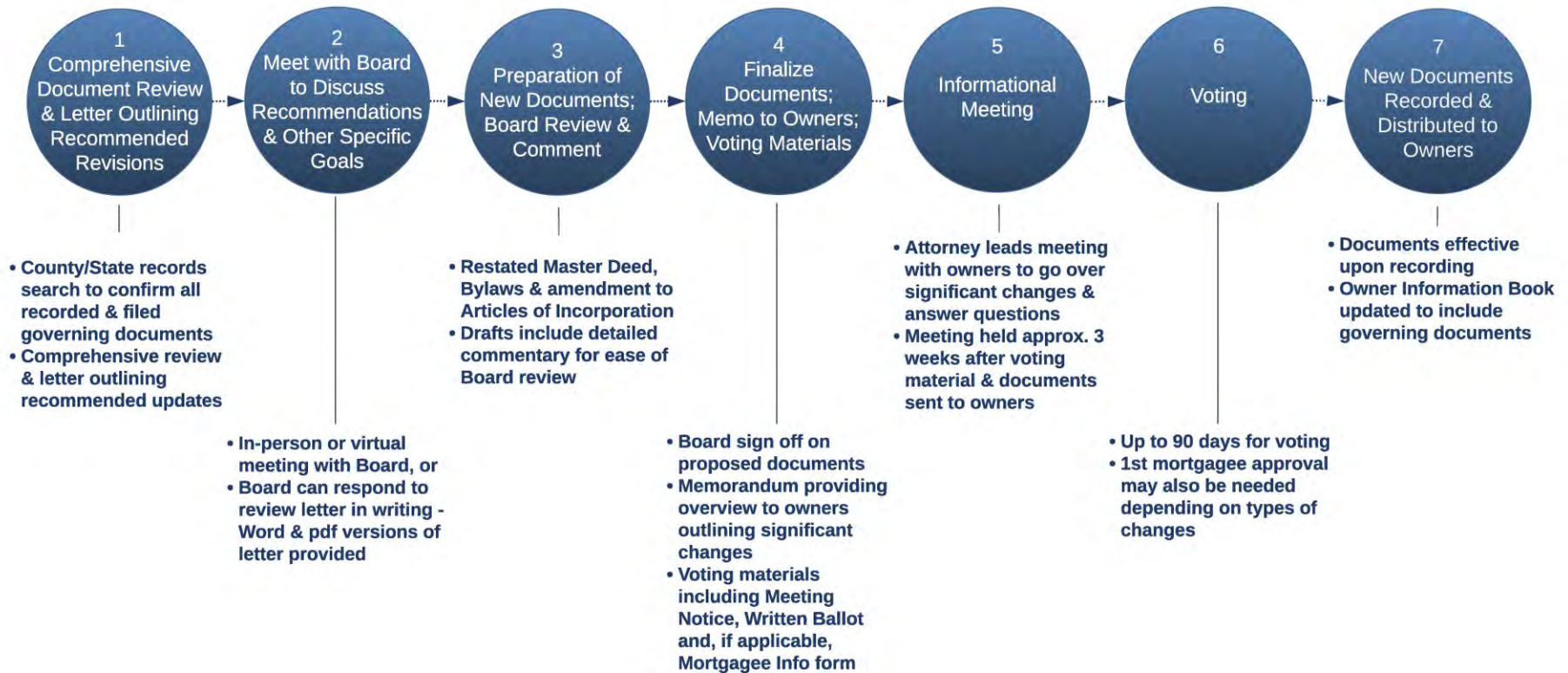




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Updating Governing Documents Board Guide to Proven Process



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The following information provides (a) a detailed roadmap of our proven process for updating governing documents along with anticipated time frames, and (b) recommendations to garner the necessary community support so that the restatement project can be a success.

Proven Process for Updating Governing Documents

1. Comprehensive Review of Existing Documents; Letter to Board Outlining Required and Recommended Revisions. First, we search the County's and the State's online records to confirm we have a complete set of your recorded and filed Condominium documents. We then perform a comprehensive review of these documents and, in letter form, advise the Board of those provisions that should be updated based on current law and practice. We may also ask the Board questions as it relates to specific items or operations within the community.

2. Board Review of Recommendations; Meeting with Board. We then ask the Board to respond to any questions and to review our recommendations to determine which recommendations the Board will accept. Several provisions are discretionary and require the Board's input in fashioning the new documents. We also look to the Board to provide guidance concerning any situations that need to be addressed that are specifically and uniquely related to the community. After the Board reviews our recommendations, we schedule an in-person or conference call meeting with the Board to address any questions and to determine those additional or changed provisions the Board would like to include in the new documents.

