

# Creating Sound, Legal Community Rules

Staying Within the Law

BY STEPHANIE MANNINO 2009 FEB

SHAREHOLDER RELATIONS



Every co-op or condo has rules and regulations that have been put in place to define the board's authority and limitations of power, as well as outline the rules for the community, residents or shareholders. And although the governing documents are intended to work in the best interest of everyone in the building, they sometimes pose problems. Especially, when rules are amended or created and they conflict with each other, create problems for residents, or are against the law.

## Where Rules Come From

Before a community has a set of rules in place, they've likely evolved over time. Many rules are somewhat standard, but some are created in a response to the unique needs of the building or HOA. In drafting a co-op or condo's original rules and regulations, most developers and sponsors rely on their attorneys.

In New York, Attorney General regulations require that an association's rules and regulations be included in offering plans. These regulations do not require a specific format or content however, according to Stephen M. Lasser, Esq., of Stark & Stark in Manhattan.

"Even though a specific format is not required, the rules and regulations contained in most offering plans are very similar," says Lasser. "This is because many lawyers have an 'If it ain't broke, don't fix it' attitude. In other words, many lawyers copy the rules and regulations from prior offering plans rather than starting from scratch. This works out well most of the time, but can be problematic if the form they copy is not updated to address issues that are unique to a particular association or changes in laws and technology that may affect an association."

For example, the rules and regulations might have been drafted prior to cell phones, and therefore fail to address an issue which might affect a particular building, such as talking loudly on a cell phone in the lobby.

"Attorneys who regularly do this work start with standard rules that they are comfortable with," says J. David Ramsey, partner at Greenbaum, Rowe, Smith & Davis, LLP, in Woodbridge, New Jersey. "[Then they] send them to the sponsor, and ask the sponsor to review and comment. Some sponsors are very hands-on and will be very involved in that process, while others will simply follow their attorney's lead."

Rules and regulations are rarely drafted from scratch; attorneys will often start with a set of rules they've used before and then revise as appropriate for a given project. That may save time and prevent accidental omissions, but rules and regulations set forth years ago can be problematic for residents and boards in older building communities.

"In co-ops, the form of propriety lease that's currently used was one you started seeing in the late 1960s," says Kenneth R. Jacobs, a partner at Smith, Buss & Jacobs, LLP, in Manhattan and Yonkers.

"Originally, most sponsors drafted their documents to enhance marketing," Jacobs continues. "They did not consider what the impact of the governing documents would have on the real-life

operations of the corporation. That has created a lot of problems for associations over the years. The sponsor would write in certain rules that would make it easier for the sponsor to sell or rent units, or which the sponsor thought would make [the building] more attractive to a buyer, but didn't consider what would happen when the sponsor was gone," says Jacobs.

## Co-ops vs. Condos: Differences

Despite their differences, co-ops and condos do have some similarities when it comes to rules and regulations.

"Traditional differences include assignments and subleases," says Jacobs. "Co-ops have absolute control over approvals of leasing and assignments. A common standard in condo bylaws gives an owner the right to sell and lease unit subject to certain controls."

However, he adds, co-ops and condos are more alike than different, especially in that fundamental area of "quality of life."

"There is a myth about condos that people buy them and can do whatever they want," Jacobs continues. "In terms of quality of life, the rights of both [co-op and condo] boards are very similar. House rules and rules and regulations address noise, alterations, when you can play loud music. Quality of life issues are very similar in co-ops and condos."

"Generally speaking, the co-op has more control because the entire building, including the apartments, is owned by the co-op corporation," adds Ramsey. "But that's just a starting point. Much depends on the governing documents. There are condominium master deeds that provide the board with extremely broad rule-making authority, and others that are more limited. Typically, though, in a cooperative the board is granted broader rule-making authority than what we would typically see in a condominium."

