

A Dogfight Over Neighborhood Rules: Amending Homeowners Association Bylaws

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Picture yourself in your new home in Tranquility Acres, a planned community built five years ago by one of the region's best residential developers.

Last year your neighbor Barney finally completed construction of his home on your street, Peaceful Loop, on the last unimproved lot in this modest 25-lot subdivision.

The developer has assigned all rights reserved to it in the Declaration of Covenants, Conditions and Restrictions for Tranquility Acres ("Declaration") to the Tranquility Acres Homeowners Association ("Association"), and the Association members have elected you and two of your neighbors as the directors of its three-person Executive Board ("Board"), and the directors have elected you as President of the Association.

The Neighborhood Dogfight

The dust from the passage of the latest (and contested) amendment to the Declaration has settled so pit bull terriers are no longer allowed in Tranquility Acres. All is well, you say, until a group of pit bull terrier-loving neighbors on the other street in Tranquility Acres, Backwater Lane, show up in numbers at the annual meeting of members and they move orally to amend the Association Bylaws to increase the number of directors on the Board from three to six and to require that three directors be elected from each of the two streets in Tranquility Acres. They are as mad as junkyard (pit bull) dogs and apparently want to seize control of the Board.

As President, you scramble about and find your copy of the Association Bylaws and try to head off this uprising before it gets out of hand. Even though the North Carolina Planned Community Act ("Planned Community Act") requires your Association to establish in its Bylaws the procedural method for amending your Bylaws, to your shock you find that your Bylaws are silent on how they may be amended. What now?

You immediately call for a short recess of the meeting in order to discuss your options with the Board. Fellow Board member Sue Fore Peace, a retired lawyer and mediator, wisely suggests that you review the Declaration, the Association's Articles of Incorporation ("Articles"), the Bylaws (again), the Planned Community Act, and the North Carolina Nonprofit Corporation Act ("Nonprofit Act") which controls nonprofit corporations like your Association, to see what guidance might be found.

Do the Association's Controlling Documents Provide a Solution?

Luckily Sue is already familiar with these planned community documents, and gives the Board a quick summary of the relevant provisions as follows:

The Articles of Incorporation

As is normally the case, the Articles are silent about the number and process for election of Board directors even though, in theory, those provisions could be set forth in the Articles.

In your case, the Articles, originally drafted by the developer to form the Association, do contain a provision that any amendment to the Articles or the Bylaws must also be approved in writing by the developer until the developer releases in writing its right to consent to or reject any proposed amendment.

The Declaration

Though not required, the Declaration for Tranquility Acres does contain a section related to the organization of the Association, in which the developer elected to limit the maximum number of directors of the Board to three persons. This section in the Declaration does not mention the Bylaws and does not set forth the manner in which the Bylaws must be amended.

What Guidance Do the Planned Community Act and the Nonprofit Act Provide?

The Planned Community Act requires that certain provisions must be included in the Bylaws, including the manner in which they may be amended, but it does not specify (a) who must approve an amendment, (b) the votes required for approval, and (c) the related procedures which are to be followed. These decisions are left to the Association. Unfortunately, the existing Bylaws did not include any amendment provisions.

The Nonprofit Act expressly requires a nonprofit corporation like the Association to adopt Bylaws, but it does not dictate what must be contained in those Bylaws, providing merely that the Bylaws "may contain any provision for regulating and managing the affairs of the corporation not inconsistent with the law or the Articles..."

On the other hand, the Nonprofit Act does dictate the process for any proposed amendment to a nonprofit corporation's Bylaws. The amendment must be approved and adopted as follows:

- First, the amendment must be approved by the Board **OR** (if the Board does not approve it) upon written notice from at least 10% of all the members of the Association, the Board is required to call a special meeting to consider the proposed amendment;
- Second, the amendment then must be approved by the affirmative vote of at least two-thirds of the members entitled to vote who are attending in person or by proxy at the special meeting of members **OR** by a majority of all votes entitled to be cast (in the case of Tranquility Acres, 13 votes would be needed), whichever is less;
- Finally, the amendment must be approved in writing by any person whose approval is required by the Articles. In the case of Tranquility Acres, that person is the developer.

In addition, the Nonprofit Act allows the Board to condition the approval of a Bylaw amendment on a higher percentage of affirmative votes of members than the percentages stated in the Nonprofit Act.

So, What Can the Board Do to Prevent the Amendment?

You ask Sue, based on the documents and laws set out above, what the Board can do to prevent an amendment of the Bylaws to increase the number of directors and a change to a "district-style" of electing directors.

Sue thinks she has the answer and tells you:

- Since the Association Bylaws do not provide a procedure for adopting amendments, we must follow the requirements of the Nonprofit Act and require the angry members, if they constitute 10% of the members, to demand, in writing, a special meeting of the members for the purpose of considering their amendments to the Bylaws.
- As for the substance of the amendment itself, the members want to increase the number of directors on the Board from three to six. However, the Declaration has set the maximum number of directors at three. Under the Planned Community Act, the provisions of the Declaration control over inconsistent provisions of the Bylaws, so the members will not be allowed to amend the Bylaws to increase the number of directors to six without first amending the Declaration in a similar manner.

In short, the members from Backwater Lane should be declared out of order since they have not given proper written notice of a demand for a special meeting pursuant to the Nonprofit Act; and, since the Declaration sets the number of directors at three, the Backwater members cannot effect the desired change through an amendment to the Bylaws without also amending the Declaration.

Conclusion

You declare the motion out of order, quickly adjourn the meeting, and slip quietly out the back door, wondering "who let the dogs out?" As soon as you get home, you tell your spouse about the ambush by the Backwater Lane members, and your spouse reminds you that (s)he wanted to buy into that more civilized condominium project across the street. (Since one fight per day is enough for you, you don't bring up the fact that Sue also told the Board that a North Carolina condominium has its own distinct set of issues for amending bylaws. That's a story for another day.)

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