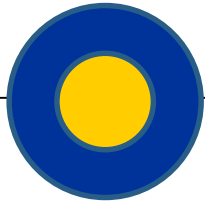


Is it time to amend your governing documents?



Kevin M. Hirzel, Esq.
kevin@hirzellaw.com
248-478-1800





Overview

- **Do the Articles of Incorporation need to be amended?**
- **Does the Declaration, Master Deed or Bylaws need to be amended?**
- **How do you adopt and enforce rules?**

The Articles of Incorporation

The Articles of Incorporation are filed with LARA:

<https://cofs.lara.state.mi.us/corpweb/CorpSearch/CorpSearch.aspx>

The Michigan Nonprofit Corporation Act was amended in 2008, 2015 and 2018



Membership

Barack is tired of living in the White House Acres Condominium and decides to sell his unit to his friend Joe on land contract. The parties execute a land contract that is to be completed over the next 5 years. Barack's nemesis, Don, is elected as a director and President of the condo association after the contract is executed. Barack, the land contract vendor, decides to show up for the next annual meeting to try and vote Don out. Joe, the land contract vendee also shows up and wants to vote.



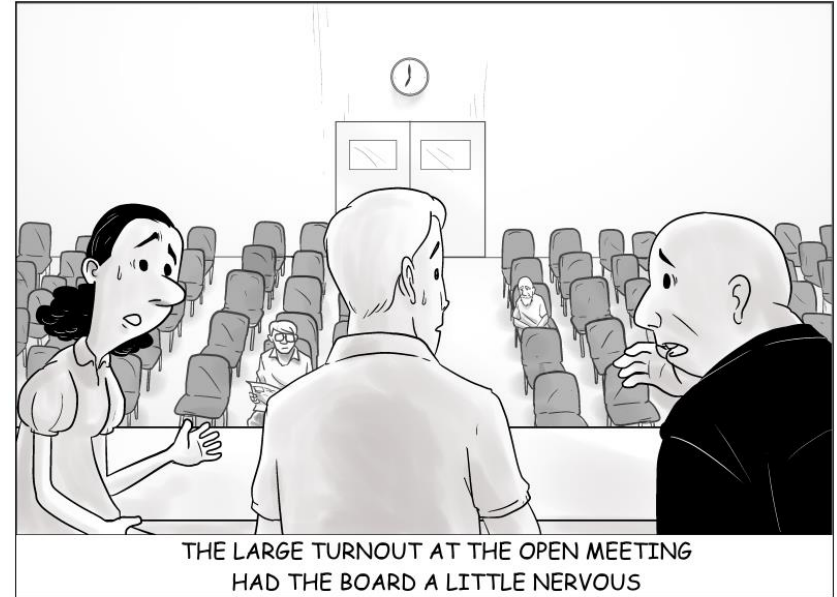
Who gets to vote at the annual meeting?



Action without Meeting

Don decides that the White House Acres Condominium condo bylaws should be amended to prevent members from e-mailing out fake Association newsletters. Don says that the Michigan Nonprofit Corporation Act permits the Association to amend the condominium bylaws without holding a meeting. 70% of the members send in ballots approving the amendment.

**Has the
amendment been
validly adopted?**

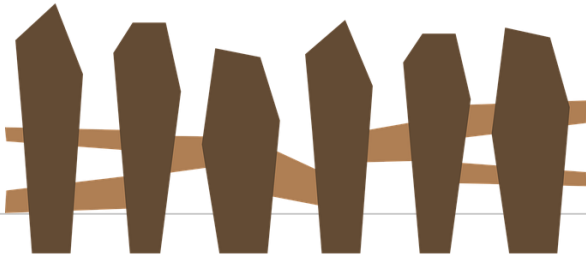


gogladly.com/comics 



Director Liability

Don is the President of the White House Acres Condominium. He is on the board with Nancy and Chuck. The condo has a problem with trespassers. The board votes to build a fence around the perimeter of the condo. Don loses 2-1. Don does not like the decision as he claims that the fence is necessary for safety and to preserve property values. Don consults with the Association's attorney, Michael, a general practitioner with only 3 clients. Michael tells Don that he can build the fence anyway. Don spends \$100,000 to build the fence. Nancy and Chuck sue Don for spending the \$100,000 on the fence.



**Is Don liable for
building the fence?**



Director Liability- POST 2015 AMENDMENTS - MCL 450.2209(c)

The Articles of Incorporation may eliminate director/officer liability for money damages for any action or any failure to take action with the following exceptions.

