

**HUSCH BLACKWELL**



## Rule Making: Power of the Board

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## A. How are Rules Created?

### 1. Who Creates the Rules and Where do You Find Them?

#### a. Declarant

- (1) As part of Declarations
- (2) As part of Bylaws
- (3) As part of Rules and Regulations

#### b. Board of Directors

### 2. Political and Legal Concerns

#### a. Wisconsin Statutes Referencing Rules

##### (1) 703.10. Bylaws

(1) Bylaws to govern administration. The administration of every condominium shall be governed by bylaws. Every unit owner shall comply strictly with the bylaws and with the **rules** adopted under the bylaws, as the bylaws or **rules** are amended from time to time, and with the covenants, conditions and restrictions set forth in the declaration or in the deed to the unit. Failure to comply with any of the bylaws, **rules**, covenants, conditions or restrictions is grounds for action to recover sums due, for damages or injunctive relief or both maintainable by the association or, in a proper case, by an aggrieved unit owner.

(2m) Limitation on enforcement of certain provisions. No bylaw or **rule** adopted under a bylaw and no covenant, condition or restriction set forth in a declaration or deed to a unit may be applied to discriminate against an individual in a manner described in §106.50.

(3) Permissible additional provisions. The bylaws also may contain any other provision regarding the management and operation of the condominium, including any **restriction on or requirement** respecting the use and maintenance of the units and the common elements.

##### (2) 703.15. Association of unit owners.

(1) Legal entity. The affairs of every condominium shall be governed by an association that, even if unincorporated, is constituted a legal entity for all purposes. Except for matters reserved to the association members or unit owners by this chapter, the declaration, or the bylaws, all policy and operational decisions of the association, including interpretation of the condominium instruments, bylaws, **rules**, and other documents relating to the condominium or the association, shall be made by its board of directors. This subsection does not affect the deference accorded to, or the standard of review of, an action of the board of directors by a court.

(3) **703.105. Display of the United States flag and political signs.**

(1) No bylaw or rule may be adopted or provision included in a declaration or deed that prohibits a unit owner from respectfully displaying the United States flag.

(1m) No bylaw or rule may be adopted or provision included in a declaration or deed that prohibits a unit owner from displaying in his or her condominium a sign that supports or opposes a candidate for public office or a referendum question.

(2) Notwithstanding subs. (1) and (1m), bylaws or **rules** may be adopted that regulate the size and location of signs, flags and flagpoles.

(4) **703.33. Disclosure requirements.**

(1) Material to be furnished by seller to purchaser before closing. Not later than 15 days prior to the closing of the sale of a unit to a member of the public, the seller shall furnish to the purchaser the following: (a) A copy of the proposed or existing declaration, bylaws and **any rules or regulations**, together with an index of the contents.

(5) **703.24. Remedies for violations by unit owner or tenant.**

(1) Definition. In this section, "violation" means failure to comply with this chapter or the declaration, bylaws, or association **rules**.

(2) Liability for unit owner violation. A unit owner who commits a violation is liable for any charges, fines, or assessments imposed by the association pursuant to the bylaws or association **rules** as a result of the violation and may be subject to a temporary or permanent injunction.

(6) **703.315. Lease or rental agreements for residential units.**

(2) Agreement for compliance. Entering into a condominium rental agreement constitutes an agreement by the tenant, as a condition of the condominium rental agreement, to comply with this chapter, the **rules** and bylaws of the association, and the provisions of the declaration. Entitlement to occupancy of a unit as a periodic tenant, as described in sub. (1)(b)2., constitutes an agreement by the periodic tenant, as a condition of the tenancy, to comply with this chapter, the rules and bylaws of the association, and the provisions of the declaration.

...

(5) Copy of condominium documents to tenant. Before a tenant occupies a unit, the unit owner shall provide a copy of the declaration and the association bylaws and **rules** to the tenant or place the information in the unit.

