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Amending Governing Documents In Cooperatives and Condominiums: Proprietary Leases, Declarations and By-laws

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The main differences between condominiums and cooperatives are their ownership structures and their governing documents, which contain the policies and rules for living in these communities. Condominium governing documents provide condominium unit owners a more flexible form of ownership regarding sales and leasing, whereas cooperative governing documents are typically more restrictive and have a more detailed sales and leasing application and approval process.

When you purchase a condominium unit, you own the unit, together with a joint interest in the building's common areas, which is reflected in your unit deed. The unit deed is recorded with the county clerk's office where the unit is located and it contractually obligates the unit owner to be bound by the terms and conditions of the recorded declaration and by-laws. When you purchase a cooperative apartment, you are not technically buying the apartment; rather, you are buying shares in a corporation which grant the shareholder the exclusive right to occupy a specific apartment pursuant to a proprietary lease. As a result, at closing for a condominium unit you receive a deed, and at closing for a cooperative apartment you receive a share certificate and a proprietary lease.

In a condominium, the declaration and by-laws govern the major policies and rights related to living in the building. The declaration and by-laws and any amendments thereto are recorded in the county clerk's office where the building is located. In a cooperative, the major policies and rights are set forth in the proprietary lease, by-laws and any amendments thereto (which are not recorded in the county clerk's office).

Although the initial provisions of condominium declarations and by-laws and cooperative proprietary leases and by-laws are usually thoughtfully and logically drafted, they are not set in stone, and most buildings find it necessary at some point to review their governing documents and make amendments if they feel certain provisions or terms are no longer applicable, equitable or enforceable, or are disliked by the owners.

The following are some common reasons for amending condominium declarations and by-laws or cooperative proprietary leases and by-laws: changes to the leasing, subletting and unit "use" restrictions; imposition of flip-taxes or transfer fees; the creation of staggered board terms to reduce board member turnover each year; and allowing boards and owners to use technology to improve and streamline corporate governance, meetings and voting. In addition, condominiums and cooperatives can increase the likelihood of collecting common charges and maintenance, late fees, legal fees and other charges by passing amendments related to these issues. Most recently,

due to the Covid-19 pandemic, we have seen an uptick in condominiums and cooperatives seeking to amend their governing documents to allow for annual meetings and voting to be held virtually via electronic communications.

Depending on your building's governing documents, it will typically require a supermajority vote of the owners to amend the declaration and by-laws or proprietary lease and by-laws. As a result, to increase the likelihood of getting amendments passed, it is important for boards to first inform owners of the proposed amendments and obtain their feedback before holding an owners meeting to vote on the issues. If the feedback is negative, the board should modify the terms of the amendments or find a way to educate the owners on the benefits of the amendments before presenting them for a vote. The board should only schedule an owners meeting to vote on the proposed amendments after the board is confident that the required number of owners will vote in favor of the amendments.

In addition to the declaration, proprietary lease and by-laws, a condominium or cooperative will also have rules and regulations or house rules which govern the day to day affairs of the building, and these rules can be amended by the board without the owners' approval. The rules and regulations or house rules govern activities such as smoking, pets, moving procedures, garbage disposal, parking, and use of the common areas (e.g., courtyards, pools, gyms, lounges, mailrooms, etc.).

Typically, amendments to governing documents, which require owner approval, impose restrictions related to the use of the actual units. In contrast, rules and regulations or house rules, which can be amended by the board without owner approval, generally impose restrictions related to the use of a building's common areas. It is important for boards to understand which matters require an amendment of the governing documents that must be approved by the owners versus amendments of the rules and regulations or house rules which may be passed by a vote of the board. For example, in New York City, as of August 2018, most buildings, including condominiums and cooperatives, are required to adopt a smoking policy pursuant to Local Law 147. If a board wanted to adopt a smoking policy prohibiting smoking within a unit and make the entire building "smoke free," it would generally require an amendment of the governing documents because it relates to the use of the units. On the other hand, if a board only wanted to adopt a smoking policy prohibiting smoking in a common area like a roof deck (or create a designated location in the common areas where smoking is permitted), a board could do so by passing a house rule or regulation without a vote by the owners.

Amending a condominium's declaration and by-laws or a cooperative's proprietary lease and by-laws may be necessary or beneficial to reflect the current technology, laws and opinions of owners as they change over time. Boards that are considering amendments to their governing documents should contact their management professionals or attorneys for advice about which amendments require owner approval and which can be passed by a board vote, and how to communicate and present amendments to the owners in a manner and form that will increase the likelihood of the amendments being passed if owner approval is required.

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