HIRZEL LAW
CONDOMINIUM & REAL ESTATE LAW

HIRZEL'S HANDBOOK: EVERYTHING YOU NEED TO KNOW TO SUCCESSFULLY OPERATE A CONDOMINIUM OR HOMEOWNERS ASSOCIATION

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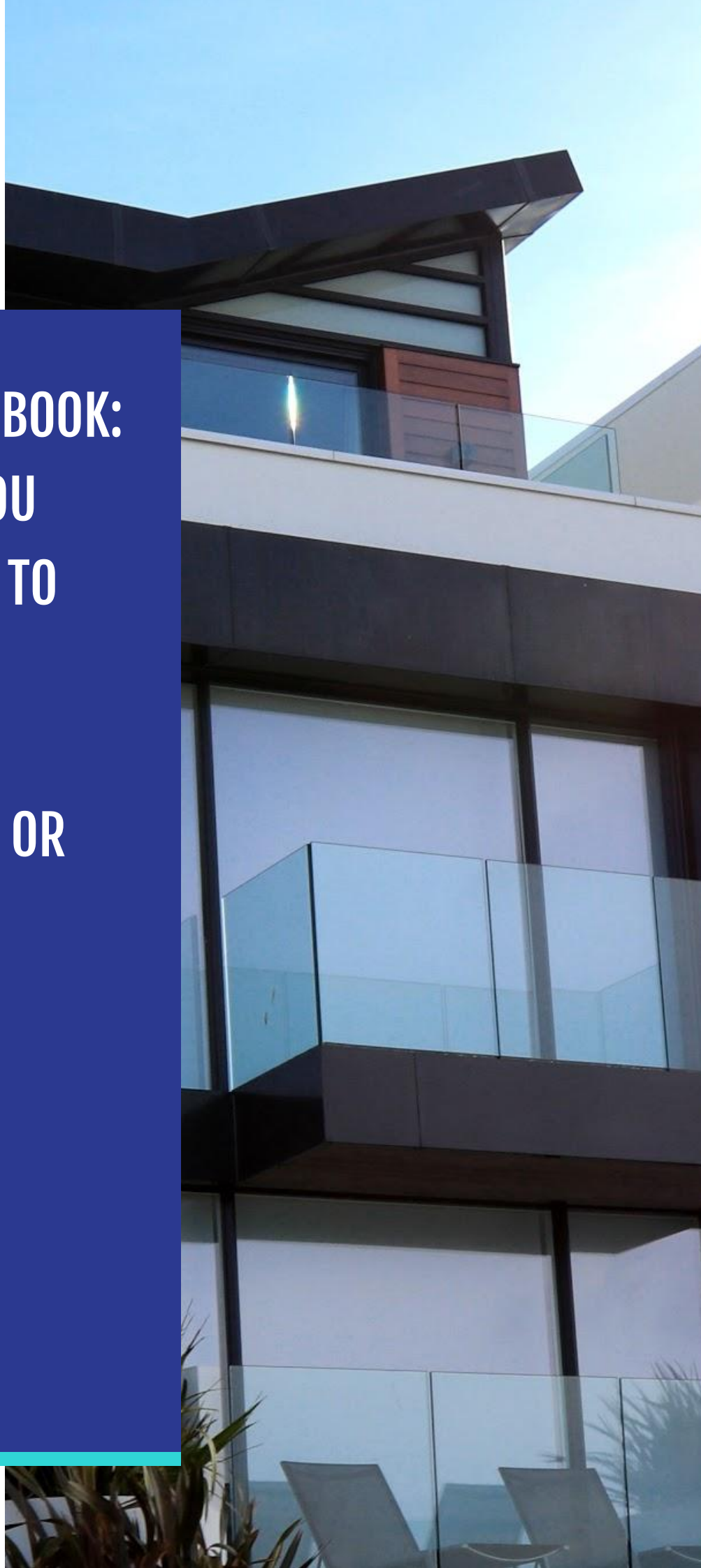

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INTRODUCTION

Introduction

So, you have volunteered to serve on the board of directors for your condominium or homeowners association – what do you do now? Many people volunteer to serve on a board because they are interested in increasing property values in their community, accomplishing a major improvement project, solving problems among neighbors or addressing concerns about the financial health of their association. Other people often are thrust into the role of a director as there simply is nobody else willing to volunteer.

However, one of the biggest mistakes that a board can make is to operate their association on an informal basis like a social club. Community associations are complex as directors are operating nonprofit corporations and owe fiduciary duties to act in the best interest of the corporation. Similarly, community associations often are assuming the role of municipal governments and are charged with providing services and policing their communities to ensure that the governing documents are followed.

Despite the complex nature of operating a condominium or homeowners association, most board members do not receive any training for these positions. Accordingly, whether you are taking control over from the developer in a new condominium project or you have been elected to the board of a seasoned community, you probably need a little more info on how to successfully operate your association, right?

You have come to the right place. In this handbook, we will help you understand:

- Basic condominium and subdivision operations
- Procedures for enforcing your governing documents
- Planning and managing collections
- Keeping your governing documents current

First, we should define a few terms and concepts. In this introduction, you will get a basic idea of the wide variety of types of real estate that are governed by condominium and homeowners associations.

WHAT ARE THE BASIC PRINCIPLES THAT GOVERN COMMUNITY ASSOCIATIONS?

In Michigan, a community association – whether it be a condominium association, cooperative, homeowners association or summer resort association – is defined by a few basic characteristics.

First, a community association is an organization, which can be either incorporated or unincorporated, that is responsible for managing and maintaining real property.

Second, a community association is composed of members, and in almost all cases, the members must have some form of ownership interest in the real property that is governed by the community association. In most cases, the governing documents make membership mandatory, but some community associations are composed of voluntary members only.

Third, community associations are governed by contractual agreements between the developer, the community association and its members. In most cases, the contractual agreements impose restrictions on how the members may use the use of real property and provide a framework for governing the community association. The community association's primary responsibility is to enforce the restrictions and abide by the procedures in the governing documents in order to preserve property values and protect the health, safety and welfare of the membership.

Fourth, community associations almost always involve a financial component, in which the members have a financial obligation to contribute towards the management and maintenance of the real property that is governed by the community association. In most cases, a community association has the ability to secure payment by placing and foreclosing liens if a member does not satisfy their financial obligations.

Fifth, almost all community associations are governed by at least one statutory scheme, either under federal, state and/or municipal law. Now that you know the basic concepts upon which most community associations are organized, we will delve a little bit deeper into the specific types of community associations that exist in Michigan.

TYPES OF CONDOMINIUM PROJECTS

In Michigan, condominiums are governed by the Michigan Condominium Act, MCL 559.101, et seq. A condominium project is created when a developer records a master deed and condominium bylaws in the Register of Deeds. The condominium project must be governed by a condominium association, which in most cases is a nonprofit corporation that is also subject to the master deed and condominium bylaws.

There are five basic types of condominium projects

- Traditional attached residential condominium projects
- Detached residential condominium projects (also referred to as "site condominiums")
- Business condominium projects
- Other types of condominium projects
- Mixed-use condominium projects

Traditional attached residential condominium projects are composed of condominium units and common elements. The owner of a condominium unit is called a "co-owner" as they own all the common elements in common with the other owners while individually they each own their own condominium unit.

A co-owner typically is responsible for maintaining and insuring their own unit, usually defined as the paint and everything else contained in the airspace of a unit. A condominium association typically is responsible for maintaining general common elements, usually from the drywall out. However, the condominium documents may assign limited common elements to a particular unit that a co-owner also is responsible for maintaining and insuring. Accordingly, a condominium's master deed and condominium bylaws should be reviewed to determine the specific responsibilities of that condominium association and its co-owners.

Site condominiums are composed of single-family homes and each unit is typically composed of land, as opposed to airspace. The physical appearance of a site condominium often is no different from single-family homes in a traditional subdivision. However, as discussed below, site condominiums and traditional subdivisions are operated by a different set of rules.

It is important to note that while the courts have recognized the existence of site condominiums, the term "site condominium" does not exist in the Michigan Condominium Act. This is likely because the Michigan Condominium Act did not contemplate condominium projects composed of detached single-family homes.

Business condominium projects are created primarily for a commercial use. Many business condominium projects will contain retail stores or service-based industries while many residential condominium projects will restrict or prohibit commercial activities.

In Michigan, a business condominium unit has a very specific definition. A business condominium unit is defined as a unit within a condominium project with a sales price of more than $250,000.00 that is offered, used or intended to be used for purposes other than residential or recreational purposes. See MCL 559.103(5).

Other types of condominium projects include:

1. Dockominiums or marina condominium projects, in which individual boat slips are the units;
2. Campsite condominium projects, in which the units are composed of individual campsites;

3. RV condominium projects, in which the units often are composed of pads where RVs park, and, in some instances, small outbuildings for use by the co-owner in addition to the RV;

4. Car storage condominium projects, in which cars can be stored and, in some instances, raced around a general common element track;

5. Airplane hangar condominium projects, in which airplanes are stored and share use of a common element runway;

6. Mobile home condominium projects, although most mobile home parks are not condominiums; and

7. Leasehold condominium projects, in which the co-owners do not own all portions of the condominium but instead lease certain portions of the condominium.

Mixed-use condominium projects, as you might have already guessed, include a mix of residential, business and other commercial condominium units in a single condominium project.

TYPES OF HOMEOWNERS ASSOCIATIONS

Michigan does not have a "homeowners association act" that governs the creation of a homeowners association. Instead, subdivisions are established under the Michigan Land Division Act, and a developer, often called a declarant, will record a declaration or a set of restrictive covenants that attach to all lots in the subdivision.

Unlike a condominium association, where membership is mandatory, membership in a homeowners association only is mandatory if it is required by the declaration or restrictive covenants. Accordingly, membership in some homeowners associations is optional. Most homeowner associations that govern subdivisions are set up as nonprofit corporations and are subject to the Michigan Nonprofit Corporation Act. Accordingly, they still must comply with the laws that govern nonprofit corporations.

In addition to traditional homeowners associations, Michigan also recognizes a unique type of homeowners association called a "Summer Resort Association", created well over 100 years ago. Summer Resort Associations are established under one of the following five statutes:

- Act 230 of 1897, Summer Resort and Park Associations, MCL 455.1, et seq.;
- Act 39 of 1889, Summer Resort and Assembly Associations, MCL 455.51, et seq.;

- Act 69 of 1887, Suburban Homestead, Villa Park, and Summer Resort Associations, MCL 455.101, et seq.;
- Act 137 of 1929, Incorporation of Summer Resort Owners, MCL 455.201, et seq.; or
- Act 161 of 1911, Parks, Playgrounds, Drives, and Boulevards, MCL 455.301, et seq.

Unlike condominium associations, which are typically governed under the Michigan Condominium Act, Summer Resort Associations are governed by their respective Summer Resort Act and the Michigan Business Corporation Act, MCL 450.1101, et seq., when an issue is not addressed in the respective Summer Resort Act. Summer Resort Associations are governed by a lot of complicated, unique and archaic rules, a summary of which can be found here.

WHAT IS THE DIFFERENCE BETWEEN A SITE CONDOMINIUM AND A TRADITIONAL SUBDIVISION?

The vast majority of new single-family home developments in Michigan are site condominiums. At first glance, a site condominium project looks a lot like a traditional subdivision. However, there are several key differences between a site condominium and a traditional subdivision, as traditional homeowners associations that operate within subdivisions are NOT governed by the Michigan Condominium Act. The key differences include, but are not limited to, the following:

1. Amending Governing Documents. MCL 559.190 and MCL 559.190a set forth the voting procedures for amending the master deed and condominium bylaws for a Michigan condominium association. Amendments that materially amend the master deed and condominium bylaws require at least 2/3 co-owner approval, and in some instances, 2/3 mortgagee approval. The Michigan Condominium Act does not allow modification of the approval requirements for amending the governing documents.

   In contrast, the declaration of a homeowners association only may be amended as a matter of contract based upon the amendment requirements in the original declaration. Many homeowners association documents set certain time periods in which the governing documents can be amended. If there is no amendment provision in a declaration, unanimous consent of all lots will be required to amend the governing documents.

2. Audits / Reviews. MCL 559.157 requires a Michigan condominium association with annual revenues in excess of $20,000.00 to have its financial statements independently audited or reviewed by a certified public accountant on an annual basis. A condominium association may opt out of having a CPA perform an audit or review of the books, records and financial statements if a majority of the

approve opting out. While the Michigan Nonprofit Corporation Act requires that condominium and homeowners associations prepare certain financial information each year, a homeowners association is not required to perform an audit or review unless the governing documents require it to do so.

3. Common Elements v. Common Areas. In a site condominium, the common areas are known as common elements and typically are jointly owned in common by all the co-owners in the condominium. MCL 559.137 states that co-owners have an undivided interest in the common elements based upon the percentage of value assigned to the unit that is identified in the master deed. In a traditional subdivision, the subdivision plat may confer rights on the owners to use certain common areas. However, it is not uncommon that the common areas are owned by the homeowners association and not the owners themselves.

4. Developer Turnover. In a site condominium, MCL 559.152 requires a developer to turn over control of the association's board of directors based on the number of units sold within 54 months after the first unit is sold. After the 54-month time period, there is a separate formula that governs how directors are elected to the board of directors. In contrast, the procedure for turning over control in a traditional homeowners association is a creature of contract that is set forth in the governing documents.

5. Liens. The Michigan Condominium Act, specially MCL 559.208, creates a statutory lien on all condominium units for any unpaid assessments. However, since homeowners associations are not subject to the Michigan Condominium Act, they only may place liens for unpaid assessments if permitted to do so by the governing documents.