- b. Illegal Rules – Even though a board complied with the terms of the bylaws, rules must not be "arbitrary and capricious. A condominium unit is real property for all purposes. The established law of real property is thereby applicable to condominium units. Part of that established law is that an injunction will not be granted unless the court is satisfied that the result would be fair, just, reasonable, and founded on adequate consideration. More specifically, a restriction on the use of real estate must be reasonable under all fo the facts and circumstances." *Le Febvre v. Osterndorf*, 87 Wis.2d 525, 275 N.W.2d 154, 159 (1979) (Court enforced rental restriction)

(1) Condominium rules are necessary and will be enforced as long as they are reasonable. *Validity and Construction of Condominium Association's Regulations Governing Members' Use of Common Facilities*, 72 ALR.3d 308.

(2) "Although no one definition of the term 'reasonable' has gained universal acceptance, most courts have applied what on commentator calls 'equitable reasonableness,' upholding only those restrictions that provide a reasonable means to further the collective, 'health, happiness and enjoyment of life' of owners of the common interest development." *Nahrstedt v. Lakeside Village Condominium Assn.*, 8 Cal.4th 361, 376

(3) The board administers and interprets the bylaws and regulations which establish the responsibilities of the unit owners. These documents will be construed strictly to insure that buyers get what they think they are getting. *Vinik v. Taylor*, 270 So.2d 413 (Fla. App).

(4) A condominium association is not at liberty to adopt arbitrary or capricious rules having no bearing on the health, happiness, and enjoyment of the various unit owners *Hidden Harbour Estates, Inc. v. Norman*, 309 So.2d 180 (1975 Fla. App).

(5) Board exceeded its authority under state statute where it allowed a unit owner to build a carport in common parking area as carport encroached on rights of other members to use common area. *Preston v. Bass*, 13 Ark App 94, 680 SW2d 115 (1984).

(6) Some courts distinguish between two categories of use restrictions: those in the declaration or master deed and rules promulgated by the board. The latter category is subject to the "reasonableness" test, while the former "should not be evaluated under a 'reasonableness' standard. Rather, such use restrictions are 'clothed with a very strong presumption of validity' and should be upheld even if they exhibit some degree of unreasonableness." *Hidden Harbor Estates v. Basso*, 393 So.2d 637, 639-40 (Fla. Dis. Ct. App. 1981). (See also, *Noble v. Murphy*, 24 Mass.App. 452, 612 N.E.2d 266 (1993)).

### 3. Notice to Owners

a. A rule that is not published is not likely to be enforced by a court. *Coventry Square Condo. Ass'n v. Halpern*, 181 N.J. super. 93, 436 A.2d 580 (1981).

b. Best Practice. Deliver rules by as many avenues as possible. *Reinventing the Rules*, Trigiani, 2002 Community Association Press, pg. 37.

(1) Handbooks

(2) Newsletters

(3) Websites

(4) Flyers

(5) Postings

(6) Resale Packages

c. Send the Rules to all new Buyers, highlighting those rules that are most commonly violated or in dispute.

## B. Correcting Ambiguities in the Governing Documents

### 1. What Controls?

#### a. 703.30 Wis. Stat.

(2) Substantial conformity of condominium instruments and bylaws sufficient. The provisions of any condominium instruments and bylaws filed under this chapter shall be liberally construed to facilitate the creation and operation of the condominium. So long as the condominium instruments and bylaws substantially conform with the requirements of this chapter, no variance from the requirements shall affect the condominium status of the property in question nor the title of any unit owner to his or her unit, votes and percentage interests in the common elements and in common expenses and common surpluses.

(3) Provisions of condominium instruments and bylaws severable. All provisions of condominium instruments and bylaws are severable and the invalidity of one provision does not affect the validity of any other provision.

(4) Conflicts in provisions. If there is any conflict between any provisions of a declaration and provisions of a condominium plat or any provisions of the bylaws, the provisions of the declaration shall control. If there is any conflict between any provisions of any condominium instruments and any provisions of any bylaws, the provisions of the condominium instruments shall control. If there is any conflict between any provisions of any condominium instruments or any provisions of any bylaws and any provisions of this chapter, the provisions of this chapter shall control.

(5) Instruments construed together. Condominium instruments shall be construed together and are determined to incorporate one another to the extent that any requirement of this chapter applying to one instrument is satisfied if the deficiency can be corrected by reference to any of the others.