"The rules and regulations for cooperatives and condominiums are usually very similar, and typically can be amended by a majority vote of the board," says Lasser. "One major difference is that cooperative rules and regulations often include a detailed purchase application and

qualification process for prospective purchasers while condominium rules and regulations traditionally do not.”

Lasser goes on to say that as condos continue to grow in popularity, a number of condo boards have adopted regulations that require purchase applicants to submit detailed information, much like co-op board requirements. “This has been done in order to give condominium boards more control over who purchases in their buildings and to gain more information about purchasers in the event they should default in their common charge payments,” he says.

In general, co-op rules are generally easier to enforce than condo rules because of the landlord-tenant relationship between co-op corporations and their shareholders.

“Most co-op proprietary leases provide that if an owner violates a rule, he or she is in default under his or her lease. Therefore, a co-op can start a proceeding in housing court to evict a shareholder who violates a rule. The threat of eviction is a powerful incentive for co-op shareholders to comply with rules,” says Lasser.

By contrast, no landlord-tenant relationship exists between condo associations and condo unit owners. As such, condo boards cannot opt for an eviction proceeding in housing court. Condo boards most often fine owners who violate the rules.

“If that fails to correct the behavior, a condo board can seek injunctive relief in state Supreme Court,” says Lasser. “Starting a lawsuit in state Supreme Court is much more expensive than starting a case in housing court and may not be a cost-effective way to curtail less serious rule violations.”

## When Rules and Regs Backfire

Even the most well intended rules can land a board in hot water. For example, certain rules might come across as discriminatory.

“What we as attorneys worry about are those scenarios where a protected class under federal or

state law (including factors like race, sex, national origin, religion, sexual orientation, disability status, etc.) is disproportionately impacted by a rule—even if the purpose of the rule was not to create a discriminatory impact,” says Ramsey.

He notes that swimming pool rules dealing with children must be extremely carefully drafted to avoid claims of “familial discrimination” or discrimination against families with minor children.

“Other rules that—while not unlawful per se—might be improper, are those that alter the intent of a restriction in the master deed or a term of the proprietary lease,” says Ramsey. “For example, let’s say the documents state that each shareholder or owner may maintain one pet in his or her apartment or unit, and those documents do not give the board authority to further limit that by rule. But the board decides that pit bulls are too aggressive and must be eliminated. The board would be treading on thin ice to adopt a ‘no pit bulls’ rule because the governing documents don’t grant the board the authority to further define a household pet,” says Ramsey.

Tenants—or subtenants, in the case of co-ops—have become a very prevalent topic of board concern. As Ramsey notes, in many communities tenants or subtenants are seen as having a negative impact upon the community, particularly when a large number of people are renting. This issue is especially relevant in the current economy, as a growing number of owners or shareholders are choosing to rent out their units.

“Boards are considering all types of rules to deal with these issues,” says Ramsey. “Some may be acceptable, but when the rules start to tread on an owner’s right to rent his unit and the new rules add prohibitions or limitations that are not found in the master deed or proprietary lease, the board may be taking away a right from a shareholder or owner that they are not authorized to enact.”

In many cases, the board is limited as to what it can and cannot change. To change a proprietary lease, “you need a minimum of two-thirds of shareholders to agree to an amendment,” says Jacobs. “Co-op bylaws can be amended by vote of the board. But there are statutory limitations of what parts of bylaws can be changed without shareholder consent. And the certificate of incorporation can only be changed by a vote of shareholders.”

## Avoiding Conflict

So with so many nuances and changes in the law, what's a conscientious, well-meaning board to do? There are many resources and professional associations available, but when in doubt, consult your attorney. "The law is evolving. Rely on your professionals, your managing agent and attorney. These people will give you resources," says Jacobs.

There are many intricacies and subtleties of the law, and it is essential that every board have legal counsel, who is an expert in this field. Ramsey notes that time spent with the association's attorney at the beginning can save enormous amounts of time and money later. "A quick email or phone call to the co-op's or condo's attorney can result in saving much time and, perhaps, understanding how a particular goal can be achieved in a different and lawful manner," he says.