6. Reserve Funds. The Michigan Condominium Act, specifically MCL 559.201 and Mich. Admin. Rule 559.511, requires a condominium association to maintain a reserve fund that is equal to 10% of the association's annual budget on a noncumulative basis. However, a homeowners association is not required to maintain a reserve fund unless the governing documents require it to do so.

7. Taxation.The Michigan Condominium Act, specifically MCL 559.231, only permits property taxes to be levied against condominium units. As such, a municipality cannot add any property identified as common elements to its tax rolls. Similarly, each individual lot in a traditional subdivision will receive an individual tax bill. However, common areas in a traditional subdivision may be assigned a separate parcel ID number and it is possible that they may be taxed under certain circumstances.

CHAPTER 1
ASSOCIATION OPERATIONS

Chapter 1: Association Operations

There are several items every board will need to address on a regular basis to ensure that the community is run smoothly from year to year. Specifically, association operations can typically be divided into three categories: (1) financial operations, (2) governance and (3) general operations.

FINANCIAL OPERATIONS

Create a budget and levy assessments
Get regular reserve studies for long-term financial success
Review or audit association financial statements on a regular basis
File annual tax returns

GOVERNANCE

File annual reports
Hold and properly conduct association and board meetings
Follow proper procedures to legally take action outside of a meeting
Keep meeting minutes and maintain books and records

GENERAL OPERATIONS

Obtain advice from professionals to provide additional liability protection
Have contracts reviewed by legal counsel
Create written, revocable architectural approvals and modification requests
Ensure that the association and co-owners have proper insurance

In this chapter, we will break down each of these items with some brief information on how to handle them and links to more in-depth resources to further help you succeed.

FINANCIAL OPERATIONS

Create a budget and levy assessments

One of the most important jobs of a board is to create a budget and levy annual assessments to pay for annual operations. Accordingly, while many boards will be tempted to keep assessments low, the assessments must be adequate to operate the association on an annual basis.

When creating a budget, Michigan condominium associations are required to set aside

money for the creation of a reserve fund. MCL 559.205 and Mich. Admin. Rule 559.511(1) require a condominium association to maintain a reserve fund that is at least 10% of the association's current annual budget on a noncumulative basis. In determining the amount that is earmarked for the reserve fund, associations should be aware that most need to set aside much more than the minimum requirement in order to avoid large assessments in the future. In contrast, a homeowners association is not required to maintain a reserve fund unless required to do so by its governing documents.

However, all associations should keep in mind that a budget is just an estimate of anticipated expenses for the year. Accordingly, if unexpected expenses do arise, most governing documents permit an association to levy an additional assessment for operational expenses without an owner vote. However, association boards should not confuse an additional assessment with a special assessment. The differences include the following:

- Additional assessments: An assessment in the association's declaration or bylaws that allows the association to collect revenue to meet deficits incurred or anticipated due to insufficient annual assessments, to replace existing common elements or common areas and/or for emergencies.

- Special assessments: These are similar to additional assessments but differ in a few ways. Condominium association bylaws typically allow for special assessments for additions to common elements over a certain dollar amount, collection of assessments to purchase a unit after foreclosure and/or assessments for other purposes not allowed under additional assessments. Special assessments typically also require approval by the co-owners while additional assessments typically only require approval by the board.

Get regular reserve studies for long-term financial success

To operate a successful community project, you need two things: physical assets (grounds, buildings, structures, etc.) and the finances to maintain and improve those assets. Getting regular reserve studies can help you maximize the value of your physical and financial assets. These will also let you know if your reserve is underfunded, which will help you adjust your association's long-term financial plans.

Many boards fall into the trap of simply budgeting from year to year and not developing a multi-year plan. Accordingly, associations should obtain or update their reserve studies every three to five years.

Review or audit association financial statements on a regular basis

MCL 559.157 requires a Michigan condominium association with annual revenues in excess of $20,000.00 to have its financial statements independently audited or reviewed by a certified public accountant on an annual basis. A condominium association may opt out of having a CPA perform an audit or review of the books, records and financial statements if a majority of the co-owners approve opting out.

A homeowners association does not have to perform an audit or review unless required to do so by its governing documents. However, a homeowners association that is a Michigan nonprofit corporation still is required to prepare financial statements and provide the most recent financial statement to a homeowner upon request.

File annual tax returns

While most community associations are nonprofit corporations, they still are required to file tax returns each year. Generally speaking, a community association has three different filing options, either a: (1) Federal Form 1120-H, (2) Federal Form 1120 or (3) Federal Form 990.

In the vast majority of cases, a community association will utilize the 1120-H form. This is a simple one-page form that is designed for associations that derive their income from assessments, which is classified as exempt income. To qualify for Federal Form 1120-H, at least 60% of the association's income must qualify as exempt. While community association tax returns are relatively simple, we still recommended that a community association hire a CPA to prepare and file the tax return in order to ensure it is properly done.

GOVERNANCE

File annual reports

At least once each year, property managers, attorneys or the association itself must file corporate documents with the State of Michigan's Department of Licensing and Regulatory Affairs (LARA) on behalf of the association.

In Michigan, some documents – such as Amended and Restated Articles of Incorporation or a Change in Resident Agent – may be filed less frequently. However, each community association in Michigan must file Annual Reports with LARA each year to maintain its corporate status. Pursuant to MCL 450.2911, nonprofit corporations are required to file annual reports with LARA by October 1st each year.

Hold and properly conduct association meetings

Association meetings will cover a range of topics and issues. As you conduct these meetings, you will need to understand and follow these guidelines:

- Meeting Notice – Pursuant to MCL 450.2404, each member is entitled to receive notice of an association meeting no less than 10 days but not more than 60 days before the meeting. The notice must be in writing and may only be delivered electronically if the member has consented to receiving electronic notice.

- Meet quorum – To transact association business, the association must meet quorum requirements. This entails holding an annual association meeting (typically in the spring or fall) – with significant attendance by members – to elect directors, distribute financial statements and provide all appropriate updates.

- Eligibility to Vote and Record Date – Generally speaking, member in a community association is entitled to vote at an association meeting. Eligibility to vote is determined based on the record date. Pursuant to MCL 450.2412, if the bylaws do not identify a record date, the board may set a record date that is not less than 10 days before the meeting and not more than 60 days before the meeting. If the board does not set a record date, the record date is the close of business on the day next preceding the day that notice of the meeting is given. It is not uncommon for governing documents to disqualify a member from voting if they are delinquent on their assessments.

- Understand the difference between a designated voter representative form (DVR) and proxy – Whether to help meet quorum requirements or to further their own agendas (or both), prior to an annual or special meeting, you will often see board candidates or other members soliciting the right to vote on behalf of other members. If a member cannot attend a meeting, they may want to allow someone else to vote as their proxy, but they may not understand the difference between a DVR and proxy. This can lead to members unwittingly giving their voting rights away. Ensure that your members are informed of this difference so that they can make the best decision on who can vote in their stead in the event they cannot attend one or more meetings.

- Understand the difference between officers and directors – In most community associations in Michigan, the same individuals will serve as officers and directors, but these are two different roles and it is important that you and your association members understand the difference. A director is essentially the same as a trustee on the board of a corporation. With a few exceptions, the directors of the

association are elected by eligible members at an annual meeting. On the other hand, officers include the president, vice president, secretary and treasurer, who are appointed by the board, and the same individual may serve in more than one officer position.

- Use parliamentary procedure at all association meetings – Robert's Rule of Order, or parliamentary procedure, should be used for uniformity and order at all association and board meetings. This is a set of rules for conduct at meetings that gives everyone a chance to be heard without confusion. In some cases, the governing documents may contain a specific order of business. However, if they do not, then we recommend that you consult with a community association attorney to help prepare a meeting agenda and learn the basics of parliamentary procedure.

Aside from these details, your board, officers and members should all be aware that if quorum requirements are not met for an election, then the current directors can carry over their positions until such time that an election does occur.

Furthermore, as social distancing and shelter-in-place orders during the COVID-19 pandemic have shown, association boards should consider how to handle the need for remote attendance and participation in annual meetings.

While annual meetings traditionally are conducted with all participants physically present, Michigan law allows members to participate in meetings by electronic means. Per Michigan's Nonprofit Corporation Act, specifically MCL 450.2405(1), "[u]nless otherwise restricted by the articles of incorporation or bylaws, a shareholder, member, or proxy holder may participate in a meeting of shareholders or members by a conference telephone or other means of remote communication that permits all persons that participate in the meeting to communicate with all other participants."

Therefore, a member not physically present at an association meeting may participate by means of remote communication and still be considered present and in person. Accordingly, this person may vote if all the following are met:

- The corporation implements reasonable measures to verify that each person who is considered present and permitted to vote at the meeting by means of remote communication is a shareholder, member or proxy holder;

- The corporation implements reasonable measures to provide each shareholder, member or proxy holder a reasonable opportunity to participate in the meeting and to vote on matters submitted to the shareholders or members, including an opportunity to read or hear the proceedings of the meeting substantially

concurrently with the proceedings; and

- If any shareholder, member or proxy holder votes or takes other action at the meeting by a means of remote communication, a record of the vote or other action must be maintained by the corporation.

Hold and properly conduct board meetings

Board meetings may be limited in attendance to only board members, who are the only ones entitled to notice of a board meeting. While association meetings require the participation of members, board meetings do not. Michigan's Open Meetings Act (OMA) and Freedom of Information Act do not apply to association board meetings as a community association is not a "public body."

Thus, board meetings are not required to be open to all members and boards are generally governed only by the corporation's bylaws and the Michigan Nonprofit Corporation Act.

Follow proper procedures to legally take action outside of a meeting

In some cases, the governing documents permit a community association to vote outside of a meeting. MCL 450.2408 states the following:

1. A corporation may provide in its articles of incorporation or in bylaws that are approved by the shareholders or members that any action the shareholders or members are required or permitted to take at an annual or special meeting, including the election of directors, may be taken without a meeting if the corporation provides a ballot to each shareholder or member that is entitled to vote on the action in the manner provided in section 404 for providing notice of meetings of shareholders or members. A provision in the articles of incorporation or bylaws authorizing shareholder or member action by ballot shall not preclude calling or holding annual or special meetings of shareholders or members.

2. The ballot provided to shareholders or members under subsection (1) shall meet all of the following:
    a. Set forth each proposed action.
    b. Provide an opportunity for the shareholders or members to vote for or against each proposed action.
    c. Specify a time by which the corporation must receive a ballot in order to be counted as a vote of the shareholder or member. The time specified shall be not less than 20 or more than 90 days after the date the corporation provides the ballot to the shareholders or members.

3. An action is considered approved by the shareholders or members by ballot if the total number of shareholders or members voting or the total number of shareholder or member votes cast in ballots received by the corporation by the time specified in the ballots equals or exceeds the quorum required to be present at a meeting to take the action, and the number of favorable votes equals or exceeds the number of votes that would be required to approve the action at a meeting at which the number of votes cast by shareholders or members present was the same as the number of votes cast by ballot. Except as otherwise provided in the articles of incorporation, an invalid ballot, an abstention, or the submission of a ballot marked "abstain" with respect to any action does not constitute a vote cast on that action.

Similarly, some associations may choose to hold votes at a specified polling place, which could include online voting options. To do this, though, your articles of incorporation or bylaws need to permit voting at a polling place. You can find more information about remote meeting attendance and taking action outside of meetings in our article here.

Keep meeting minutes and maintain books and records

Per MCL 450.2485, "[a] corporation shall keep books and records of account and minutes of the proceedings of its shareholders or members, board, and executive committee, if any." Accordingly, all community associations that are nonprofit corporations are required to keep meeting minutes.

The meeting minutes do not need to record every conversation that happened at the meeting. Rather, the meeting minutes should reflect any votes taken at a meeting and who voted for or against any matter that was voted on. An association can keep these records in written form or in a form that is reasonably converted to written form (e.g., in a digital format that can be printed).

If a member entitled to inspect your records requests them, you must convert them to written form and provide them to that person at no charge. However, a member must articulate a proper purpose for inspecting a community association's books and records, and there are certain exemptions to record inspections as well. However, if a board does receive a proper request, then MCL 450.2487 requires the association to permit an inspection within five (5) business days, although the inspection itself does not necessarily have to occur in this timeframe.

OPERATIONS

Obtain advice from professionals to provide additional liability protection

Pursuant to the business judgment rule and MCL 450.2541, directors and officers can rely on information, opinions, reports or statements from experts. This may include financial statements and data prepared or presented by:

- Another director, officer or employee of the association whom the director or officer reasonably believes to be reliable and competent in advising on the subject matter; or

- Other experts, including legal counsel, engineers or public accountants

Important: If the director or officer has any knowledge on the matter in question that makes reliance unwarranted, then the director or officer is NOT entitled to rely on that information.

Have contracts reviewed by legal counsel

Failing to properly vet vendors and contractors and thoroughly review your association's contracts may lead to significant legal issues. Legal counsel should review all major contracts with the association's vendors, and all contracts should be in writing.

Important provisions that should be contained in all contracts include:

- The parties to the contract
- Scope of goods or services provided
- Time for performance
- Length of the contract and how it can be renewed
- Compensation
- Insurance requirements
- Indemnification and hold harmless provisions in favor of the association
- Termination provisions
- Whether the contracts can be assigned or transferred
- Whether the contract can be cancelled due to force majeure, an act of God or other unforeseen events, such as the coronavirus pandemic
- An integration clause indicating that the written agreement is the entire agreement
- A process for amending the contract in writing

Create written, revocable architectural approvals and modification requests

Owners often want to make modifications and improvements to their individual units or to common elements of the project. You can save your association and board a lot of.

legal and clerical headaches by entering into a written modification agreement that specifically states the terms and conditions of the approval.

This record protects owners against a new board that might try to pursue action against them for violating bylaws, perhaps years later. Further, this best practice helps a community association avoid unnecessary additional responsibility or risk resulting from modifications.