#### b. In short, the order of control in the event of an ambiguity or inconsistency is:

- (1) Statute
- (2) Declarations
- (3) Plat and other recorded documents
- (4) By laws
- (5) Rules

### 2. Amendments

#### a. Declarations

(1) **703.095. Modification and correction of recorded condominium instruments, amendments and addenda.** A recorded condominium instrument, amendment or addendum may only be modified by recording an amendment, addendum or correction instrument, or by removal from the provisions of this chapter under §703.28(1). The register of deeds may not record a correction instrument if it does not refer to the instrument being corrected and may not record amendments and addenda unless they are numbered consecutively and bear the name of the condominium as it appears in the declaration.

(2) **703.09 Declaration**

(2) Except as provided in sub. (4) and §§703.093, 703.13(6)(c) and (d) and (8)(b), and 703.26, a condominium declaration may be amended with the written consent of at least two-thirds of the aggregate of the votes established under sub. (1)(f) or a greater percentage if provided in the declaration. An amendment becomes effective when it is recorded in the same manner as the declaration. The document submitting the amendment for recording shall state that the required consents and approvals for the amendment were received. A unit owner's written consent is not effective unless it is approved in writing by the first mortgagee of the unit, or the holder of an equivalent security interest, if any. Approval from the first mortgage lender or equivalent security interest holder, or the person servicing the first mortgage loan or its equivalent on a unit, constitutes approval of the first mortgagee or equivalent security interest holder under this subsection.

(3)(a) If an amendment to a condominium declaration has the effect of reducing the value of any unit owner's interest in any common element, including any limited common element, and increases the value of the declarant's or any other unit owner's interest in the common element or limited common element, then the declarant or other unit owner shall compensate the unit owner the value of whose interest is reduced in the amount of the reduction in value, either in cash or by other consideration acceptable to the unit owner.

b. **By-Laws**

(1) **§703.10**

(5) Amendment. The bylaws may be amended by the affirmative vote of unit owners having 67% or more of the votes. Each particular set forth in sub. (2) shall be expressed in the bylaws as amended.

(2) By following the provision for amendment set forth in the By-laws. Frequently, presumably because of poor drafting, this provision has lesser requirements than is set forth in §703.10(5). However, if you use the lesser requirements, you will need to be aware, and advise your client, that the conflict provisions of 703.30 may make such an amendment void.

c. **Rules and Regulations**

(1) By whatever means are set forth in the Rules for amendment.

(2) If no provision is set forth, then normally by the majority vote of the Board under its powers as set forth in:

(a) the By-Laws pursuant to §703.10(2)(a);

(b) **§703.15 Association of Unit Owners**

(3)(a) Powers. An association has the power to:

4. Exercise any other power conferred by the condominium instruments or bylaws.

(3)(b) Conditional powers. Subject to any restrictions and limitations specified by the declaration, an association may:

2. Regulate and impose charges for the use of common elements.

## C. Owner Control or Check on Board Power

1. Have an attorney carefully read the documents as they control.
2. Obtain the proxies needed to vote the current board off.
3. Use the statutes to enforce the rules, and argue that the Board breached its fiduciary duty by failing to enforce the rules.
  - a. **703.31. Personal application.** (1) All unit owners, tenants of the owners, employees of owners and tenants or any other persons that in any manner use property or any part thereof subject to this chapter shall be subject to this chapter and to the declaration and bylaws of the association adopted under this chapter.
  - b. **703.24. Remedies for violations by unit owner or tenant of a unit owner. (2) Liability for unit owner violation.** A unit owner who commits a violation is liable for any charges, fines, or assessments imposed by the association pursuant to the bylaws or association rules as a result of the violation and may be subject to a temporary or permanent injunction.

## D. Annual Meeting Considerations and Voting Power

1. Be Prepared
  - a. Proxies
  - b. Send out a notice ahead of time as to your position, assuming it won't cost you the proxies you have.
2. **§703.10(4) Prohibiting voting by certain unit owners.** The bylaws may contain a provision prohibiting any unit owner from voting at a meeting of the association if the association has recorded a statement of condominium lien on the person's unit and the amount necessary to release the lien has not been paid at the time of the meeting. **(So make sure that you stay current even if you dispute some action of the Board).**

## E. What Control Do Boards Have

1. Essentially Absolute
  - a. *Apple Valley Gardens v. MacHutta*, (2009, Wis. Supreme Ct.)
    - (1) Board can "limit the rights of . . . owners."
    - (2) "Statutes are clear that associations have this power."
    - (3) No limitations on the types of restrictions "as long as use restrictions do not conflict with the declarations or with state or federal law, they are valid and enforceable."

