

THE COMMUNITY BUILDER

Documents, Statutes, and Laws... Which One Takes Priority?

Last week I stumbled onto a blog that provided a forum for homeowners living in associations to pose questions. The forum provided responders with the ability to write in answers, insight or experience relative to the question or issue. One thing I noticed was confusion by both the writer and the responder as it relates to what information is contained in the documents and which document or state law governs to determine the outcome.

In one instance, I responded to a question only to have someone chide me about their state "not having any statutes or higher authority" as I had suggested. Well, I went online to see if I was wrong...only to find that particular state not only had a condominium statute, but a Not-For-Profit Act as well. My advice was indeed correct. So, this experience provided me with the subject for this week's E-News: Documents, statutes or laws, which one takes priority?

Every state in the continental U.S., Alaska and Puerto Rico has a condominium act. It is either referred to as a Condominium Act or a Horizontal Property Regime. There are 14 states that also have statutes specific to homeowners or community owners associations. Not all statutes are equally comprehensive, however. Some are much more restrictive than others. From my personal experience in at least 11 states, I have found some level of restriction on elections, candidates, budgets, reserves and imposing fines in each of them.

What that means is if the documents in your community do not provide a process for elections, you would then generally look to either the prevailing statute OR in the case of an HOA where there are no statutes specifically, you would refer to the Not - or Non-Profit- Corporate Act.

All associations are incorporated as a Not- or Non-profit. It does not mean that your Association cannot realize a profit at year-end; it simply means that unlike a for-profit corporation, you do not issue shares nor do you distribute profit to the members. In this instance, a Non-Profit Corporate Act does not reflect organizations the IRS identifies as a 501(c) like a church or charitable organization with their relationship to paying taxes. Your Association will pay income tax on any income earned other than assessment income.



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The requirements imposed on Association actions apply in the order listed below. So, when several documents address the same issue, or there are conflicts between documents, the Declaration takes precedence over the Articles, the Article takes priority over Bylaws, and so forth.

Declaration (or Master Deed)

Recording this document in the county where the community is located creates the covenants that bind the deed/title to the property. This document governs the property rights, covenants and restrictions.

Articles of Incorporation (or Charter)

This document is the official document that creates the corporation. It outlines the structure of the corporation, defines the powers of the Board of Directors corporately. It is filed with the Secretary of State and is then recorded with the Declaration.

Bylaws

Bylaws (and I constantly hear and read references to the "bylaws", when someone is actually referring to the Documents as a whole) relate to the administrative operation of the corporation. They are but a section in the entire document. Usually this document is ALSO recorded with the Declaration - but in many cases it is not. In the event an association does not have bylaws, the authority would then fall to either the state statute or the Not-For-Profit Act governing corporations for guidance on the issues of administrative guidance.

Rules and Regulations

Rules and regulations are generally adopted by the association after its creation and then amended (changed or updated) as necessary. The rules and regulations may govern daily life addressing things like parking, quiet hours, amenity use, etc. Rules and regulations are likely to evolve over time and will change as the needs of the community change. Generally Rules and Regulations are not recorded as any changes would then require that the updated changes be recorded as well. Rules and regulations cannot EXCEED the authority provided in the higher level documents (i.e. while the Declaration may indicate that pets are permitted, the



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rules cannot impose pet restrictions such as size, type, number, etc.) This authority would have to be provided in the Declaration. Another often abused authority is that of fining. Unless your Declaration specifically provides for fining, a rule cannot cause it to be legally implemented.

The above documents specifically confer on the ability to regulate your community, but there is still a higher authority. The following laws would come into consideration ahead of your recorded documents:

Federal Law

Federal law supersedes any state laws or association documents which conflict with them. Examples would be: Fair Housing Act, U.S. Constitution and FCC Regulations.

State Law

Numerous state laws apply to associations, as noted above:

Condominium or Horizontal Property Statutes

- Homeowners Association Statutes
- Not-For-Profit Corporate Acts

City/County laws

The laws of the city and county where the community located will also apply. Some examples are:

- The city's or county's building code
- The city's or county's municipal codes and laws
- Local discrimination laws (different than protected classes)

So, you can see from the above information, that it may not be as simple as referring to your documents for a "simple" answer.