Ensure that the association and co-owners have proper insurance

An association needs to ensure that it carries proper insurance to cover common elements. Mich. Admin. Rule 559.508 states that condominium bylaws must require a condominium association to "… carry insurance for fire and extended coverage, vandalism and malicious mischief, and, if applicable, liability and workers' disability compensation, pertinent to the ownership, use and maintenance of the premises…."

The state of Michigan does not require homeowners to carry insurance, but most mortgage lenders do. Your condominium association bylaws can and should require co-owners to carry proper insurance on their units.

Mich. Admin. Rule 559.508 addresses a condominium association's requirement to carry insurance over the condominium project and states:

> *The bylaws shall provide that the association of co-owners shall carry insurance for fire and extended coverage, vandalism and malicious mischief, and, if applicable, liability and workers' disability compensation, pertinent to the ownership, use, and maintenance of the premises and that all premiums for insurance carried by the association shall be an expense of administration. The association may carry other insurance coverage, including cross-coverage for damages done by 1 co-owner to another.*

MCL 559.156 of the Michigan Condominium Act states, in pertinent part, that a condominium association's bylaws may contain provisions "for insuring the co-owners against risk affecting the condominium project, with prejudice to the right of each co-owner to insure his condominium unit or condominium units on his own account and for his own benefit."

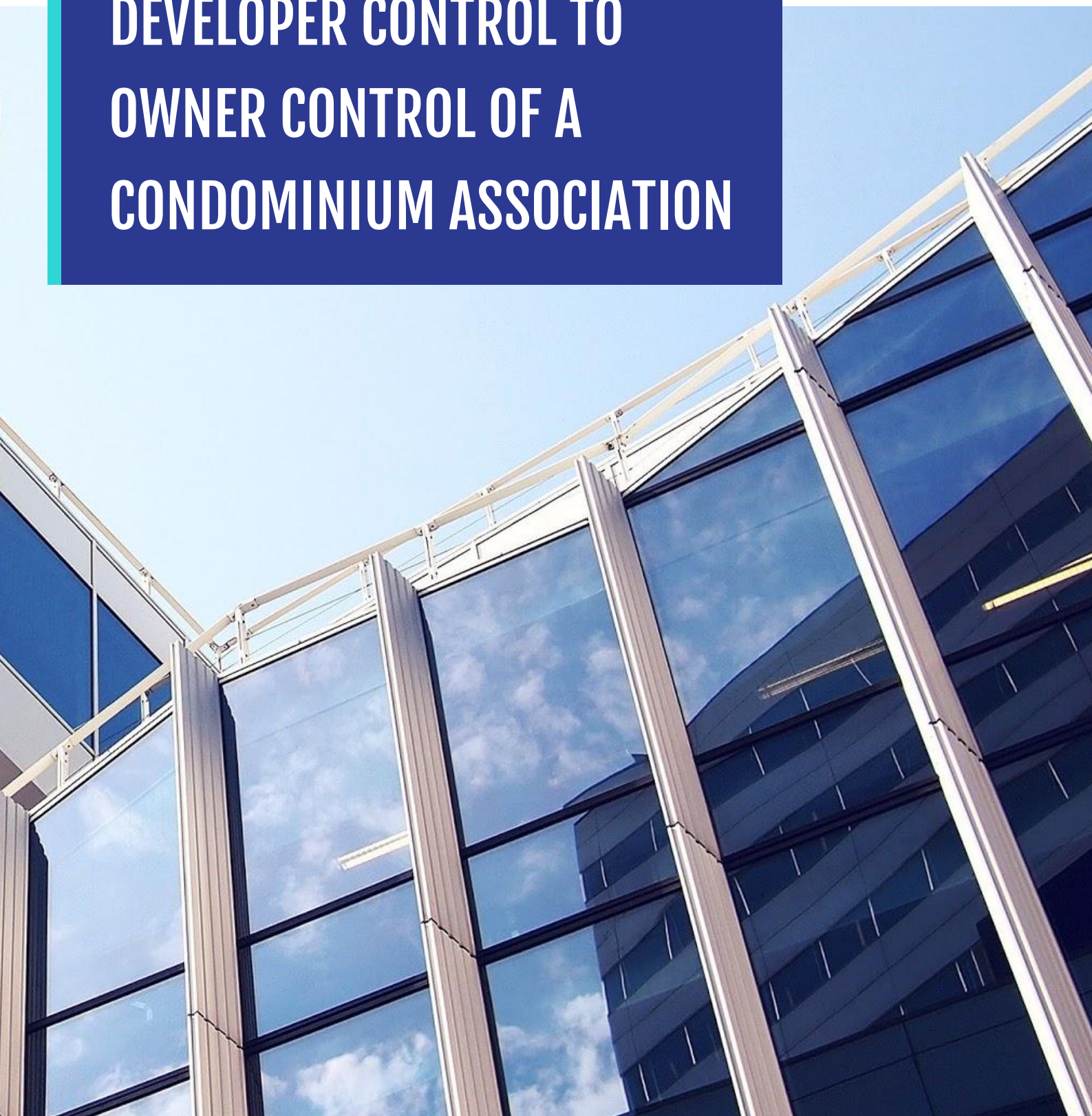
The insurance requirements for a condominium project are largely dictated by the project's master deed and condominium bylaws. Depending on the type of condominium project being insured, the association and co-owners will likely have different needs and requirements for insurance, both in terms of policy limits and

coverage.

For example, every condominium association should have insurance coverage for the common elements and any other items that the association is obligated to maintain, repair or replace under the governing documents. Further, every community association should maintain liability insurance to protect the association in the event that damages or injuries occur to another person or property, including the members. The association also should carry director and officer (D&O) liability insurance in the event that a director or officer is named in a lawsuit. You can get more in-depth information on insurance requirements for the association as a whole and for members here.

CHAPTER 2

TRANSITIONING FROM DEVELOPER CONTROL TO OWNER CONTROL OF A CONDOMINIUM ASSOCIATION



Chapter 2: Transitioning from Developer Control to Owner Control of a Condominium Association

Every condominium association in Michigan goes through a transition – also known as a "turnover" – phase. During this phase, the control of the condominium association shifts from the developer to the co-owners. The process for this phase in condominium associations is governed by the Michigan Condominium Act.

Because the Michigan Condominium Act does not govern homeowners associations, this transition period is governed solely by a homeowners association's governing documents. While homeowners association board members may gain some insights in this chapter on details to include in their governing documents, we will focus specifically on condominium associations here. For more information on transitioning from developer control to owner control for a homeowners association, reach out to us at Hirzel Law today.

At times, the transition process may seem complicated but a successful turnover is crucial to the future success of your condominium association in Michigan. In this chapter, we will provide information and resources to assist you in a successful turnover.

HOLD A TRANSITIONAL CONTROL MEETING TO ELECT CO-OWNER DIRECTORS

Transitioning control from the developer to the co-owners starts with holding an annual meeting in which more co-owners are elected to the board of directors than seats held by representatives of the developer.

MCL 559.152 provides a formula for electing directors in this meeting:

> *(2) Not later than 120 days after conveyance of legal or equitable title to nondeveloper co-owners of 25% of the units that may be created, at least 1 director and not less than 25% of the board of directors of the association of co-owners shall be elected by nondeveloper co-owners. Not later than 120 days after conveyance of legal or equitable title to nondeveloper co-owners of 50% of the units that may be created, not less than 33-1/3% of the board of directors shall be elected by nondeveloper co-owners. Not later than 120 days after conveyance of legal or equitable title to nondeveloper co-owners of 75% of the units that may be created, and before conveyance of 90% of such units, the nondeveloper co-owners shall elect all directors on the board, except that the*

developer shall have the right to designate at least 1 director as long as the developer owns and offers for sale at least 10% of the units in the project or as long as 10% of the units remain that may be created.

(3) Notwithstanding the formula provided in subsection (2), 54 months after the first conveyance of legal or equitable title to a nondeveloper co-owner of a unit in the project, if title to not less than 75% of the units that may be created has not been conveyed, the nondeveloper co-owners have the right to elect, as provided in the condominium documents, a number of members of the board of directors of the association of co-owners equal to the percentage of units they hold and the developer has the right to elect, as provided in the condominium documents, a number of members of the board equal to the percentage of units which are owned by the developer and for which all assessments are payable by the developer.

We have seen many condominium associations fail to elect directors in compliance with the timelines set forth in the Michigan Condominium Act. This can cause significant issues down the line as it is required by law and impacts the operation of the condominium association. Accordingly, you will want to make this your first order of business in the turnover process.

YOUR TURNOVER CHECKLIST

Once you have held your annual meeting and elected directors, you will want to ensure that the rest of the transition process proceeds smoothly. Here is a turnover checklist to help ensure that you address the necessary details in the turnover:

1 - Perform an initial audit of the documents provided by the developer. Your condominium association board should have all books and records, including, but not limited to:

A. Any original recorded documents (e.g., the Master Deed and Bylaws)
B. Any declarations or disclosure statements
C. The Articles of Incorporation, including any amendments
D. A complete set of the board's meeting minutes
E. All Rules and Regulations
F. All accounting information, including any audits performed by the developer
G. All escrow accounts or funds
H. The current operating budget and all previous operating budgets
I. All banking accounts and safety deposit boxes
J. All state and federal tax returns

K. All insurance policies
L. All contracts entered into by the developer
M. A complete list of all current co-owners with addresses and any other contact information
N. All site plans, including any as-built drawings
O. A list of all contractors, manufacturers, subcontractors and/or suppliers involved with the project, and all warranty information pertaining to the same
P. All local municipality documents pertaining to compliance with state statutes and local ordinances
Q. All documents related to any past or pending claims
R. The association's tax identification number

2 - Retain a competent certified public accountant. A qualified CPA or independent auditor should be enlisted to perform an initial review of the association's financials and analyze all income and expenses during the developer's control. This will ensure that your assessments are not artificially low and that they adequately cover operational costs moving forward. Further, MCL 559.204 and Mich. Admin. Rule 511 require condominium associations to maintain a minimum reserve fund equivalent to 10% of the association's current annual budget on a noncumulative basis. After this analysis, the board should establish a comprehensive collection policy that is uniformly enforced to avoid a claim of selective enforcement.

3 - Hire a professional property management company. Pursuant to MCL 559.155, the board may void a management contract with the developer or affiliates of the developer within 90 days of the transitional control date or with 30 days' notice at any time thereafter for cause. Typically, the management company remains the same after the transition and there are benefits for continuing to utilize the same management company; however, this should be reviewed on a case-by-case basis.

4 - Hire a professional engineer. You should have a licensed civil engineer inspect all the common elements of the condominium project, including both readily-apparent and hidden defects, such as:

A. Collapsing retaining walls resulting from improper installation
B. Cracking in the foundation or drywall caused by concealed foundation issues
C. Electrical wiring that is not properly installed within common element walls
D. Flooding caused by improper installation of the underground storm water drainage system
E. Heaving or cracking of concrete porches, driveways or sidewalks due to poor drainage
F. Leaks, mold and other water issues caused by improperly installed roofing, siding, flashing and/or windows

I. Premature road failure resulting from failure to test and/or account for soil conditions, improper use of base course materials or drainage issues
J. Missing or improperly installed trusses, which compromise the structural integrity of the roofing and/or building

The engineer will prepare a report outlining any construction defects, the cause of the defects, a proposed fix, whether any problems are covered by a warranty and the estimated cost to fix the problems. This engineering report will assist the board and the condominium association's attorney in evaluating the scope of the problems and determining the best course of action.

5 - Retain a community association attorney. Typically, the board will consult with a community association attorney prior to the transitional control date. Once the transitional control date takes place, the board then will hire the attorney on behalf of the association. MCL 559.276 provides an association with three years from the transitional control date or two years from the date that a claim accrues to pursue a construction defect claim arising out of the development or construction of a condominium project. A claim for breach of contract against a contractor for a defect that arises from the repair or replacement of a construction defect typically has a six-year statute of limitations. However, the sooner the association takes action, the better the chance of its success.

DO YOU HAVE ANY CONSTRUCTION DEFECTS?

In the event the engineer finds construction defects, the engineering report should lay out all defects in the project and include proposed fixes and costs.

In Michigan, responsibility for construction defects in a new condominium project is attributable to the developer(s), the contractor(s) hired by the developer(s) and/or the association's board. Before holding a developer responsible for construction defects, a condominium association must identify the identity of the "developer", which often proves to be a difficult task. The Michigan Condominium Act defines a developer of a condominium as "a person engaged in the business of developing a condominium as provided in this act," per MCL 559.106(2).

While real estate brokers and residential builders are, in certain circumstances, excluded from the definition of a "developer" under the Michigan Condominium Act, it is clear that the definition of a developer is extremely broad and often may encompass more than one person and/or corporate entity. In many cases, you will need to enlist the help of your community association attorney to ensure that you identify the correct person(s) or other entities that are liable for the cost of resolving condominium project defects.

HAS THE DEVELOPER COMPLETED ALL "MUST BE BUILT" ITEMS?

MCL 559.203b(3) states that a developer is required to maintain an escrow fund in connection with the purchase of each unit until all the following occurs:

1. Issuance of a certificate of occupancy for the unit, if required by local ordinance;
2. Conveyance of legal or equitable title of the unit to the purchaser;
3. Receipt by the escrow agent of a certificate signed by a licensed professional engineer or architect either confirming that those portions of the phase of the project in which the condominium unit is located and which are labeled "must be built" are substantially complete or determining the amount necessary for substantial completion thereof; and
4. Receipt by the escrow agent of a certificate signed by a licensed professional engineer or architect either confirming that recreational or other facilities which are labeled "must be built", whether located within or outside of the phase of the project in which the condominium unit is located, and which are intended for common use, are substantially complete or determining the amount necessary for substantial completion thereof.

