compliant

## Why Amend? (cont'd)

### Article V Insurance:

- The Association's insurance duties should be more detailed
  - Should specifically mention Directors and Officers Liability Insurance

### Article VI Reconstruction and Repair:

- Sec. 1 (a) is not FHA-compliant – it should require 67% co-owner approval and 51% first mortgagee approval to terminate the Condominium in event a part of the Project is damaged (just different voting percentages)
- Sec. 8 regarding takings by eminent domain is also not FHA-complaint (fails to mention right of 51% of first mortgage holders to approve amendments to adjust percentages of value after a takings)



## Why Amend? (cont'd)

### Article VII – Restrictions

- Section 1 is illegal (violates the Fair Housing Act):
  - "No unit in the Condominium shall be used for other than single family residence purposes, and, in no event, may more than five (5) persons domiciled in any single unit."
  - The "single family" language is problematic – you cannot discriminate in housing based on familial status (it should just restrict use "for other than residential purposes . . .")
- Section 3 needs to address the FCC satellite dish rules (antennas may be installed on LCE in accordance with FCC rules) and the rights of disabled persons to make certain alterations to units to the Condominium Act (to facilitate access to or movement within the Unit for disabled persons)
- Section 8 concerning vehicles should be updated to list more types of vehicles, include text about expired registrations and immobile vehicles, and to provide a specific definition of "commercial vehicle."



## Why Amend? (cont'd)

- Article VII – Restrictions (cont'd):
  - Section 12 discusses a co-owner's responsibility for maintaining unit and liability for not doing so. It should be rewritten to be more specific.
  - Section 13 discusses building modifications and should be incorporated into Section 3, which also discusses alterations/modifications (or deleted, at least in part, since it is redundant)
  - Section 15 contains outdated language regarding the first annual meeting:
    - "Any such regulation or amendment may be revoked at any time by sixty (60%) percent of all Co-owners in number *except that the Co-owners may not revoke any regulation or amendment prior to said first annual meeting of the Association.*"
  - Section 17 requires that a Co-owner notify the Association at least 10 days in advance of when and to whom they plan to sell their unit, and lists other restrictions on sales. This should be deleted to help facilitate unit sales and financing. A very unusual provision, and fairly pointless, since Board has no power to approve/disapprove a purchaser, and other items in this Section are already covered by other sections of the Bylaws (such as duty to provide evidence of ownership, which is already in Art. II, Sec. 3 (d))



## Why Amend? (cont'd)

- Article VIII - Mortgages
  - The current text is not FHA compliant
  - Art. VIII, Sec. 5's language can result in a *major* loss of assessments after a foreclosure because of the way it is currently worded:
    - "Any holder of the mortgage which comes into possession of the unit pursuant to the remedies provided in the mortgage, foreclosure of the mortgage, or deed in lieu of foreclosure, shall take the property *free of any claims* for unpaid assessments or charges against the mortgaged unit *which accrue prior to the time such holder comes into possession of the unit...*"
  - Lenders' attorneys WILL use this text against the Association eventually, which means potentially losing 6 months' worth of assessments – language should be amended so that foreclosing lenders are liable from date on which they *acquire title* onward, not from *possession*





## Overview of FHA Certification

- The Federal Housing Administration (FHA) is part of the U.S. Department of Housing and Urban Development (HUD)
- The FHA insures mortgage lenders against the risk of loss when the borrower defaults – opens up mortgage lending to a larger pool of borrowers (e.g., who might not otherwise have the 10% or more to put down on a conventional loan – only 3.5% down required for an FHA-insured loan)
- According to the Federal Financial Institution Examination Council:
  - 7% of all mortgages in 2007 were FHA mortgages
  - 26% of all mortgages in 2008 were FHA mortgages
  - 37% of all mortgages in 2009 were FHA mortgages
  - 38% of all mortgages in 2010 were FHA mortgages
- Some lenders are even demanding that non-FHA insured loans must meet the standards for FHA certification
- HUD makes the certification regulations, and processes the applications
- The collapse of the mortgage lending industry prompted HUD to issue new requirements for FHA insured condominium mortgages
- As of January 2010, individual condominium mortgages could no longer be “spot approved”; the *entire project itself must be FHA certified*



## Overview of FHA Certification

- Amending the Bylaws does not automatically obtain FHA certification – it is just one piece of the puzzle (making your Bylaws match what HUD’s handbook requires)
- There are other eligibility requirements for Certification, such as:
  - Proper levels of insurance coverage
  - Limit on Delinquency rates
  - Contributions to reserve account
  - Overall financial status
- Amending the Bylaws will get the Association’s “ducks in a row” in regard to that requirement for FHA Certification eligibility



## Why FHA Certification is Important



- If a project is not certified, the FHA will NOT insure mortgages at that project
- If a project is not certified, other lenders may refuse to make mortgage loans even for non-FHA insured loans
- If a project is not certified, realtors may refuse to accept listings or show units
- *The loss of over 35% of all potential loan sources resulting from lack of certification can be expected to have a strong negative impact on property values in the Condominium, because it will reduce demand for units and the available pool of potential purchasers*
- In addition to the negative impact on sales, co-owners will desiring to refinance will also find fewer opportunities for borrowing

## Question & Answer Segment



We are always looking for feedback on our presentations. If you have any comments, questions, or suggestions, please email us at [cem@azdfcondo.com](mailto:cem@azdfcondo.com).

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