

Resolving Conflicts in Governing Documents

Problems in a community can often be avoided by understanding the proper relationship between the governing documents. In general, restricted subdivisions are governed by declarations (sometimes known as covenants and/or restrictions) bylaws and rules & regulations. In addition, there are provisions of the North Carolina Nonprofit Corporation Act and the Planned Community Act that may also apply to your association.

In general, when there is a conflict between the governing documents, the highest ranked document prevails over those documents below it in the following order:

1. The Planned Community Act
2. The North Carolina Nonprofit Corporation Act
3. Declarations
4. Bylaws
5. Rules & Regulations Adopted by the Association

An example of how the hierarchy of documents works is found with the amendment language in some declarations. We often see a provision allowing amendment of declarations by a simple majority of lots. However, the Planned Community Act requires approval of amendments to the declarations by the owners of two thirds of the lots subject to the declarations. In most cases, the provisions of the Planned Community Act will prevail over conflicting provisions in the declarations.

However, some of the Planned Community Act provisions are not applicable to communities where the declarations were recorded before January 1, 1999 and other provisions of the Planned Community Act permit the governing documents to “opt out” of the Act’s provisions. Resolving conflicts between the governing documents can be complex and it is best to consult a lawyer when faced with conflicting language.

Board members of associations should be familiar with both the Planned Community Act and the North Carolina Nonprofit Corporation Act. As with the other governing documents, they primarily address two different aspects of restricted communities. Declarations are used to describe property rights and obligations associated with property ownership in a restricted subdivision. That is why they are recorded with property records. North Carolina law stringently protects property rights and changes in the declarations can have unanticipated consequences for not only current property owners but subsequent purchasers. Changes in the declarations should only be made after consultation with an attorney.

The North Carolina Nonprofit Corporation Act authorizes and regulates nonprofit corporations. It is primarily concerned with how such corporations are created, managed and dissolved. Some of its provisions overlap with similar provisions in the Planned Community Act. When there is no conflict, both statutes usually apply. When there is a conflict, the Planned Community Act is more specific and usually prevails over the provisions in the Nonprofit Corporation Act. Both of these statutes prevail over the declarations in most cases.

Bylaws of the association should be used primarily as internal operating rules for your association – including information regarding election procedures, board and member meetings and similar information. In general, they should not address property rights and obligations other than as necessary to identify the procedure used to carry out the provisions of the declarations.

In Western North Carolina we often see bylaws of a restricted community recorded with the Register of Deeds. Many times this results from the mistaken belief that recordation is required. While recordation of bylaws may be required in other states, it is not required in North Carolina and can pose a big problem. If the recorded bylaws conflict with the recorded declarations, there may be confusion created as to which provisions control, leaving to needless litigation.

Rules & Regulations are should be primarily used to deal with the day to day details of management of the community. They can be adopted by the board without membership approval but cannot conflict with the bylaws. The board is permitted to adopt rules and regulations which can be easily changed from time to time because they are generally limited to issues that have no material impact on property rights and must be flexible to deal with changing circumstances within the community. Rules and regulations typically may prescribe how common areas may be used, operating hours of clubhouses and times when entry gates may be open and closed. They may also describe in greater detail regulation of activities that are restricted by the declarations.

Conflicts in a restricted community are inevitable. However, many conflicts can be avoided by understanding the relationship between the governing documents and checking with an attorney before making changes in those documents. Our firm is experienced in drafting and interpreting governing documents and we are happy to address your concerns by telephone, email or in person.