Whether due to ignorance, the tedious and expensive nature of fulfilling the above requirements or some combination of both, many developers do not comply with MCL 559.203b. This is something to watch out for in your turnover process as a vast majority of disclosure statements indicate that funds are being held in escrow, even when they may not be.

Alternatively, MCL 559.203b(5) allows for a developer to opt out of maintaining an escrow fund, which would need to be properly disclosed in the disclosure statement and escrow agreement, if the developer provides the escrow agent with "evidence of adequate security, including, without limitation, an irrevocable letter of credit, lending commitment, indemnification agreement, or other resource having a value, in the judgment of the escrow agent, of not less than the amount retained pursuant to subsection."

Many developers do not provide a letter of credit or lending commitment as this exposes them to additional liability in the event that the "must be built" structures and common elements are not completed. Additionally, if a developer goes out of business and fails to complete the project, then an indemnification agreement does little to ensure that the condominium project is completed. Thus, you can see how important it is to ensure that all "must be built" items have been built and that you have proper documentation from the developer.

IS THE CONDOMINIUM PROJECT PROPERLY CONFIGURED AND HAVE ANY "NEED NOT BE BUILT" UNITS BEEN ELIMINATED FROM THE PROJECT?

A recent decision by the Michigan Court of Appeals has provided much-needed guidance in addressing the issue of "need not be built" units in the turnover phases. MCL 559.167 originally was enacted to provide an end date for the development of condominium projects. MCL 559.167(3) initially required a developer and its successors or assigns to either complete any

units identified as “need not be built” on the condominium subdivision plan within 10 years of the date of commencement of construction of the project or within six years of exercising a right of conversion, expansion or contraction of the project.

If the developer and its successors or assigns did not complete the “need not be built” units or withdraw them from the project within the statutory time periods, then the right to construct the units automatically terminated and the undeveloped land remained as common elements owned by all the co-owners.

However, in 2016, amendments to MCL 559.167 created a new “reversion” process to eliminate “need not be built” units after the expiration of the six year or 10 year statutory time periods. Newly-created MCL 559.167(4) requires 2/3 of the co-owners that are in good standing to vote to approve a “reversion” of “need not be built” units to common elements by adopting a declaration that will be recorded in the register of deeds after the expiration of the statutory time periods.

If 2/3 co-owner approval is obtained, then the condominium association must send the declaration to the developer or successor developer at its last known address. The developer or successor developer may withdraw the land on which the units were to be located or amend the master deed to make the units “must be built” within a 60 day period.
If the developer or successor developer fails to withdraw the land or amend the master deed within 60 days, then the condominium association may record the declaration, which becomes effective upon recording and the developer or successor developer loses the right to construct those “need not be built” units.

In Cove Creek Condo Ass’n v Vistal Land & Home Dev, LLC, ___ Mich App ___; ___ NW2d ___ (2019), issued Dec 19, 2019 (Docket No. 342372), the Michigan Court of Appeals issued a published opinion establishing binding legal precedent and clear guidance on the interpretation and application of MCL 559.167. In Cove Creek, supra, the Court of Appeals decided the following important issues:

1. MCL 559.167, as amended in 2016, cannot be used to retroactively re-create “need not be built” condominium units that ceased to exist by operation of law prior to September 21, 2016, when MCL 559.167 was last amended.

2. MCL 559.167, as amended in 2002 and as it existed prior to September 21, 2016, was constitutional and the loss of a developer or successor developer’s right to construct units due to the passage of time did not violate the due process or takings clauses of the Michigan or United States Constitutions.

Given that Cove Creek Condo Ass’n v Vistal Land & Home Dev, LLC, ___ Mich App ___; ___

NW2d __(2019), issued Dec 19, 2019 (Docket No. 342372), is binding precedent, attorneys, co-owners, condominium associations, developers, successor developers and title companies should be aware of the following in the turnover process:

1. MCL 559.167, as amended in 2002, applies to ALL condominium projects that existed at the time the statute was enacted, not just condominium projects that were created on or after the effective date of 2002 PA 283.

2. "Need not be built" condominium units are automatically eliminated by operation of law under MCL 559.167, as amended by 2002 PA 283, and a replat or recording of any additional documents is not necessary.

3. The co-owners acquire vested rights in the common elements under MCL 559.167, as amended by 2002 PA 283, which cannot be eliminated by 2016 PA 233.

4. The co-owner voting "reversion" process and the additional 60-day time period for a developer to withdraw "need not be built" units that was created in 2016 only applies to condominium projects in which the six or 10 year statutory periods did not expire by September 21, 2016 or to condominium projects created after September 21, 2016.

For more information on condominium project expansions, you can read our article here. To learn more about the precedent set by Cove Creek Condo Ass'n v Vistal Land & Home Dev, LLC, __ Mich App __; __ NW2d __(2019), you can access our article here.

DID THE DEVELOPER PROPERLY SET UP RECREATIONAL FACILITIES?

Recreational facilities in condominium projects – such as barbeques, basketball courts, boat launches/slips, clubhouses, gyms, parks, picnic areas, pools, private lakes, saunas, spas or tennis courts – often are some of the most attractive amenities to potential buyers. Many recreational facilities are common elements located within a condominium project and may only be used by the co-owners. In these situations, the recreational facilities are controlled solely by the condominium association's board and the maintenance, repair and upkeep of the recreational facilities are financed through assessments collected pursuant to MCL 559.169.

However, some recreational facilities located in condominium projects also may be used by third parties. Similarly, it is also common for a developer to build recreational facilities on property located outside of the condominium project that is used by multiple condominium projects or apartment complexes. Situations involving recreational facilities that are not solely owned and controlled by the co-owners are often more complicated, as the interests of the co-owners may differ from the third parties that either own or use these facilities.

Accordingly, the Michigan Condominium Act and accompanying administrative rules have specific requirements that must be satisfied when a condominium association shares its recreational facilities with third parties or the co-owners utilize recreational facilities that are owned by a third party. MCL 559.234 states that "[r]ecreational facilities and other amenities, whether on condominium property or on adjacent property with respect to which the condominium has an obligation of support, shall comply with requirements prescribed by the administrator, to assure equitable treatment of all users." Mich. Admin. Rule 559.111 was enacted to implement MCL 559.234 and, in part, imposes certain requirements on recreational facilities that are owned by the co-owners but also are used by third parties:

a. When the recreational facilities are owned by the condominium co-owners and are to be used by a third party, all of the following conditions shall be met:

    i. *Disclosure shall be made to all prospective purchasers that the recreational facilities will be shared with a third party.*
    ii. *The master deed shall define who is entitled to use recreational facilities.*
    iii. *The master deed shall set forth the appropriate financial obligations of all the parties involved.*

To comply with Mich. Admin. Rule 559.111(a), the disclosure statement for the condominium project must disclose to potential purchasers that the recreational facilities can be used by third parties. This also constitutes "[o]ther material information about the condominium project and the developer that the administrator requires by rule" that is required to be contained in the disclosure statement under MCL 559.184a.

HAS THE DEVELOPER PAID PROPORTIONATE SHARE OF EXPENSES OR ASSESSMENTS?

Assessments are determined based on a budget for the upcoming year. Accordingly, once the overall expenses of the community association are estimated, a budget is created and the amount of the overall expenses contained in the budget is apportioned among the co-owners to determine the assessments.

However, most developers pay just proportionate share of expenses, which is calculated differently from assessments as it is based on actual expenses and billed after the expenses are incurred.

DID THE DEVELOPER FUND THE RESERVE AT TURNOVER?

Before concluding the turnover phase, you should ensure that the developer funded the

condominium association's reserve fund. Mich. Admin. Rule 559.511 states:

1. The bylaws shall provide that the association of co-owners shall maintain a reserve fund for major repairs and replacement of common elements in accordance with section 105 of the act. The co-owners' association shall maintain a reserve fund which, at a minimum, shall be equal to 10% of the association's current annual budget on a noncumulative basis.

2. The funds contained in the reserve fund required to be established by section 105 of the act shall only be used for major repairs and replacement of common elements.

3. There shall be set aside the amount of funds required by subrule (1) of this rule by the time of the transitional control date. The developer shall be liable for any deficiency in this amount at the transitional control date.

4. The following statement shall be contained in the bylaws: "The minimum standard required by this section may prove to be inadequate for a particular project. The association of co-owners should carefully analyze their condominium project to determine if a greater amount should be set aside, or if additional reserve funds should be established for other purposes."

If the developer did not fund the reserve fund adequately, you will need to ensure that your condominium association does so. This will involve levying appropriate assessments and you may need to enlist the assistance of your condominium association attorney to ensure that the reserve is properly funded.

DO YOU NEED TO VOTE BEFORE SUING THE DEVELOPER?

If the developer is in breach of contract or if you need to sue them for any other reason, you may first need to hold a co-owner vote. Failing to do so, if required, could result in your lawsuit being dismissed or overturned.

In Sawgrass Ridge Condominium Association v Louis J Alarie, et. al., unpublished opinion of the Court of Appeals, issued Jan 9, 2018 (Docket No. 335144), the Court of Appeals reversed the trial court and dismissed a condominium association's lawsuit to enforce the condominium bylaws after the proper process was not followed to approve the lawsuit's filing.

In this particular case, which may set precedent for similar cases, the Sawgrass Ridge Condominium Association filed a complaint against co-owners who violated the condominium bylaws by modifying their deck without the board's prior written approval.

The association filed a motion for summary disposition, and the co-owners argued that the

association did not follow the proper process for approving the lawsuit under the condominium bylaws. While the trial court held that the association was authorized to file the lawsuit – as a majority of co-owners signed a consent resolution outside of an association meeting after the lawsuit was filed – the Court of Appeals reversed the trial court's decision on the basis that the association did not follow the proper procedure in approving or ratifying the lawsuit. The Court of Appeals cited Article III, Section 4 of the condominium bylaws, which stated:

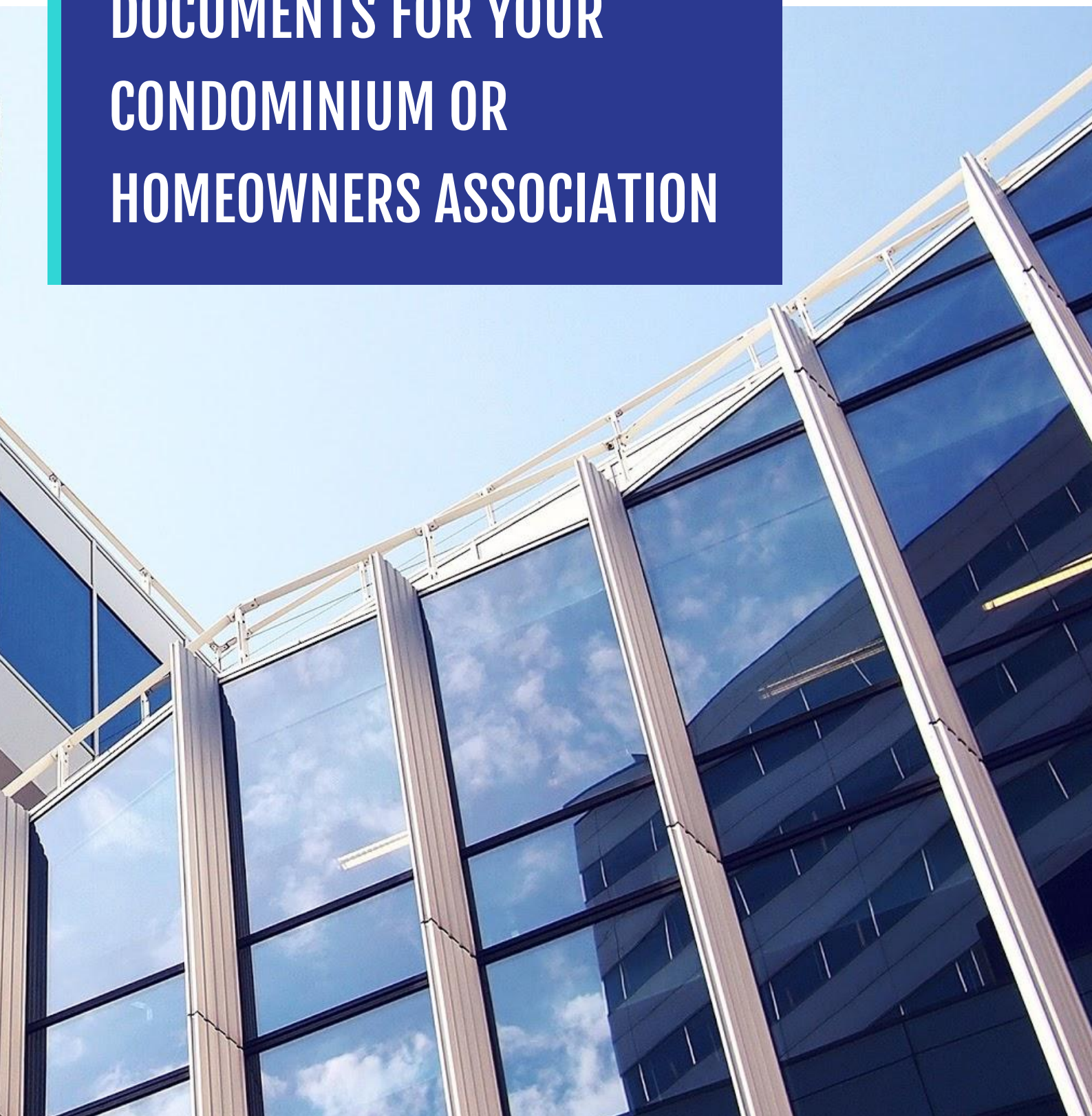
> *Any civil action proposed by the Board of Directors on behalf of the Association, other than for the collection of delinquent assessments, shall be subject to prior approval of a majority of the co-owners. After the first annual meeting of the members of the Association, the foregoing percentage requirements shall be determined without regard to any units which may be owned by the Developer.*

Accordingly, given the plain language of the condominium bylaws, the Court of Appeals held that co-owner approval was required, in addition to board approval, prior to filing a lawsuit to enforce the condominium bylaws. The Court of Appeals also noted that MCL 450.2407(3), which was cited in the consent resolution, did not apply as the association did not obtain unanimous consent of the co-owners and the governing documents did not permit an action without a meeting.