3. Draft and Preparation of New Documents. After meeting with the Board, we draft a new set of Condominium documents including an Amended and Restated Master Deed, Amended and Restated Condominium Bylaws and, most likely, an amendment to the Articles of Incorporation. The Board will then review these drafts and can provide us with any comments or questions either in writing or via an in-person or conference call meeting.

4. Finalization of Documents; Memorandum to Co-owners Outlining Significant Changes; Voting Package. Once the proposed documents are finalized and approved by the Board, we prepare a Voting Package to be sent by the Board or management to the Co-owners. The Voting Package consists of the following:

A. Proposed New Documents: Amended and Restated Master Deed, Amended and Restated Condominium Bylaws, and, if necessary, Amendment to the Articles of Incorporation.

B. Memorandum to Co-owners Outlining Significant Changes: This document provides an overview of all the significant changes to the existing documents in memo form so that the Co-owners do not have to comb through the proposed new documents to determine the significant changes.

C. Voting Documentation: This includes (i) Instructions, (ii) Notice of Vote (this Notice will specify the Informational Meeting Date and location as well as the Voting Deadline Date, both of which are discussed in further detail below), (iii) Ballot, (iv) Registration of Mortgagee Information form (if applicable), and (v) Designated Voting Representative form.

5. Informational Meeting: We recommend that the Board hold an Informational Meeting to answer any questions that Co-owners may have prior to submitting their votes on the proposed new documents. The Informational Meeting date should be approximately 3 weeks after the Board or management mail the Voting Package to the Co-owners. As to preferred times for holding an Informational Meeting, while some boards choose to have the Informational Meeting coincide with the association's annual meeting, discussion of the proposed documents could take several hours, making a combination with a director election prohibitively time consuming in most circumstances. We therefore generally recommend that the Informational Meeting be held separate from the Association's annual meeting. The Board should also consider such factors as to Co-owner availability (for instance, many Co-owners often travel or otherwise reside offsite during the winter months).

6. Co-owner Voting Deadline Date; Mortgagee Vote: The Voting Deadline Date should be approximately 45 to 60 days following the Informational Meeting Date as the Board and/or a committee will need enough time to go door-to-door to collect votes. Note, though, that the Voting Deadline Date cannot exceed 90 days from when the documents are originally distributed to the Co-owners. The Association again should take into consideration Co-owner availability and weather if significant outdoor campaigning is necessary to gather votes.

Assuming two-thirds of the Co-owners entitled to vote approve the new Condominium documents, we may also need to obtain the approval of two-thirds of the lenders with first mortgages recorded against the Units. Whether we need to obtain first mortgagee approval depends on the types of changes made. If mortgagee approval is required, our firm will prepare and mail the necessary voting materials. The first mortgagees have 90 days from the date of mailing to return their votes. Fortunately (and unlike Co-owner votes), a mortgagee's failure to respond is considered a "yes" vote. We have yet to see an amendment fail for lack of mortgagee approval.

7. Recording with County; Co-owner Information Book; Distribution to Co-owners. Once first mortgagee approval is obtained, we record the new Amended and Restated Master Deed and Bylaws with the County Register of Deeds and, if applicable, file a copy of the amendment to Articles of Incorporation with the State. These documents become effective upon recording/filing. We then prepare an updated Co-owner Information Book containing the new Amended and Restated Master Deed and Bylaws, and the updated Articles of Incorporation. The Co-owner Information Book is sent to the Board for distribution to all Co-owners.

Garnering Community Support

When adopting a new set of Condominium documents, it is often imperative that the Board provide Co-owners with sufficient advanced notice that the Board is undertaking the endeavor. Easing in the idea of revision certainly goes a long way in reducing any unwarranted concerns. The Board should therefore consider providing information early on via its website or through newsletters that it

is working with Association counsel on updating the existing documents. The Board should update Co-owners through the process, and you may want to consider soliciting input via a committee.

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Please feel free to call Stephen Guerra at 248 254-7600 if you would like to discuss updating your community's governing documents.



4 Reasons Your Michigan Condominium or Subdivision Association Should Update Its Governing Documents

Governing documents for Michigan community associations serve several functions. The foremost of these functions is to inform members and prospective members of the respective rights and obligations of membership in the association relative to the upkeep of the property and the operation of the community. Good documents serve these needs and enhance the marketability of the member's property.

Updating to Reflect Current Laws

Most documents more than 20 years old are generally outdated and should be revised. Even newer documents will often suffer from several inadequacies due to changes in the laws that may govern your particular community association, such as the Michigan [Condominium Act](#) and the Michigan [Nonprofit Corporation Act](#). These laws have undergone significant changes over the last decade and documents drafted before then do not address these changes, nor prepare the association for future issues that may arise.

