

# Power can be limited, so know how to wield it.

By Robert Braverman

## IS FOR GOVERNING DOCUMENT (CONDOS)



**C**ONGRATULATIONS! You have just been elected to the board of managers of your condominium, replacing five individuals who previously served and have all moved out of the country and left you no forwarding information or other instructions or insight as to what your duties, responsibilities, and roles should be as a board member.

To make matters even more interesting, tomorrow night is your first board meeting and you have just received an e-mail from your managing agent with an agenda attached. Among the items: (1) unit-owner arrears; (2) a proposed lobby renovation; and (3) sales and leases.

Sounds overwhelming but take heart: the answers to how to address and deal with these and other issues you are likely to encounter on the board can all be found in your condominium's governing documents.

"Great," you say. "I don't even know what a governing document is."

Let's start from scratch. Your condominium was created under a statutory scheme commonly referred to as the Condominium Act. The act serves as a framework for how a condominium is structured and operated. Under the act, a condominium is created by the recording of a document known as a declaration. The declaration is one of three governing documents of a condo, the other two being the bylaws and the rules and regulations (commonly called the "house rules").

The declaration defines those parts of the property that make

up the common elements, the limited common elements, and the units themselves. The declaration also sets forth limits on the ability to sell and lease units in the condo, contains floor plans for each unit, and sets forth the allocation of common interest: the percentage of ownership of the common elements attributable to each of the units.

A declaration in a mixed-use condo – i.e., one that has both residential and commercial units – lists those parts of the property that comprise "residential common elements" and those that are considered to be "commercial common elements."

The bylaws establish the governing structure of the condominium; including, among other things, the number of members needed for the board of managers; the procedural requirements for having board meetings and unit-owner meetings; the powers of the board; the obligations of unit-owners to pay common charges and assessments; rights and limitations concerning alterations and repairs to units and to the common elements; the procedures for conducting sales and crafting leases of condominium units; and the remedies available to the condominium in the event of unit-owner defaults.

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The house rules lay out the daily “quality of life”-related rules, designed to ensure harmonious living. Typically, house rules cover such items as limits on harboring pets; prohibitions on the use of common areas for the storage of personal property; the requirement to cover a certain area of an apartment with carpet or other floor covering; and permissible hours for performing work or for playing musical instruments. If the condominium has amenities such as a gym, playroom, or lounge, the house rules may set forth the regulations governing the use and operation of these amenities.

The rules can be changed by a vote of the board; however, the declaration and bylaws can only be amended by a super-majority (usually between 60 and 80 percent) of unit-owners at a meeting called for that specific purpose.

Let’s apply the information about the governing documents to the challenges discussed earlier.

### **Arrears**

A condominium’s bylaws empower the board to fix the amount of common charges to be paid by unit-owners. Generally, these charges are based on the amount of money required to “run” the condo every year. Most often, the lion’s share of the annual budget consists of fixed expenses that include payroll, insurance premiums, management fees, and utility costs.

The bylaws will require the condominium’s unit-owners to pay common charges in a timely fashion, and failure will often result in the mandated imposition of a late fee and, in some instances, interest at the maximum rate permitted by law. Where bylaws do not contain an express amount of a late fee or interest, they will generally vest the board with the power to impose fines against unit-owners who fail to comply with their obligations.

In the event of a continuing delinquency, most condo bylaws require a board to enforce the condominium’s remedies; namely the start of a lawsuit for breach of contract (the bylaws are considered a contract between the condominium and the unit-owner) or the filing of a lien and, if necessary, a foreclosure action.

So, in this instance, the board should review its bylaws, determine what, if any, late fee is allowed, and instruct its managing agent to impose the fee and to follow up with the delinquent owner. If the unit-owner is more than 60 days behind, the board should strongly consider consulting with the condo’s counsel about pursuing legal action.

### **Lobby Renovation**

Here’s one where a board may need to be careful. Many condo bylaws contain restrictions on the amount of money the board may spend on capital improvements and, in some instances, non-emergency capital repairs (i.e., roof or façade repair) without first having to obtain unit-owner approval (usually a simple majority, i.e., 51 percent). Accordingly, even if the lobby hasn’t been re-decorated in 25 years and has furniture that is in tatters, if the cost of renovation exceeds the threshold amount the board is permitted to spend, it is going to have to call a special meeting of unit-owners (the steps for which

will also be prescribed in the condo’s bylaws) and obtain unit-owner approval before committing the condo to the expenditure.

In the event there is no limit on the amount, the board will need to consider how the project will be funded. Are the board’s capital reserves sufficient to cover the expense? If so, what will be the plan for replenishing the funds? Will there need to be an assessment and, if so, for how much and for how long?

Before engaging in any major capital project, a prudent board will consult with its managing agent and possibly its accountant for input on how to fund the project. If there is any question as to whether unit-owner approval or some other procedural step may be required before starting the project, the condominium’s counsel should also be consulted.

### **The Sale and Leasing of Units**

Unlike the sale or sublet of a co-op apartment, which is subject to the approval of the board, a condo board is going to be far more limited in its ability to “reject” the sale or leasing of an apartment.

With regard to sales, most condos provide the association with a right of first refusal, which must be exercised within a certain period of time after notice is given to the board – in a method and manner expressly provided for in the declaration and bylaws – of the unit-owner’s intention to sell. In other words, the only way a board can “reject” or otherwise block a sale from proceeding (assuming proper notice is given) is to cause the association to purchase the unit on the same terms and conditions as the prospective sale. The “waiver” of the condominium’s right of first refusal must typically be exercised within a specified period of time (i.e., 30 days), or else it will be considered waived.

Needless to say, the exercise of the right of first refusal is no easy feat to accomplish and, indeed, many governing documents require that a board must obtain the approval of a majority or even super-majority of unit-owners before exercising the condo’s right of first refusal.

Similarly, other than limitations on certain short-term leases (i.e., less than six months), a condominium unit-owner enjoys a very broad right to rent his or her apartment, so long as the board is notified in accordance with established procedures and is offered a right to rent the unit on the same terms and conditions. Again, a board that fails to act on a rental application within the time frame specified by the governing documents will usually be deemed to have waived its rights in this matter.

A prudent board will require that a potential buyer complete a purchase application containing some information about the proposed purchaser/tenant, and will review such “packages” and assent to the condominium’s waiver of its right of first refusal.

These are only a few of the myriad issues you will confront during your tenure on the board. Issues regarding unit-owner disputes, alterations, capital repair projects, and governance-related matters are also likely to rear their heads. In each of these instances, your first stop should always be your governing documents for guidance. ■