- ⦿ A financial benefit received by a director or volunteer officer to which he or she is not entitled.
- ⦿ Intentional infliction of harm to the corporation, its shareholders, or members.
- ⦿ An intentional criminal act.
- ⦿ A liability imposed under section 497(a) (attorney's fees and costs incurred in a failed derivative action).

ELIMINATION OF LIABILITY IS OPTIONAL - CUSTOMIZE YOUR DOCUMENTS

Indemnification

Don is not happy that Nancy and Chuck sued him for breach of fiduciary duty. Don spent \$100,000 in attorney's fees having to defend himself against Nancy and Chuck's claim. The court ultimately found that Don acted in good faith because he relied on the advice of the Association's attorney. Don sues the Association to recover his attorney's fees?

**Does the
Association need to
indemnify Don?**



Indemnification – MCL 450.2209(e)

The Articles of Incorporation may allow the Association to assume liability under the following circumstances:

- The volunteer was acting or reasonably believed he or she was acting within the scope of his or her authority.
- The volunteer was acting in good faith.
- The volunteer's conduct did not amount to gross negligence or willful and wanton misconduct.
- The volunteer's conduct was not an intentional tort.
- The volunteer's conduct was not a tort arising out of the ownership, maintenance, or use of a motor vehicle.

Governing Documents





The Governing Documents

Condominiums

- Master Deed
- Condominium Bylaws/Corporate Bylaws
- Rules and Regulations

HOA's

- Restrictive Covenants
(a/k/a Deed Restrictions or Declarations)
- Corporate Bylaws (typically not recorded)
- Rules and Regulations





General Amendment Issues

- Changes in the Law
- Conflicting Provisions
- Developer Issues
- Legalese
- Outdated Documents





Original Developer Documents

Washington, LLC is the developer for the White House Acres Condominium. White House Acres has numerous leaks. Washington's attorney, Mr. Hamilton, drafted the bylaws. The bylaws require 2/3 co-owner approval for any litigation expenses. The board believes it has the authority to initiate litigation and files a complaint as this provision is unreasonable and usurps the board's authority granted under the Michigan Nonprofit Corporation Act. Washington, LLC moves to dismiss the case as a vote was never taken.

Is the anti-lawsuit provision enforceable?





Developer Issues

- **Anti-Lawsuit Provisions**
- **Assessment Exemptions**
- **Consolidating Master Deeds**
- **Removal of Development Rights**





Drafted before 2001

The Michigan Condominium Act was enacted in 1978. **Any Master Deed or Bylaws drafted prior to 1978 should be immediately reviewed and amended.**

Significant amendments were made to the Michigan Condominium Act were made in 2001 and 2002, other have been made too.

**Fair Housing – Familial / Disability
Discrimination – 1988**

FCC/OTARD Rules – 1996





Insurance

Joe pays off the land contract and runs for the board of the White House Acres Condominium Association. Joe holds a barbeque and burns down Nancy and Chuck's limited common element decks. The smoke causes damage to Nancy's artwork collection inside of her unit. The bylaws contain the following provisions:

The Association is responsible for insuring all of the common elements.

Each co-owner is responsible for repair and replacement of their limited common element deck.

Each co-owner may obtain insurance with respect to their units and appurtenant limited common elements in an amount they deem fit.



Chuck has insurance, Nancy and Joe do not have insurance. What damage is covered under the Association's insurance policy?



Marijuana

RESIDENTS OF WOODSTOCK VILLAS TAKE THE NEW
"FLEXIBLE GARDENING" POLICY A LITTLE TOO FAR.



gogladly.com/comics gladly

designed by Dawid Szymczyk

Proposal 1 passes and Michigan legalizes marijuana. The White House Acres Condominium Association's bylaws are silent on marijuana use. The bylaws contain a provision that prohibits a co-owner from causing a nuisance or engaging in any illegal activity.

Blazing Bernie decides to grow 12 plants for personal use on the balcony of his unit, the maximum allowed by Michigan law. The Association can see the plants on Bernie's balcony, but the smell does not bother the other co-owners.

Smoking Sam does not grow marijuana and prefers to smoke it. All of the neighbors complain to the Association about the smell of marijuana in the common element hallway outside of the unit.

Are the bylaws sufficient to stop Blazing Bernie and Smoking Sam?



Pets





Pets

Poultry Loving Pete is Millennial that is into alternative pets. He is unhappy with his job and decides that a pet hen will make him happy. He has not been diagnosed with depression. Pete lives in the White House Acres Condominium that has the following bylaw provision:

Household pets. No animals, birds[,] or poultry shall be kept or maintained on any lot, except recognized household pets which may be kept thereon in reasonable numbers as pets for the pleasure and use of the occupants but not for any commercial use or purpose.