Thus, the safest course of action, whether you need to sue the condominium's developer, a contractor, a co-owner or any other individual or entity, is to enlist the aid of a qualified condominium association attorney to verify whether you first need to hold a vote.

CHAPTER 3

ENFORCING THE GOVERNING DOCUMENTS FOR YOUR CONDOMINIUM OR HOMEOWNERS ASSOCIATION



Chapter 3: Enforcing the Governing Documents for Your Condominium or Homeowners Association

Every community association has governing documents, which establish the following:

1. The legal relationship between the developer and community association
2. The legal relationship between each owner and the community association
3. Contractual relationships among all the owners
4. A corporate governance structure for the community association
5. A mechanism to impose assessments to fund community association operations
6. A set of restrictions on property use that are intended to enhance property values and protect the health, safety and welfare of the community

Accordingly, enforcing the governing documents plays a major role in successfully operating a community association.

In this chapter, we will outline steps you can take to fairly and consistently enforce your association's governing documents, discuss common violations and review options for enforcing the governing documents.

THE GOVERNING DOCUMENTS ARE RESTRICTIVE COVENANTS THAT RUN WITH THE LAND

In Michigan,

> *[a] covenant affecting the use of real property runs with the land if, in relevant part, the parties express their intent to bind their successors and assigns. Greenspan, 56 Mich App at 320-21; 224 NW2d 67. If the covenants are structured to run with the land, a subsequent purchaser will be bound by the covenants if he or she purchases the land with actual or constructive notice of the covenants. Phillips v Naff, 332 Mich 389, 393; 52 NW2d 158 (1952). A subsequent purchaser is on constructive notice that his or her use of the property will be subject to the covenants when the covenants appear in the purchaser's chain of title. Sanborn, 233 Mich at 231-32; 206 NW 496.*
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> *Conlin v Upton, 313 Mich App 243, 260; 881 NW2d 511 (2015).*

Accordingly, in condominium projects, the master deed and condominium bylaws constitute restrictive covenants that run with the land. In traditional subdivisions, many

associations have a recorded declaration that constitutes a covenant that runs with the land.

What does "covenants that run with the land" mean? As an initial matter, it means that an owner is bound by the covenants simply by purchasing property that is subject to the covenants. Similarly, it means that a purchaser of real property that is subject to restrictive covenants is responsible for bringing the property into compliance and correcting any violations that the previous owner left.

In Fox Pointe Association v Ryal, the Michigan Court of Appeals addressed the issue of whether a purchaser was responsible for pre-existing violations that were caused by a previous owner. The court held that the purchaser was responsible for the pre-existing violations as the covenants ran with the land and the purchaser inherited the responsibility for correcting any violations from the previous owner.

THE GOVERNING DOCUMENTS MUST BE ENFORCED AS WRITTEN

In Michigan, the master deed and condominium bylaws for a condominium association must be enforced based upon their plain language. Specifically, the Michigan Court of Appeals has held:

> *Pursuant to the Condominium Act, the administration of a condominium project is governed by the condominium bylaws. MCL 559.153. Bylaws are attached to the master deed and, along with the other condominium documents, the bylaws dictate the rights and obligations of a co-owner in the condominium. See MCL 559.103(9) and (10); MCL 559.108. Condominium bylaws are interpreted according to the rules governing the interpretation of a contract. See Rossow v Brentwood Farms Dev, Inc, 251 Mich App 652, 658; 651 NW2d 458 (2002). Accordingly, this Court begins by examining the language of the bylaws. See Wiggins v City of Burton, 291 Mich App 532, 551; 805 NW2d 517 (2011). Words are interpreted according to their plain and ordinary meaning. McCoig Materials, LLC v Galui Constr, Inc, 295 Mich App 684, 694; 818 NW2d 410 (2012). Further, this Court avoids interpretations that would render any part of the document surplusage or nugatory, and instead this Court gives effect to every word, phrase, and clause. Id. Ultimately, we enforce clear and unambiguous language as written. Greenville Lafayette, LLC v Elgin State Bank, 296 Mich App 284, 291; 818 NW2d 460 (2012).*

Tuscany Grove Ass'n v Peraino, 311 Mich App 389, 393; 875 NW2d 234 (2015). In fact, the Michigan Condominium Act, specifically MCL 559.207, states:

> *A co-owner may maintain an action against the association of co-owners and its officers and directors to compel these persons to enforce the terms and provisions of the condominium documents. In such a proceeding, the association of co-owners or the co-owner, if successful, shall recover the costs of the proceeding and reasonable attorney fees, as determined by the court, to the extent that the condominium documents expressly so provide. A co-owner may maintain an action against any other co-owner for injunctive relief or for damages or any combination thereof for noncompliance with the terms and provisions of the condominium documents or this act.*

In the context of declarations and restrictive covenants for homeowners associations, the Michigan Court of Appeals has applied the same principles and reached the same result:

> *"… [C]ourts must apply unambiguous restrictive covenants as-written "unless the restriction contravenes law or public policy, or has been waived by acquiescence to prior violations." Id. "The general rule with regard to interpretation of restrictive covenants is that where no ambiguity is present, it is improper to enlarge or extend the meaning by judicial interpretation."*
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> *Mazzola v Deeplands Dev Co LLC, unpublished per curiam opinion of the Court of Appeals, issued July 25, 2019 (Docket No. 343878), at p 3.*

Accordingly, it is of the utmost importance that a community association board enforce the documents as written. Often, community association boards fall into the trap of not enforcing the governing documents, either because the governing documents were not enforced by the prior board, the current board does not want to spend the money, the board does not want to cause turmoil in the neighborhood or the board believes that a bylaw is not fair.

However, failing to enforce the governing documents may expose a community association to liability and the directors and officers to claims for breach of fiduciary duty. Thus, if a community association board has an issue with enforcing the plain language of the governing documents, then the best course of action is to amend the governing documents. Similarly, fair and consistent enforcement of the documents will avoid a potential claim by owners of selective enforcement.

As with any general rule, there are certain exceptions to enforcing the plain language of the governing documents. Examples of these exceptions include:

- Fair Housing: The Federal Fair Housing Act (FHA) prohibits discrimination based on

color, disability, familial status, national origin, race, religion or sex. Accordingly, if a community association has a restriction that discriminates against a protected class, then it should not be enforced. Similarly, in the case of disability, the Michigan Condominium Act, the Michigan Persons with Disabilities Civil Rights Act and the FHA require a community association to make a reasonable accommodation to its restrictions and rules if the accommodation is necessary to allow a person with a disability an equal opportunity to use and enjoying their dwelling or the common elements. Common issues that a community association may be required to address include:

- Assistance and emotional support animals: The Department of Housing and Urban Development (HUD) has new and updated rules regarding assistance and emotional support animals. You can learn about these here. It is important that a board take requests for assistance and emotional support animals seriously and know how to handle them.

- Modifications and improvements to protect persons with disabilities: Section 47a of the Michigan Condominium Act has the information you need to ensure you do not violate protections for persons with disabilities who need to modify their units or common elements to ensure a safe, accessible environment.

- Avoiding religious discrimination claims: Whether you are dealing with restrictions around holiday lights or religious services held in common areas, here is some information on avoiding religious discrimination claims.

- Handling hostile environment claims: HUD has specific rulings involving assault, harassment and hostile living environments. In handling a hostile environment claim, it may be advisable to depart from the governing documents in order to comply with HUD's rules.

- Familial Discrimination: You may not see an issue with rules regarding the use of pools and other common elements by unsupervised children or requiring children to be supervised at certain hours. However, subjective rules regarding children and teens have been found – on more than one occasion – to violate the FHA. As FHA violations can incur significant financial penalties, you may want to consult with counsel before implementing or attempting to enforce this type of rule. You can find more information on the FHA's impact on condominium pool rules here.

- FCC Rules: As part of the Telecommunications Act of 1996, the Federal Communications Commission (FCC) adopted the OTARD (Over-the-Air Reception

Devices) Rules, which effectively prevent community associations from completely prohibiting owners from installing satellite dishes on areas over which they exercise exclusive control, such as balconies or patios. However, the rule does allow community associations to set certain rules regarding satellite dishes. Additional information on this topic can be found here

- Illegality: The board is not responsible for enforcing governing documents that were enacted illegally or which violate Michigan or federal law. By way of example, MCL 559.190(2) states, in pertinent part:

    - Except as provided in this section, the master deed, bylaws, and condominium subdivision plan may be amended, even if the amendment will materially alter or change the rights of the co-owners or mortgagees, with the consent of not less than 2/3 of the votes of the co-owners and mortgagees. A mortgagee shall have 1 vote for each mortgage held. The 2/3 majority required in this section may not be increased by the terms of the condominium documents, and a provision in any condominium documents that requires the consent of a greater proportion of co-owners or mortgagees for the purposes described in this subsection is void and is superseded by this subsection.

  If the condominium bylaws required 3/4 co-owner approval for a material amendment, such a provision would be illegal and unenforceable.

- Equity: In some very specific cases, the terms of the governing documents are not required to be enforced if certain circumstances can be established, such as waiver. While this is a highly fact-specific inquiry, waiver may apply in the following situations:

    - Technical violations and absence of substantial injury
    - Changed conditions
    - Limitations and laches

You can find more information on these exceptions here. However, generally speaking, all governing documents should be enforced as written and inconsistent enforcement should be avoided whenever possible. If you intend to deviate from enforcing the governing documents as written, or if it is questionable as to whether a certain provision is enforceable, then the board should consult with an attorney to determine the appropriate course of action.

COMMON ENFORCEMENT PROBLEMS

While community association restrictions vary from community to community, many associations deal with similar issues. The most common violations that community associations deal with include:

- Commercial use restrictions
- Landscaping
- Noise/nuisance/illegal activity
- Parking issues
- Pet issues
- Unruly renters
- Social media / Internet use restrictions
- Unauthorized changes to common elements
- Let's briefly go through each of these and how you can confront them.

COMMERCIAL USE RESTRICTIONS

Many condominium bylaws and declarations contain a prohibition on the commercial use of a unit or lot. The Michigan Supreme Court defines "commercial use" as follows:

> *"Commercial" is commonly defined as "able or likely to yield a profit." Random House Webster's College Dictionary (1991). "Commercial use" is defined in legal parlance as "use in connection with or for furtherance of a **607 profit-making enterprise." Black's Law Dictionary (6th ed). "Commercial activity" is defined in legal parlance as "any type of business or activity which is carried on for a profit." Id. "Business" is commonly defined as "a person ... engaged in ... a service." Random House Webster's College Dictionary (1991). "Business" is defined in legal parlance as an "[a]ctivity or enterprise for gain, benefit, advantage or livelihood." Black's Law Dictionary (6th ed).*
>
> *Terrien v Zwit, 467 Mich 56, 64; 648 NW2d 602 (2002).*

Thus, a prohibition on commercial use typically is quite broad and has been held to prohibit activities ranging from operating a typical business to using a unit for short-term rentals. However, many documents will contain an exception for home-based businesses with no customers. Accordingly, a community association board should carefully review their documents to determine which types of commercial activity, if any, are permitted under the governing documents. However, it is not uncommon for a community association board to take enforcement action against an owner that attempts to use a condominium unit or lot to operate a business.

LANDSCAPING

Many community associations have landscaping restrictions, including prohibiting an owner from planting trees, flowers or shrubs or from placing any ornamental materials, including, but not limited to, statuary, bird feeders, exterior lighting, fountains, furniture, implements, rocks or boulders, fencing or other decorative items without prior board approval. Accordingly, it is not uncommon for owners to install landscaping without permission, which requires the board to take enforcement action.

NOISE, NUISANCE AND ILLEGAL ACTIVITY

Living in close quarters often creates issues among neighbors. Many governing documents prohibit illegal activity, which may be useful in stopping the short-term rental of a property that is operating in violation of a local municipal ordinance or responding to somebody that is smoking marijuana in violation of federal law. Accordingly, the prohibition on illegal activity in community association restrictions is a powerful tool for many boards.

In addition to prohibiting illegal activity, many governing documents restrict any activity that is unreasonably noisy, a nuisance, dangerous or unsightly. Accordingly, the board may take enforcement action in situations where an owner has loud parties, plays loud music, allows odors to dissipate into other units or permits smoke to go into the common areas or another unit.

PARKING ISSUES

The enforcement of parking restrictions is one of the most common problems with which community associations are forced to address. Parking spaces often are at a premium in densely-packed urban areas and issues arise when owners fail to park in their designated areas. In contrast, suburban site condominiums with single-family homes often face issues related to parking boats, commercial vehicles or inoperable vehicles in driveways or on the street. Common parking issues that typically require a board to take enforcement action include:

- Owners and/or their guests parking in prohibited areas;
- Owners parking commercial vehicles, boat trailers, buses, watercraft, boats, motor homes, camping vehicles/trailers, snowmobiles, snowmobile trailers, recreational vehicles, non-motorized vehicles, off-road vehicles or all-terrain vehicles when they are prohibited by the governing documents;

- Owners who park vehicles on the street or in other areas overnight when they are not permitted to do so; and

- Owners who park nonoperational vehicles outside their garage.