2. How to Make Things Move as Smoothly as Possible
  - a. Rules are well documented.
  - b. A Proactive approach is taken to the extent possible. Meaning tell people what is expected and WHY so that they understand why the rule exists.
  - c. Use the Golden Rule: treat others as you would want to be treated.
  - d. Have a procedure in place to report violations.
    - (1) Require at least:
      - (a) Name and/or unit number of the violator;
      - (b) Name and unit number of the complaining party;
      - (c) A brief summary of the violation and the specific rule the complaining party believes is violated; and
      - (d) Names of witnesses.
    - (2) Give notice to the alleged violator and the opportunity to state his/her side of the story.
    - (3) Seek an amicable resolution.
  - e. When all else fails, FINE.
    - (1) Fines and late fees must be reasonable in amount.
    - (2) Late fee that is equivalent to 255% of the initial assessment, the court held that the late fee was unreasonable and unenforceable. *Hidden Groge Condo. Ass'n v. Crooks*, 744 N.E.2d 305 (Ill. App. Ct. 2001).
    - (3) Court may reduce late fees that it finds to be excessive or unreasonable in amount. *In re Barcelli*, 270 B.R. 837 (Bankr. S.D. Ohio 2001).
  - f. Have a procedure in place that provides due process to the alleged violator.
3. Defenses to Rules Violations.
  - a. Arbitrary Application
    - (1) In *Coventry Square Condo. Ass'n v. Halpern*, 181 N.J. super. 93, 436 A.2d 580 (1981), the court held that it would not enforce a rule requiring an owner to collect a \$225 security deposit from a tenant where the association:
      - (a) did not provide notice of the rule to the members;
      - (b) did not seek to regulate owner-occupants in a similar manner; and
      - (c) admitted that it wanted to have the benefit of a part of the owner's security from the tenant.

Reasoning: The court held that the rule was unreasonable because it created a separate class of unit owners and it was therefore arbitrary.
    - (2) In *White Egret Cono., Inc. v. Franklin*, 379 So.2d 346 (Fla. 1979), the court held that an age restriction was arbitrarily enforced, where other young children lived in the complex, but that rule was only being enforced against this unit owner. **(I don't believe the FHA would allow such a rule under any circumstances at this time).**
    - (3) Where a developer and association did not enforce restrictions uniformly and did not set reasonable parameters for approval, association's disapproval of outbuildings was arbitrary and unenforceable. *Wood Moor Homeowners' Ass'n v. Bolden*, 2004 Ohio 843 (Ohio App. 2004).