Boards should make sure they are not exceeding the authority given to them under other governing corporate documents. For example, it might constitute a breach of authority for a board to create a new fine, penalty or late fee that is not authorized under the governing documents.

"Courts have held that monetary obligations, which are only authorized by a board enacted rule, are not enforceable," says Lasser. "If an improperly enacted rule imposing a monetary obligation is challenged and overturned by a court, the association may be responsible for reimbursing the aggrieved shareholder or unit owner. This can potentially be a very expensive mistake."

Another pitfall for boards, says Lasser, "is failing to take into account a shareholder's or unit owner's disability when enforcing a rule. Pursuant to federal, New York State and New York City laws, cooperatives and condominiums must provide 'reasonable accommodations' to disabled residents so that they can use and enjoy their apartments. This means that even a properly enacted rule or regulation may not be enforceable against a disabled building resident. Some examples of rules that have been held to be unenforceable are rules prohibiting certain types of alterations, rules prohibiting washing machines and rules prohibiting pets," says Lasser. "In the event a board is unsure whether a reasonable accommodation is required, they should consult with legal counsel."

Sometimes, actions might not be illegal, but that doesn't mean it's a good idea to act in certain ways. "It might be legal, but not prudent," says Jacobs. "Say a board wants to publish names of

shareholders or unit owners in arrears in its minutes or the building newsletter. Is it legal? Yes. Is it wise? No." It could be done, but what if you're wrong? "What if your managing agent messed up, and you've printed the wrong name? You've just exposed yourself to a defamation suit."

Boards may also decide to impose qualifications on who can run for a spot on the board. Shareholders or residents, however, might choose to challenge those decisions, and the board could end up in court. "I know of a case where a board didn't like particular shareholder who had not gone to college," says Jacobs. "They passed a bylaw change that said anyone who did not have a college degree could not be on the board. The shareholder sued and won. The court determined absence of college education did not disqualify person from being on board," says Jacobs.

In addition to your attorney and managing agent, professional organizations can provide guidance and help boards stay up to speed on pertinent legal issues. "Community Associations Institute (CAI) and the National Association of Housing Cooperatives (NAHC) can provide some guidance, particularly on issues where federal law requires a particular set of rules or guidelines," says Ramsey. Examples might include rules regarding the flying of the American flag, or installing satellite dishes.

"It is helpful to read trade publications to keep up to date with trends and legal decisions affecting the industry," says Lasser. Rules and regulations are set forth for the benefit of everyone in the community. As such, it behooves the board to have a clear understanding of and stay within the law when amending, enforcing or creating rules and regulations. Consulting with the association's attorney, other professionals and staying current with professional organizations and trade publications are a board's best defense against potential lawsuits, which no co-op or condo wants—or needs—to endure.

*Stephanie Mannino is a freelance writer and a frequent contributor to The Cooperator.*

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#### 4 COMMENTS



PENNY on TUESDAY, SEPTEMBER 14, 2010 5:41 PM

I was recently at our shore cono in NJ and was yelling for about 2 minutes at my kids. Then later in the day at my husband for spraying bug spray onto the windows( he thought it ws windex.lol) each time it wasonlya few minutes and i recieved a complaint notice. Can they really tell me how loud to talk??

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ANONYMOUS on TUESDAY, NOVEMBER 2, 2010 9:05 PM

yes they can

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DEB on WEDNESDAY, APRIL 13, 2011 6:52 PM

You state that a two-thirds shareholder majority is required to amend a proprietary lease. Could you provide the authority for this requirement?

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FATIMAH on MONDAY, NOVEMBER 14, 2011 6:28 AM

Hello. i am suffering harassment and discrimination at the hands of my Co-op Board. I have a disability - Bipolar Disorder. I am on Social Security disability. Can you help me? Thank you.

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