In most cases, parking restrictions will need to be dealt with through fines, towing or injunctive relief. You can learn more about enforcing parking restrictions here.

ANIMAL RESTRICTIONS

Issues with restrictions regarding animals pose a problem for almost every community association. Common issues involving animals include:

- An owner keeping a type of animal that is prohibited by the governing documents;
- An owner having more animals than is permitted by the governing documents;
- An owner failing to keep a dog on a leash and the dog bites a child or another owner; and
- An owner failing to clean up pet waste.

Accordingly, it is not uncommon for a board to have to take enforcement action to remove a dangerous animal or ensure that an animal is not causing problems for other owners. However, restrictions on animals must be reasonable and the Michigan Court of Appeals has struck down a rule that arbitrarily limited the weight of an animal. Similarly, as outlined above, if an owner is claiming that an animal is necessary for assistance or emotional support, enforcement action may not be permitted. However, the board should consult with an attorney to determine if enforcement action should be taken.

PRIVACY

Technology has created privacy concerns and often results in violations of the governing documents. By way of example, many communities now pursue violations when drones are prohibited in the community or are used for an improper purpose. Similarly, many people use cameras on Ring doorbells or other types of cameras that are prohibited by the governing documents or have been installed in violation of the governing documents. Finally, many people use smartphones to record their neighbors or record association meetings, even if prohibited from doing so by the governing documents. Accordingly, it is becoming more common for associations to pursue violations for these privacy-related issues.

RENTAL ISSUES

The Michigan Condominium Act places restrictions on renting condominium units. Specifically, MCL 559.212(2) states:

> *A co-owner, including the developer, desiring to rent or lease a condominium unit shall disclose that fact in writing to the association of co-owners at least 10 days before presenting a lease or otherwise agreeing to grant possession of a condominium unit to potential lessees or occupants and, at the same time, shall supply the association of co-owners with a copy of the exact lease for its review for its compliance with the condominium documents. The co-owner or developer shall also provide the association of co-owners with a copy of the executed lease. If no lease is to be used, then the co-owner or developer shall supply the association of co-owners with the name and address of the lessees or occupants, along with the rental amount and due dates of any rental or compensation payable to a co-owner or developer, the due dates of that rental and compensation, and the term of the proposed arrangement.*

Accordingly, any unit rental must be disclosed to the condominium association and any unit lease must be provided to the condominium association. However, if there is no written lease, then the co-owner must notify the condominium association of the name and address of the occupants, rental amount and due dates on which rent will be paid. Many governing documents also contain rental caps that limit the number of units that may be rented at any given time. The required disclosures under MCL 559.212(2) allow a condominium association to evaluate whether a rental cap has been exceeded, among other possible violations or concerns.

A co-owner's failure to comply with MCL 559.212 is a violation of the Michigan Condominium Act and almost always a violation of the condominium bylaws, which typically contain provisions that mirror MCL 559.212(2). As such, if the association discovers that a unit is being rented and it was not notified of the rental, it should send a bylaw violation letter to the co-owner, advising them of the violation. If the co-owner still does not comply with MCL 559.212, then the association can potentially fine the co-owner or initiate court proceedings to obtain compliance. Accordingly, in the event that the condominium association has an issue with a renter, the first step is to determine whether they are properly in the unit. In instances where the condominium bylaws impose rental caps, these unnotified rentals may also run afoul of the rental cap.

Assuming that the tenant is properly in the unit, MCL 559.212(3) requires all "tenants or nonco-owner occupants [to] comply with all of the conditions of the condominium

documents of the condominium project….” To the extent that a written lease or rental agreement exists, then the rental agreement also must state that the tenant is required to comply with the condominium documents.

If a tenant or non-co-owner occupant violates the condominium documents, then MCL 559.212(4) allows for the condominium association to take the following action:

> *(a) The association of co-owners shall notify the co-owner by certified mail, advising of the alleged violation by the tenant. The co-owner shall have 15 days after receipt of the notice to investigate and correct the alleged breach by the tenant or advise the association of co-owners that a violation has not occurred.*
>
> *(b) If after 15 days the association of co-owners believes that the alleged breach is not cured or may be repeated, it may institute on its behalf or derivatively by the co-owners on behalf of the association of co-owners, if it is under the control of the developer, an action for both eviction against the tenant or non-co-owner occupant and, simultaneously, for money damages against the co-owner and tenant or non-co-owner occupant for breach of the conditions of the condominium documents. The relief provided for in this section may be by summary proceeding. The association of co-owners may hold both the tenant and the co-owner liable for any damages to the general common elements caused by the co-owner or tenant in connection with the condominium unit or condominium project.*

Accordingly, MCL 559.212(4) allows for the condominium association to pursue eviction proceedings as well as a claim for monetary damages against a tenant that violates the condominium documents. Additionally, the condominium association has its traditional remedies available for fines, injunctive relief or monetary damages against a co-owner for allowing a violation of the condominium documents to occur, as provided in MCL 559.206.

SHORT-TERM RENTALS

Short-term rentals represent one of the most prevalent issues that community associations face today. As a result, many community association documents contain restrictions on rentals, including a restriction that requires a minimum rental term. If the governing documents do not contain a minimum rental term, then the Michigan Court of Appeals has issued several opinions demonstrating that short-term rentals may be prohibited based upon other types of restrictions. Examples of restrictions that may be used to stop short-term rentals include:

1. A restriction limiting the use of a lot or unit to residential use;
2. A restriction that bans or otherwise limits the commercial use of a lot or unit;
3. A restriction on renting, which often includes the following: (a) a rental cap limiting the number of rentals; (b) a minimum rental period; and/or (c) a requirement that the association be notified of any rentals;
4. A restriction that bans activities that constitute a nuisance or annoyance; or
5. A restriction that requires compliance with local ordinances, if the local zoning ordinance contains a ban on short-term rentals or other rental requirements.

SIGNS, FLAGS AND HOLIDAY DECORATIONS

Many governing documents contain a restriction on what types of signs, advertisements, flags or holiday decorations are permitted within a community. It is not uncommon for an owner that does not read the restrictions to put up holiday decorations at inappropriate times or leave them up too long, or put up garden flags, statutes or other lawn ornaments that are prohibited by the governing documents. However, it is important to note that a community association cannot restrict an owner from displaying a United States of America flag that is no larger than 3' x 5' under the Freedom to Display the American Flag Act of 2005, 4 USC § 5 and MCL 559.156a of the Michigan Condominium Act.

If the board does not enforce the governing documents on what may seem to be smaller matters, this inaction often leads to widespread violations. Accordingly, it is important that the board take enforcement action on all violations as soon as possible. If an owner violates these types of restrictions, it is common for an association to impose fines or pursue injunctive relief.

UNAUTHORIZED CHANGES TO COMMON ELEMENTS

One of the most common bylaw violations in a condominium project is a co-owner modifying the common elements without prior board authorization. MCL 559.147(1) states, in pertinent part, the following regarding a co-owner modifying the general common elements:

> *(1) Subject to the prohibitions and restrictions in the condominium documents, a co-owner may make improvements or alterations within a condominium unit that do not impair the structural integrity of a structure or otherwise lessen the support of a portion of the condominium project. Except as provided in section 47a, a co-owner shall not do anything which would change the exterior appearance of a condominium unit or of any other portion of the condominium project except to the extent and subject to the conditions as the condominium*

documents may specify.

MCL 559.147(1) generally prohibits a unilateral alteration to the general common elements without permission of the condominium association and typically limits co-owner alterations to a co-owner's unit (subject to the terms of the condominium documents). The only exceptions typically include:

1. The master deed or condominium bylaws expressly allow a co-owner to alter the common elements without the board's permission.
2. The removal of all or part of an intervening partition or creation of doorways or other apertures therein, notwithstanding that the partition may in whole or in part be a common element, so long as a portion of any bearing wall or bearing column is not weakened or removed and a portion of any common element other than that partition is not damaged, destroyed or endangered by a co-owner that owns adjoining units. See MCL 559.147(2)
3. An improvement or modification to facilitate access to or movement within the unit for persons with disabilities who reside in or regularly visit the unit or to alleviate conditions that could be hazardous to persons with disabilities who reside in or regularly visit the unit if a condominium association fails to respond to a request for alteration within 60 days. See MCL 559.147a.

Almost all condominium documents prohibit a co-owner from making unilateral modifications to the common elements. Accordingly, in most cases, a co-owner will violate the Michigan Condominium Act and condominium documents by making a unilateral modification to the general common elements, unless one of the above limited exceptions applies. Accordingly, a condominium association should take enforcement action and obtain an injunction to remove any unauthorized modification.

However, if the board would have approved the modification if approval were sought in the first place, entering into a written modification agreement after the fact may be another way to resolve a dispute. To learn more about how the Michigan Court of Appeals has addressed unauthorized common element modifications, read our article here.

REMEDIES FOR ENFORCING THE GOVERNING DOCUMENTS

The Michigan Condominium Act, specifically, MCL 559.206, provides the following remedies for violations of the condominium documents:

> A default by a co-owner shall entitle the association of co-owners to the following relief:

(a) Failure to comply with any of the terms or provisions of the condominium documents, shall be grounds for relief, which may include without limitations, an action to recover sums due for damages, injunctive relief, foreclosure of lien if default in payment of assessment, or any combination thereof.

(b) In a proceeding arising because of an alleged default by a co-owner, the association of co-owners or the co-owner, if successful, shall recover the costs of the proceeding and reasonable attorney fees, as determined by the court, to the extent the condominium documents expressly so provide.

(c) Such other reasonable remedies the condominium documents may provide including but without limitation the levying of fines against co-owners after notice and hearing thereon and the imposition of late charges for nonpayment of assessments as provided in the condominium bylaws or rules and regulations of the condominium.

In the context of homeowners associations, the remedies for violating the governing documents are typically limited to pursuing a claim for breach of covenant to obtain compliance with the declaration, unless the governing documents provide additional remedies. Accordingly, common remedies for these violations include:

- Fines. MCL 559.206 only permits a condominium association to impose fines after notice and a hearing on the fine. The governing documents of most community associations permit an association to levy fines and typically require the association to provide a warning letter prior to imposing a fine. If the owner does stop violating the governing documents, then typically the community association must provide an additional notice and hold a hearing for the board to decide whether to levy a fine against the owner. A fine may still be levied against the owner if they do not show up for the hearing. In most cases, the governing documents provide an escalating fine schedule and the board must comply with these schedules when imposing fines. Whiles fines can be effective tools for handling some violations, in many cases they may not be effective in remedying issues such as commercial use of a unit, unauthorized construction, marijuana use, pets, smoking or rentals. In these types of situations, many owners may simply pay the fine and continue the violation.

- Injunctive Relief. MCL 559.165 of the Michigan Condominium Act requires that every owner "… comply with the master deed, bylaws, and rules and regulations of the condominium project…" Similarly, in the context of a homeowners association, the Michigan Supreme Court has held as follows:

"… [A] breach of a covenant, no matter how minor and no matter how de minimis the damages, can be the subject of enforcement. As this Court said in Oosterhouse v Brummel, 343 Mich 283, 289; 72 NW2d 6 (1955), " 'If the construction of the instrument be clear and the breach clear, then it is not a question of damage, but the mere circumstance of the breach of the covenant affords sufficient ground for the Court to interfere by injunction.' " (Citations omitted.)

Terrien v Zwit, 467 Mich 56, 65; 648 NW2d 602 (2002).

Accordingly, in most cases, an injunction is the most effective way of enforcing the governing documents. An injunction is a form of relief in which a court either compels somebody to do something or forbids somebody from doing something.

- Money Damages. While injunctive relief is the most common way in which governing documents are enforced, a community association may also pursue a claim for monetary damages caused by a violation of the governing documents. By way of example, if an owner damaged the common elements and the association incurred costs in repairing those damages, then the association may pursue a claim against the owner to recover the monetary damages. In some cases, the governing documents allow the association to assess the monetary damages to a unit or lot, place a lien on the property and foreclose on the lien if the monetary damages are not paid.

- Attorney's Fees and Costs. As indicated in MCL 559.206, a condominium association will be entitled to recover reasonable attorney's fees and costs in a case involving a violation of the governing documents if the condominium documents expressly so provide. The governing documents for many homeowners associations also permit the recovery of attorney's fees and costs for a violation of the declaration. Accordingly, while many disputes require each party to pay their own legal fees, community associations have a distinct advantage in enforcing the governing documents as they often are allowed to recover their attorney's fees and costs if they prevail. The Michigan Court of Appeals also has ruled that a community association may be able to recover attorney's fees for successfully defending claims brought by an owner if it involves the enforcement of the governing documents.

  In Highland Beach at Lake Michigan v Sanderson, __ Mich App ___; ___ NW2d ____, 2010 WL 1445415 (Mar 24, 2020), the Michigan Court of Appeals held:

  > Giving the language of this unambiguous bylaw its plain and ordinary

> meaning, Rory, 473 Mich at 464; 703 NW2d 23, we hold that the bylaw entitled HBLM to an award of attorney fees and costs associated with defending against Sanderson's counterclaim. The proceeding arose because of Sanderson's alleged default, which has now been established, and the counterclaim was part of and encompassed by the "proceeding."
>
> Furthermore, assuming for the sake of argument that the counterclaim must be viewed as its own "proceeding" apart from the complaint for purposes of the bylaw, the counterclaim for breach of contract still constituted a proceeding arising because of an alleged default. Sanderson only filed the counterclaim because he was accused of a default for violating the amended bylaw restricting rentals—without the default there would have been no responsive counterclaim. Indeed, the breach of contract counterclaim sought money damages on the possibility that Sanderson would not be permitted to use his property for short-term rentals because of the amended bylaw. Accordingly, the trial court did not err by awarding HBLM attorney fees and costs incurred in defending against the counterclaim. Id at 14.