- b. Selective Enforcement
  - (1) See, *White Egret Condo., Inc. v. Franklin*, 379 So.2d 346 (Fla. 1979) above.
  - (2) Where the developer failed to enforce a rule, but the Association, after taking over control, consistently enforced the rules, there was no selective enforcement. *Ladner v. Plaza Del Prado Condo. Ass'n.*, 423 So.2d 927, 930 (Fla. Dist. Ct. App. 1982).
  - (3) The implementation of a “uniform policy” to enforce a rule **prospectively** is not selective enforcement. *Chattel Shipping and Investment, Inc. Brickell Place Condo. Ass'n, Inc.*, 481 So.2d 29 (Fla. Dist. Ct. App. 1985).
- c. Waiver
  - (1) This is very similar to Selective Enforcement, so you would want to analogize to those cases.
  - (2) When waiver is claimed, it should be for the same or substantially similar conduct. When the waiver defense is being advanced for a use or action that is substantially different in its effect from the prior violation, the waiver claim will not succeed. *Sharstown Civic Ass'n., Inc. v. Pickett*, 679 S.W.2d 956, 958 (Tex. 1984).
- d. Changed Conditions
  - (1) Generally, the source of the changed conditions does not matter as long as the change frustrates the purpose of the restriction. Natelson, *Law of Property Owners Associations* §5.5.3 (1989).
  - (2) Court allow nonresidential use in some undeveloped parcels due to changes in the surrounding area. *Meyerland Community Improvement Ass'n. v. Temple*, 700 S.W.2d 263 (Tex. App. 1985).
  - (3) A builder may deviate from initial restrictions if nature of community has change in such a way that the initial guidelines are no longer enforced or applicable. *Heldman Terrace Property Owners Ass'n., Inc. v. D.J.T., Inc.*, 2001 WL 574944 (Ohio Ct. App. May 25, 2001).
- e. Estoppel
  - (1) According to one court, the elements needed for Estoppel are the following:
    - (a) full knowledge of the facts;
    - (b) unreasonable delay in asserting an available remedy; and
    - (c) an intervening reliance by and prejudice to another.*Woodmoor improvement Ass'n, Inc. v. Brenner*, 919 P.2d 928, 931 (Colo. Ct. App. 1996).
  - (2) When a community association makes specific complaints about a covenant violation, even without taking substantive action to enforce, the defense of equitable estoppel is not available. *Barker v. Jeremiasen*, 676 P.2d 1259, (Colo. Ct. App. 1984).
- f. Violation of a Constitutional or Statutory Right
  - (1) Requirements:
    - (a) Otherwise legal conduct is prohibited; and
    - (b) the conduct prohibited would be constitutionally protected if the regulation were imposed by a government.

(2) Case Law:

- (a) *Shelly v. Kraemer*, 334 U.S. 1, 18 (1948) holding that state action existed when a court enforced racial restrictions.
- (b) When dealing with individuals with disabilities, an association must make reasonable accommodations to amend an otherwise valid restriction or limitation. *Canady v. Prescott Canyon Estate Homeowners Ass'n. Board of Directors*, 204 Ariz. 91, 60 P.3d 231 (2002).
- (c) Limitations on the number of children allowed in a unit may violate the Fair Housing Act. See, *Hamad v. Woodcrest Condo Ass'n.*, 328 F.3d 224 (6th Cir. 2003).

(3) Defense. An individual, by buying into a condominium, may relinquish a statutory protection through its contractual agreement with the Association.

- (a) *Midlake on Big Boulder Lake Condo. Ass'n. v. Capucco*, 449 Pa. Super. 124, 673 A.2d 340 (Pa. Super. Ct. 1996), where the court held that "the mere fact that a business is subject to state regulation does not itself convert its actions into that of the state." *Id.* at 129, 673 A.2d at 642. The court found that "[one] of the fundamental precepts which we recognize, however, is the individual's freedom to contractually restrict, or even give up, those rights." *Id.* At 130, 673 A.2d at 342.
- (b) *Goldberg v. 400 East Ohio Condominium*, 12 F. Supp. 820 (N.D. Ill. 1998).
- (c) *Knolls Condo. Ass'n v. Harms*, No. 92971 (Ill. Supreme Ct. November 21, 2002).

g. Statute of Limitations

(1) Issues involved:

- (a) when the cause of action accrues;
- (b) when the statute starts to run;
- (c) which statute of limitations applies; and
- (d) what events might toll the statute.

(2) Wisconsin Law

Sending a collection letter on a debt after the statute of limitations had run misrepresented the legal status of the debt because the passing of the statute of limitations effectively extinguishes the debt, not just the judicial remedies under Wisconsin Law. *Klewer v. Cavalry Inns, LLC*, 2002 U.S. Dis. LEXIS 1778 (W.D. Wis. 2002).

4. Practice Tips

Write short simple rules. See the following Community Association Institute Pamphlets on this topic:

- a. *Drafting Association Rules*. (Fourth Edition) Gurdon H. Buck, ©2002 Community Association Press.
- b. *Reinventing the Rules*. Lucia Anna Trigiani, ©2002 Community Association Press.
- c. *Be Reasonable (How Community Associations Can Enforce Rules Without Antagonizing Residents, Going to Court, or Starting World War III)*, Kenneth Budd, ©1998 Community Associations Institute.