**Can Pete have a pet hen?
What if Pete had a diagnosis?**



Rental Issues

The White House Acres bylaws state that units are to be used “only for residential use.” The bylaws prohibit commercial activity, except for home based businesses with no customers. The bylaws do not prohibit rentals. Joe decides to list his unit on Airbnb to obtain extra income for his political future?

Can Joe rent his unit on Airbnb?





Short-Term Rentals

- Commercial Use
- Residential Use
- Leasing/Rental
- Nuisance
- Unlawful Activity



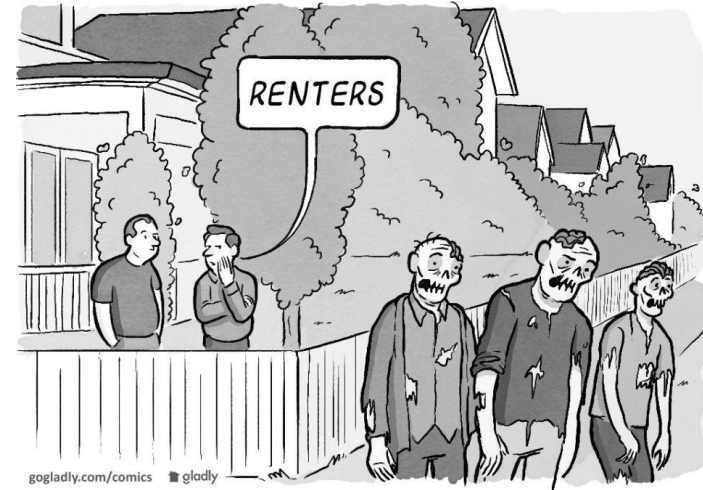
Consider prohibiting “licensing” in addition to renting/leasing.

Consider prohibiting the listing of the unit.



Other Rental Issues

- Do you have a rental cap? Needs 2/3 co-owner approval, best to get one before 1/3 of the units are rentals
- MCL 559.212 – Co-owners must disclose leasing 10 days in advance. Must provide a written lease or co-owner information if there is no written lease.
- If Co-owner fails to pay assessments rent diversion is a good option.





Smart Phones / Social Media / Website Use

Hillary lives in the White House Acres Condominium. Hillary really wanted to be the Association President but lost to Don in the last election. Hillary is contemplating whether to run for the board again. Hillary shows up at a board meeting to make trouble. The board is discussing a roofing contract. One of the options is Don's friend, Tony. Tony's quote is \$50k cheaper than all other quotes. Hillary records part of the conversation, creates a website called www.whitehouseacres.net and posts the recording on the website and a fake association Facebook page that she created?

What are the Association's options?





Wi-Fi

Hillary is thinking about running to be on the board of the White House Acres Condominium Association and one day serving as its President. After losing the last election to Don, she needs to dig up some dirt. Hillary thinks that Don has some e-mails that will expose an alleged affair with Don's friend Stormy. Hillary hacks into Don's wi-fi and gains access to his computer. The bylaws were drafted in 1990 before wi-fi even existed. Don demands that the Association take action against Hillary after learning that his Wi-Fi was hacked.

Is there anything that the Association can do?



Enforcement Issues

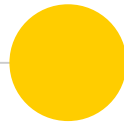
- Fines
- Late Fees
- Attorney's Fees (Is your provision specific, does it cover pre-litigation fees or co-owner claims?)
- Bylaw Enforcement/Collection Policies



gogladly.com/comics gogladly

designed by Dawid Szymczyk

Rules and Regulations

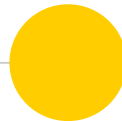


Rules and Regulations

The White House Acres Association bylaws require the Association to maintain, repair and replace the limited common element front door of each unit. The bylaws also permit the board to adopt rules regarding the appearance of the condo. Don convinces Nancy and Chuck to adopt a rule requiring that all front doors be painted brown. Alexandria refuses to paint her front door brown.



Is the rule enforceable?





Common Rules

- Aesthetic Issues
- Bylaw Enforcement Policy
- Code of Ethics
- Collection Policy
- Fair Housing Policy
- Fine Policy
- Satellite Rules





Thanks!

Any *questions* ?

You can find me at

- kevin@hirzellaw.com
- (248) 478-1800
- Website: hirzellaw.com
- Blog: micondolaw.com