Accordingly, given that community association board members have a fiduciary duty to enforce the documents and they are often allowed to recover attorney's fees and costs for prevailing in an action related to the enforcement of governing documents, community associations must be diligent in pursuing enforcement remedies.

CHAPTER 4
COLLECTIONS

Chapter 4: Collections

Most community associations are formed as nonprofit corporations so typically income from assessments is their sole source of income. Income from these assessments then is used to provide essential services and to fund operations. Whenever an owner fails to pay assessments, all the other owners suffer as they now have to shoulder the burden of the association's operational costs.

With that in mind, in this chapter, we will discuss the particulars of collections, how you can streamline the collections process and what to do in situations when an owner is delinquent. With these guidelines, you will have the resources you need when you face these challenges and you will be better prepared if and when you need to talk with your attorney about a collections issue.

CAN CO-OWNERS WITHHOLD ASSESSMENT PAYMENTS?

If a co-owner is unhappy with their condominium association, they may threaten to withhold their assessments. Common reasons that owners attempt to withhold assessment payments include, but are not limited to:

- Their unit has sustained damage and they believe the condominium association has not responded as quickly or thoroughly as it should;
- They are not happy with repairs made to their unit;
- They are dissatisfied with some aspect of how the condominium association is operating, such as accounting practices or the board's financial decisions;
- They are not receiving services that they expected; and
- They are dissatisfied with the board for political reasons.

However, none of these reasons gives a co-owner the right to withhold assessment payments. While Michigan law permits tenants to withhold payment if repairs are not timely made, this does not apply to condominium owners. Specifically, in Newport West Condominium Ass'n v Verner, 134 Mich App 1, 11; 350 NW2d 818 (1984), the Michigan Court of Appeals held the following:

> *MCL 559.165; MSA 26.50(165) requires each condominium unit owner to comply with the project's master deed, bylaws, and the rules and regulations found in and promulgated under the Condominium Act. In this case both the bylaws and the act require the assessment of fees to cover the common expenses of the project. MCL 559.169(3); MSA 26.50(169)(3); Newport West Condominium Bylaws, art II, § 4. Under MCL 559.169(4); MSA 26.50(169)(4) a co-owner may not be exempted from contributing his or her share of the common expenses by nonuse*

> *or waiver of the use of any common element or by abandonment of his or her unit. The sums assessed against a co-owner by the association that remain unpaid constitute a lien upon the delinquent co-owner's unit. MCL 559.208; MSA 26.50(208). This section of the act empowers the association to foreclose on the lien or to seek a money judgment. Section 139 of the act, MCL 559.239; MSA 26.50(239), provides:*
>
> *"A co-owner may not assert in an answer, or set off to a complaint brought by the association for non-payment of assessments the fact that the association of co-owners or its agents have not provided the services or management to a co-owner(s)."*
>
> *In our view the phrase "services or management" as employed in the above section embraces the audits and properly funded reserves desired by defendant. Simply stated, the Condominium Act does not provide a co-owner with the self-help remedy of withholding part or all of his assessed fees.*

Accordingly, co-owners who withhold payments should be made aware that they may not withhold assessment payments, per Michigan law, and that they likely will incur late fees, interest, legal fees and potential foreclosure if they do not pay in a timely manner.

ALL COMMUNITY ASSOCIATIONS SHOULD HAVE A COLLECTION POLICY

A collection policy is the first step to protecting your community association from issues with delinquent payments and other cash flow problems. With a clear collection policy, owners will know what is expected of them, when they need to pay and what kinds of penalties they will incur if they do not pay. A collection policy also is important to avoid claims of selective enforcement and ensure that all owners are treated the same in the collection process. A typical collection policy should identify the following:

- The due date of assessments and the date that interest or late fees begin to accrue;
- A time period in which the board or management company will send a follow up letter for any missed payments;
- A time period for turning over delinquent assessments to legal counsel;
- Whether legal counsel will send an additional demand letter or letters to a delinquent owner;
- Whether assessments will be accelerated, if permitted by the governing documents;
- Whether a rent diversion letter will be sent to the tenant of a condominium unit that is rented under MCL 559.212;

- How payments will be applied to delinquent accounts and ensuring that they are applied in a manner that is consistent with the governing documents;
- A time period in which a lien will be placed on the property if the default remains ongoing; and
- A time period in which foreclosure will be commenced and/or a complaint will be filed in court if an account remains delinquent.

Most collection policies also provide the board with discretion to enter into payment plans. In exercising this discretion, the board should ensure that a delinquent owner provides evidence that they are suffering from a financial hardship that requires a payment plan.

If a community association takes an inflexible position with delinquent owners from the outset, such action may force the owner to declare bankruptcy, which can complicate matters. However, accepting a payment plan does not mean that a community association should accept less than the total amount of assessments owed. While providing a "discount" may seem like a neighborly thing to do, in reality, it only shifts the financial burden onto the other owners.

HOW SHOULD YOUR CONDOMINIUM ASSOCIATION HANDLE FORECLOSURES?

Judicial foreclosure

Judicial foreclosure starts when the community association files a lawsuit against the delinquent owner and the association can request a monetary judgment against the owner in addition to the judgment of foreclosure. If the owner does not respond to the community association's lawsuit, then the association may seek a default judgment. If granted, the default judgment would give the association the relief it requested in the lawsuit, which is typically the monetary judgment or judgment of foreclosure. If there is a dispute as to the amount owed, then the court will determine the amount owed.

Whether the judgment is obtained via default, summary disposition or after trial, the association must wait 21 days before taking action to enforce or collect the judgment. See MCR 2.614 for more detail.

Additionally, the association cannot seek to have the property sold until at least six months have passed after the filing of the lawsuit. See MCL 600.3115. The sheriff conducts the foreclosure sale, which ordinarily takes place at the county circuit court. All members of the public, including the association, may bid on the property at the sheriff's sale. In the majority of circumstances, the association will enter a full credit bid (i.e., a bid in the amount of the judgment plus any additional expenses) as the

opening bid for the property. If the property is sold for a price greater than the opening bid amount, then the owner is entitled to receive the surplus.

If the association is the successful purchaser, a Sheriff's Deed is recorded with the County Register of Deeds. The redemption period, which is the time period given to borrowers in foreclosure during which they can buy back or "redeem" their property after foreclosure, begins to run from the date the Sheriff's Deed is recorded. The redemption period is six months from the date of the sale, unless the property is deemed abandoned, in which case the redemption period expires one month from the date of sale.

Foreclosure by advertisement

In contrast, foreclosure by advertisement allows for a community association to sell the property without going to court and the association only is required to publish a notice in the local newspaper. The statute governing foreclosure by advertisement is MCL 600.3201 et seq, which requires a notice of foreclosure to be published at least once per week for four consecutive weeks with a newspaper published in the county where the property is located.

The association also is required to post a copy of the notice in a conspicuous place on the property, which is usually the front door. See MCL 600.3208. Many condominium association governing documents include an additional requirement that the association notify the co-owner it will be pursuing foreclosure by advertisement and advise the co-owner that they are permitted to request a judicial hearing by bringing suit against the association. See Gorosh v Woodhill Condo Ass'n, unpublished per curiam opinion of the Court of Appeals, issued Oct 16, 2012 (Docket No. 306822).

If the owner fails to pay the amount stated in the notice, then a sale is scheduled and the county sheriff conducts the sale in the same manner as a judicial foreclosure. Similar to a judicial foreclosure, the owner who has defaulted on their assessments has the right to redeem the property after foreclosure. As with a judicial foreclosure, the redemption period in a foreclosure by advertisement is six months, unless the property is deemed abandoned, in which case the redemption period is one month.

From a practical standpoint, a major advantage of judicial foreclosures is that the association can seek a monetary judgment in addition to a judgment of foreclosure. Thus, if the owner is uncollectable, then the association can seek to foreclose on the property and take possession and the property can be sold to a third party or leased out to allow the association to recover its costs.

Alternatively, if the owner is collectible and/or there is no equity in the property, then the association can seek to recover on the monetary judgment and garnish wages and/or bank accounts of the delinquent owner. Another advantage of judicial foreclosures is that the association may seek to have a receiver appointed, especially if there is a tenant in the property, to collect rent during the litigation, per MCL 559.208(7). For these reasons, judicial foreclosures provide an association with more flexibility in pursuing delinquent owners.

However, judicial foreclosures are disadvantageous because they require a much longer period of time before the association can take possession of a property. When taking into account the time to file the lawsuit, serve the lawsuit, wait for the response, file a motion, obtain a judgment and wait the required six-month period of time, there is a minimum of seven to eight months before the association can even foreclose on the property. Judicial foreclosures also are more complex and expensive than foreclosure by advertisement.

There are several benefits to foreclosing by advertisement, which is much faster and less expensive than judicial foreclosures. In addition, foreclosure by advertisement only requires publishing and posting of the foreclosure notice. Accordingly, an owner cannot evade service to avoid a foreclosure by advertisement because service is not required. Finally, foreclosure by advertisement does not give the owner the right to raise a defense or challenge the foreclosure or the balance owed unless they file a lawsuit in court, putting the financial burden of initiating litigation on the owner instead of the association. Foreclosure by advertisement forces an owner to pay off the balance in full or risk losing their home in a short period of time and can be an extremely valuable tool for associations to compel payment.

Whether the foreclosure is conducted judicially or by advertisement, if the association purchases the property at the foreclosure sale and the property is subject to a senior lien, such as a first mortgage or a state or federal tax lien, then the association only owns the property and is entitled to lease the property until the senior lienholder forecloses its lien, at which time the association's interest is terminated. You can find more information here, but in most cases, you should consult counsel before proceeding with either type of foreclosure.

Lien Priority

It is especially important for an association to record liens for unpaid association assessments to protect its lien priority. In the context of condominiums, MCL 559.208(1) states the following regarding lien priority:

> *Sums assessed to a co-owner by the association of co-owners that are unpaid together with interest on such sums, collection and late charges, advances made by the association of co-owners for taxes or other liens to protect its lien, attorney fees, and fines in accordance with the condominium documents, constitute a lien upon the unit or units in the project owned by the co-owner at the time of the assessment before other liens except tax liens on the condominium unit in favor of any state or federal taxing authority and sums unpaid on a first mortgage of record, except that past due assessments that are evidenced by a notice of lien recorded as set forth in subsection (3) have priority over a first mortgage recorded subsequent to the recording of the notice of lien.*

However, at least one federal court has ruled that a condominium lien that was recorded before a federal tax lien may take priority over the federal lien based upon federal law. Similarly, it is important to record a lien on a unit if there is no mortgage as the condominium lien has priority over a first mortgage of record that is recorded after the condominium lien was recorded. However, a condominium association lien may not be protected if the condominium association accepts a deed in lieu of foreclosure and allows junior interests to remain on the property.

In the context of a homeowners association, the declaration may determine the association's lien priority. However, generally speaking, Michigan is a race-notice state, meaning the first recorded interest takes priority. Specifically, MCL 565.29 states that "[e]very conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded."

While there may be certain statutory exceptions to this general rule, such as for state or federal taxes, it is especially important for a homeowners association to record liens, if permitted to do so by its governing documents, in a timely manner as they do not have the same statutory priority granted to condominium associations.

When Is a Bank or Other Mortgage Lender Obligated to Pay Assessments After a Foreclosure?

If a co-owner's mortgage lender forecloses on them, is the lender then obligated to pay the co-owner's assessments? Yes and no. The lender will not be responsible for any delinquent assessment payments prior to the time the bank foreclosed on the unit. After the bank forecloses, though, it takes on the debts and liens associated with the property accruing after foreclosure. Thus, it will be responsible for any assessments due from the date of the sheriff's sale, going forward. For more information on lenders'

obligations to pay assessments, read our article here.

What Happens When an Owner Declares Bankruptcy?

Declaring bankruptcy is a means to resolve debt, either through asset liquidation or debt consolidation. Typically, if an owner files for bankruptcy, they will file under either Chapter 7 or Chapter 13. In Chapter 7, the debtor (in this case, the owner) has a low-income threshold and largely unsecured debt and their non-exempt assets will be sold in an attempt to pay their debts back to their creditors (including your association). Unfortunately, in most cases, there is not enough money collected from these sales to pay off debtors, and you likely will not recoup most or any of the assessments owed.

In the case of a Chapter 13 bankruptcy, the debtor commits to a repayment plan of some or all of their debt over a period of three to five years. However. there is no guarantee that your assessments will be among the debts paid off in full, and you may not see any repayment at all.

In Chapter 7 cases, the owner almost always will surrender their unit and then be granted a Discharge Order. This prohibits the community association from attempting to collect assessments accruing prior to the bankruptcy filing. However, the owner will be responsible for post-bankruptcy filing assessments as long as they have an ownership interest in the unit. If they are keeping the unit, then they will be responsible for paying back all assessments owed to the condominium association.

In Chapter 13 cases, the owner will either surrender the unit or keep the unit. If they surrender the unit and are granted a discharge, then you will not be able to collect pre-bankruptcy filing assessments, but you may have received payments on delinquent payments during the bankruptcy term. If the owner is allowed to keep their unit, then they will be responsible for paying both pre- and post-bankruptcy filing assessments.

You can protect your association by ensuring all liens are filed in a timely manner when the owner becomes delinquent. This will, in most cases, ensure that you are not impacted by the owner's bankruptcy.

This should help you better understand collecting assessments and how to ensure that your community association is paid what it needs to operate smoothly and ensure a successful community experience for your members. In the next chapter, we will go through what you need to know and the resources you will need to keep your governing documents up to date.