An example of such a change, is that [Section 57](#) of the [Condominium Act](#) now requires an annual audit or review by an independent CPA if the association's annual revenues exceed \$20,000.00. Outdated bylaws will often not require a CPA to be involved. The membership also has the right to opt out of this requirement, but older bylaws will be silent regarding this right.

Another issue that may arise with respect to older documents is the lack of provisions relating to or addressing the rights of disabled individuals under [Section 47a](#) of the [Condominium Act](#) to alter the common elements or community areas administered by your association. Older documents may not have proper language addressing the installation of antennas and satellite dishes in the community and may instead contain restrictions that violate the Federal Communications Commission's [Over-the-Air Reception Devices Rule](#). Because of these legal deficiencies, older governing documents do not serve the purpose of putting members and prospective members on proper notice of their respective rights and responsibilities.

Protecting Assessment Levels

Older documents can also contain language that can unnecessarily add significant unexpected costs to an association, or fail to protect the association from unnecessary expenses. For example, documents often specify that a member may not be responsible for damage or costs to the association unless the damages or costs resulted from the member's negligence. This negligence requirement provides an unnecessary hurdle for an association to pass those damages and costs onto the member that is responsible in the first place. Negligence is difficult to prove in these situations and as a result, damages and costs resulting from a single member's actions will be unfairly shared amongst all the

members in that association. An association can help protect itself by simply removing the “negligence” requirement from its documents so that other members aren’t on the hook for the costs and damages incurred when a member causes damages to the association’s property.

On the other hand, an archaic set of restrictive covenants governing a subdivision association or bylaws guiding a condominium association may not specify that the costs of enforcing the restrictions contained within those documents will be automatically assessed to the member in violation. Oftentimes, these documents may omit any reference to the association recovering such fees or costs, or limit them by requiring that a Court make the determination on the fee and cost recovery. This would have the effect of requiring a lawsuit to be filed for the association to have any hope of being awarded its fees and costs for enforcing its restrictions. Documents with these omissions or limits on the association’s ability to recover its fees and costs constitute a hardship on their associations and lead to enforcement challenges.

For example, if a member installed an unapproved fence on the common elements in violation of the governing documents, the association would have a duty to see that the fence is removed. The association will likely incur fees and costs in obtaining that member’s compliance and the removal of the fence. If the language omits or limits the association’s ability to automatically assess those fees and costs to the offending member, the entire membership will share those costs. This creates an inequitable result for those rule-abiding members that make up the majority of the association.

Unnecessary Litigation Approval Hurdles

Another concern is documents may contain language that makes it difficult to file an action to enforce its restrictions against a member. There are provisions in some governing documents that would require the affirmative vote of a majority or super-majority of the members before a lawsuit may be filed by the association against a member not in compliance with the restrictions. Obtaining this majority or super-majority approval is often difficult because of, among other things, a lack of member participation, and can effectively prevent an association from being able to take action to enforce its valued restrictions. Updating the governing documents to eliminate this type of impediment to the association’s ability to enforce its restrictions is highly recommended.

Operations

Looking ahead, there are objects of modern technology and burgeoning lifestyle changes older documents may not properly address. Consequently, your association may be in the dark on how to handle requests or disputes that may arise in the future. Some examples include solar panel restrictions, electric vehicle charging station installation or the use of drones in your community. If your condominium association intends to allow modifications to common elements to allow for the installation of solar panels or “EV” charging stations, it would be best to have updated language in your bylaws requiring not only that co-owners submit proper plans and specifications for review and approval first, but that the Co-owners are required to execute recordable modification agreements with the association. This will help ensure that future co-owners are on notice of their obligations regarding those particular modifications.

With respect to a subdivision association, perhaps your existing documents prohibit the installation of solar panels solely on the basis of the materials used, or the documents do not grant the association any say on whether these panels may be installed upon a lot. Updating your documents to properly address these types of concerns would be of substantial benefit to your association in addressing these and other newer disputes as they arise.

While there exists some [Federal](#) and [State](#) regulation regarding the use of drones, they may not factor in the ability of an association to control drones within its community. Michigan subdivision associations do not usually enjoy the statutory rule-making authority afforded to Michigan condo associations. If there is indeed any rule-making authority in these older subdivision documents, it generally is limited to common areas where the usage of drones may not actually present a problem in the community. Updating an association's governing documents to provide it with rule-making authority over the entire subdivision (including lots) will allow boards greater flexibility to address both newer and future concerns.

Michigan community associations are empowered by their governing documents. The older the documents are, the more likely they are to prevent the association from achieve its goals. Therefore, it is important that association boards ensure that their association's governing documents are updated. If your Michigan condominium association or HOA board has any questions regarding updating your governing documents or any other topic addressed in this article, one of the [experienced attorneys](#) at [Makower Abbate Guerra Wegner Vollmer](#) will be more than happy to assist.