CHAPTER 5
KEEPING YOUR GOVERNING DOCUMENTS CURRENT

Chapter 5: Keeping Your Governing Documents Current

Community associations must regularly review their governing documents to ensure smooth operations and avoid exposure to litigation. This chapter will identify common reasons why a community association will update its governing documents.

DO YOUR ARTICLES OF INCORPORATION NEED TO BE UPDATED?

When did you last update your community association's articles of incorporation or corporate bylaws? If it was prior to 2008, you likely need to update your language to comply with the Nonprofit Corporation Act. As of January 15, 2008, when Gov. Rick Snyder signed Michigan Senate Bill 623 into law, six major changes were made to the Nonprofit Corporation Act that could impact your association, including:

- Participation by Electronic Means: Required Unless Prohibited: Unless otherwise prohibited, members may now participate in membership meetings via electronic means (e.g., phone, conference call, Skype, etc.).

- Voting by Electronic Means or at a Polling Place Now Available: Instead of requiring members to make a physical appearance at a meeting to place their votes, they can now vote through electronic transmission or at a designated polling place, if such language is included in the governing documents.

- Additional Limitations on Director and Officer Liability Now Available: As of 2008, associations may absolve directors or officers of all fiduciary liability for any action made on the behalf of the association.

- Nonexecutive Committees: In addition to executive committees consisting of one or more directors of the association, the board now can appoint one or more "nonexecutive committees", including members, directors, officers or shareholders of the association.

- Inspection of Records: New Restrictions Now Available: Clarifications were made to the procedures by which a member is allowed to inspect certain records and which information they are permitted (and not permitted) to inspect.

- Mergers and Dissolutions: New Options for Twenty Co-Owners or More: Previously, a plan to merge or dissolve an association could be approved if the majority of members approved the measure either in person or by proxy. Now, this type of measure can be approved in the same type of vote but a minimum of 20 members entitled to vote must be present.

Based on the number of provisions and updates, if you have not amended or otherwise updated your articles of incorporation or corporate bylaws, it is likely time. We now will discuss how to appropriately make those updates.

WHEN AND HOW TO AMEND YOUR MASTER DEED AND BYLAWS OR DECLARATION

First, if there is still some question as to whether it is time to amend your governing documents, here is a list of indicators evidencing that it is time to make a change:

1. Your articles of incorporation are dated prior to January 15, 2015: Major revisions were made to Michigan's Nonprofit Corporation Act in 2008 and 2015. If you have not updated since then, you likely need to make a few amendments to comply with state law.
2. The master deed and bylaws were written before 2002: In 2001 and 2002, the Michigan legislature made significant amendments to the Michigan Condominium Act. Master deeds and condominium bylaws written before these amendments are very likely outdated and in need of amending.
3. The developer's attorney wrote the master deed and bylaws or declaration. In most cases, a developer's attorney drafts a master deed and condominium bylaws or declaration to protect the developer and not in the interest of the owners and association.
4. Your master deed and bylaws or declaration do not include or address recent technological improvements. Do your governing documents address issues, challenges and opportunities presented by newer technological innovations? If your governing documents were written before the widespread release of drones, smartphones, social media, WiFi-enabled security systems, smart home devices, solar panels and other technology, it is time to update them.
5. Your master deed and bylaws or declaration contain contradictory, incomplete and/or unclear provisions. As we covered in Chapter One, your governing documents should contain clear, plain language. If yours have provisions that are incomplete, contradictory or unclear in any way, take this opportunity to amend them so that you can consistently enforce them and avoid a breach of contract claim.
6. The master deed and bylaws or declaration do not have liability disclaimers for issues typically covered by an association's insurance. While a community association's general liability insurance policy will cover many things, a community association needs to have appropriate documents to fill in the gaps for items that typically are not covered. Examples of items that the association should disclaim liability for in the governing documents are damage resulting from the criminal acts of third parties, damage from COVID-19 or other viruses, incidental damage caused by the common elements or common areas that may

be covered under the owner's insurance policy or acts of God that are outside the association's control.

Now we will discuss how to amend your governing documents. We will begin first with the articles of incorporation and then move on to discuss how to amend your master deed and condominium bylaws or declaration and rules and regulations.

AMENDING YOUR ASSOCIATION'S ARTICLES OF INCORPORATION

A community association may amend its articles of incorporation by complying with the Michigan Nonprofit Corporation Act, MCL 450.2101. The process begins first with a mandatory notification to the members and shareholders at least 20 days prior to calling a meeting to discuss the amendment.

Then, after notice is given, a meeting is held to consider and discuss the amendment. At this meeting, a vote will be taken to approve the amendment. With few exceptions, an amendment can be made to the articles of incorporation if a majority of the members eligible to vote approve the amendment.

AMENDING YOUR MASTER DEED, BYLAWS AND CONDOMINIUM SUBDIVISION PLAN

The procedure to amend the master deed, bylaws and/or condominium subdivision plan is governed by the Michigan Condominium Act. To properly and legally amend any or all of these documents, the association must notify co-owners of the amendment at least 10 days before a meeting to discuss and vote on the amendment(s), and the amendment(s) need to receive a two-thirds majority vote of co-owners and/or mortgagees.

If you need more details, the articles linked above in this section give more information about the proceedings involved with when and how to amend your condominium association's articles of incorporation and/or other governing documents. For more specific guidance on amendments that you would like to make to your governing documents, we recommend consulting with counsel.

RED FLAGS TO BE AWARE OF WHEN UPDATING GOVERNING DOCUMENTS

Earlier, we listed a few key indicators that evidence your governing documents likely need to be updated. Now, we will discuss a few red flags that you also should look for in your documents as you consider what amendments are needed.

Your governing documents do not address potential technology issues

You might think you do not need to update your governing documents because they were last updated in 2010, long after the last changes to the Michigan Condominium Act. However, in 2010, camera-equipped drones were not widely available at easily affordable prices. Similarly, many energy-efficient, money-saving home upgrades were not available on a wide scale before just a few years ago, including solar panels and Wi-Fi-enabled smart devices. Do your governing documents address the challenges and opportunities that these technological innovations present?

You do not have provisions for electric vehicles

By 2040, experts project at least 35% of all new vehicles will be hybrids or fully electric vehicles. That means that over the next few years, you can expect a lot more requests from owners about places to plug their cars into at night. If your governing documents do not already cover things like where electric vehicles can dock and how the association will pay to charge them, it is time to make an amendment.

You do not have a rental cap

With few exceptions, namely vacation condominium developments and condominium hotels, most condominium projects are developed with the intent that the co-owners will be owner-occupants. In the wake of the housing crash, though, investors across the U.S. bought up condominium units and other properties to rent out to tenants. As a result, we have seen a big influx of renters in condominium developments across Michigan. Too many renters can cause a number of issues for condominium associations, but a rental cap can help prevent this issue.

You have not planned for short-term rental issues

Along with technological advancements, in the last few years we also have seen the rise of vacation rental services such as Airbnb and VRBO. And, as a result, we have seen a rise in issues with owners, associations and short-term renters. Savvy boards and community associations are making amendments to their governing documents to restrict or prohibit short-term rentals.

You have not addressed Wifi issues

In some cases, you will not need to make any amendments to your governing documents concerning Wi-Fi. For example, if you do not have a Wi-Fi network available for use in common elements and all owners are responsible for their own Wifi, you may not need an amendment. However, if you have plans for any type of communal Wi-Fi network, you must address it in your governing documents to avoid issues later.

You do not have a plan for the potential impact of legalized marijuana

Michigan decriminalized recreational use of marijuana in 2018, but the new law does restrict who can use marijuana and where. As a community association, you will need to address marijuana use on the premises and you will need to consider other aspects of this law, such as who can grow marijuana and where they can keep their plants.

You have not adopted building access and use rules in response to COVID-19 or other emergency powers to quickly respond to dynamic situations
It is essential to be proactive in protecting the health and safety of your co-owners at all times. This has been especially highlighted during the coronavirus pandemic, and updates should be made to your governing documents in accordance with new and emerging safety measures, restrictions and guidelines. As the Michigan Court of Appeals stated in Cohan v Riverside Park Place Condominium Ass'n Inc (After Remand), 140 Mich App 564, 569, 570; 365 NW2d 201 (1985):

> Inherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and use facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property.

Many of the common elements and areas, such as recreational facilities, clubhouses, elevators, exercise rooms, hallways, laundry rooms, lobbies and pools, are high-traffic areas where COVID-19 could be spread. Accordingly, your association's governing documents should provide the board with the ability to quickly respond to dynamic situations, including the coronavrius pandemic, by expressly permitting the board to control the closing, reopening and regulating of common elements and areas during these emergencies. Your association also should be proactive in creating rules to respond to the coronavirus pandemic, in addition to implementing increased cleaning measures.

However, given that the board's rulemaking authority is limited to implementing the existing governing documents, we recommend that the board enlist an attorney to draft these rules to ensure that they comply with any existing emergency orders and do not conflict with the condominium bylaws.

WHEN IS MORTGAGEE APPROVAL REQUIRED FOR DOCUMENT AMENDMENTS?

In general, most amendments to condominium documents require a two-thirds (2/3) majority vote of co-owners. Under certain circumstances, though, mortgagee approval

also is required before an amendment is effective. These limited circumstances include:

- Termination of the condominium project;
- Changes to the formula or method used to determine the percentage of the value of the condominium project assigned to a unit subject to the mortgagee's mortgage;
- Reallocation of responsibilities for maintenance, replacements, repairs or decoration of a unit, its appurtenant limited common elements or the general common elements from the association of co-owners to the unit subject to the mortgagee's mortgage;
- Elimination of a requirement for the condominium association to maintain insurance on the condominium project as a whole or condominium unit, subject to the mortgagee's mortgage;
- Reallocation of responsibility for obtaining and/or maintaining insurance from the association to the unit subject to the mortgagee's mortgage;
- Modification or elimination of an easement benefiting the unit subject to the mortgagee's mortgage;
- Partial or complete modification, imposition or removal of leasing restrictions for units in the project; and
- Amendments requiring consent of all impacted mortgagees.

HOW TO PROPERLY USE RULE-MAKING AUTHORITY

With or without owner approval, a community association is limited in its ability to create rules and regulations for the community. Specifically, according to the Michigan Court of Appeals in Mt. Vernon Park Association v Chantelle Clark, associations in Michigan may not create rules and regulations that are inconsistent with the association's master deed and condominium bylaws or declaration.

In this case, the Mt. Vernon Park Association created a rule that required all co-owners to paint their doors the same color and attempted to place the responsibility for the cost and labor on the co-owners. The Court of Appeals held that the association could require co-owners to paint their doors the same color but its bylaws stated that front doors were limited common elements, and, accordingly, the association could not place financial responsibility for painting doors on its co-owners.

Be sure that any rules you create are aligned with and consistent with your master deed and bylaws or declaration as these will always supersede any rules and regulations you enact.

WHAT TYPES OF DOCUMENT AMENDMENTS DO NOT REQUIRE A CO-OWNER VOTE?

Some changes to your condominium documents actually do not require a vote or approval from co-owners, and these may surprise you.

First, condominium associations may relocate unit boundaries without a vote. This is because unit boundaries are not necessarily fixed. Accordingly, a co-owner may purchase two adjoining units and move the boundary between them. And, in a site condominium, adjoining unit owners may alter boundaries for construction or landscaping purposes.

In cases such as these, a relocation can be approved by the condominium association's principal officer. Likewise, if your condominium documents expressly permit subdivision of units, then an amendment to the master deed to subdivide a unit also can be approved by the association's principal officer.

Another instance in which you do not need a co-owner vote is when a co-owner wants to transfer or sell their limited common element parking space, though this also has its limitations. In most instances, parking spaces are limited common elements and co-owners must submit an application to the condominium association to amend the master deed in order for the transfer to take place.

WHAT IS THE PROCESS FOR AMENDING THE DECLARATION OF A HOMEOWNERS ASSOCIATION?

Michigan presently does not have a homeowners association act. Accordingly, the 2/3 co-owner approval process in the Michigan Condominium Act does not apply to homeowners associations. Thus, unless the declaration contains a specific amendment requirement, unanimous consent is required to amend the declaration. However, many declarations provide a process to amend the governing documents, which, among other things, may limit the time periods in which the declaration may be amended. Therefore, it is important to consult with a community association attorney to determine the appropriate process for amending your declaration.

When in doubt, always seek counsel from a qualified attorney. You may not foresee the need for amendments in years to come, but your attorney may find red flags and potential pitfalls that could cost your association and your whole community in more ways than one. If you have questions about your governing documents, or anything else about operating a successful community association, please do not hesitate to reach out to us at Hirzel Law today.

Conclusion: Your Condominium or Homeowners Association Is Only as Strong as its Governing Documents

Congratulations! By reaching the end of this handbook, you now have the information and resources you need to:

- Successfully operate a condominium or homeowners association;
- Navigate the turnover process;
- Enforce your association's governing documents;
- Collect appropriate assessments from the owners to ensure streamlined association operations; and
- Update and amend governing documents to keep up with changes.

With this guide and the links to external resources we have included within it, you should have the tools necessary to address a wide variety of issues. From camera-equipped drone usage and electric vehicle docks to foreclosures and updating articles of incorporation, you now are prepared to operate your community association.

When you refer back to this text, remember that in areas where the subject was too deep or broad for this handbook, we included links to other resources that may help you get your bearings in even more complex situations. However, we know that these articles cannot replace the legal expertise of an attorney.

Every case is different, and, in our opinion, all governing documents should be reviewed by counsel. If you are concerned at all about a dispute with an owner, the clarity of some of your rules and regulations or any other issues regarding the operation and maintenance of your community, please do not hesitate to reach out to us at Hirzel Law today.

You can reach us by phone at (248) 478-1800, by email at info@hirzellaw.com or by filling out our online contact form. We are here to guide you through even the most complex issues for your community association.

CONTACT US