

Cooperative Housing Operation  
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“Knowing Your Governing Documents For Co-ops”

Know what documents govern a housing cooperative:

I. Introduction: Who cares? Why is it important?

These are the tools of corporate control. They set the ground rules within which the shareholders and board must operate. They are the standards by which courts will judge issues. Ignorance of them and how they work among themselves will leave you defenseless to those who do know how to use them. It is the difference between winning and losing.

II. An Inventory of the Cooperative’s Governing Documents

Here, we provide a survey of the governing documents of the Cooperative. It is not as simple as one would expect. The governing documents include what you normally think: articles and bylaws. But it is really much more expansive than that; to fully understand your governing documents, you need to recognize that there is a much larger universe of documents which govern the cooperative. This list is an attempt to alert you to the general contours of the universe of documents but it is not exhaustive.

A. The Cooperative’s Own Documents

1. Articles of Incorporation

a. Filed with the State

b. Public Document

a. Usually broad and general

b. Amended by the Members only

c. Important Clauses:

1. Purpose of the Corporation
  2. Amendment Procedure
  3. Board of Directors
2. Bylaws
- a. Not filed with the State
  - b. HUD should have the bylaws
  - c. Under the Regulatory Agreement, HUD is to approve them
  - d. Usually detailed and descriptive
  - e. Amended by the Members only
  - f. Important clauses:
    1. Quorum
    2. Authority of Board
    3. Amendment Procedure
    4. Who can call a Special Meeting of the Members
3. Board Policies
- a. Not filed with the State
  - b. Adopted and amended by the Board
  - c. While relatively easy to change, if ignored it can create a basis for overturning an inconsistent board decision
- Example: Policy on Fines & Rule Violations

**B HUD Environment**

1. Regulatory Agreement
  - a. Contract between Coop & HUD

- b. Not filed with the State
- c. Limits the authority of the Board
- Example: Requires HUD approval to sue
- d. Duration: exists while original HUD-insured mortgage in effect

2. HUD Handbook

- a. Incorporated through the Regulatory Agreement
- b. May be amended by HUD
- c. Duration: expires when Regulatory Agreement ends

3. National Housing Act

- a. Incorporated through the Regulatory Agreement but sometimes the Articles will incorporate the Act
- b. May be amended by Congress
- c. Duration: depends on how it is incorporated:
  - 1. If only through Regulatory Agreement: it ends when the Regulatory Agreement expires
  - 2. If through the Articles: need to check that language; it may affect the scope or operation of the Coop inadvertently
  - 3. Code of Federal Regulations for HUD are created under the Act, as a supplement to the Act, as a means of “fleshing out” the Congressional intent of the Act.

C. State Corporate Law Environment

- 1. Nonprofit Corporation Act
  - a. The Act defines the parameters of corporate affairs
  - b. Of importance:
    - 1. It contains mandatory provisions that all corporations must

place in their articles or bylaws

2. It contains permissive provisions that corporations may take advantage of by placing them into the articles or bylaws

Example: Liability Limitation of Directors

3. If the articles and bylaws are silent, the Act may furnish direction

1. Other mandatory requirements are found in Act

Example: Filing of Annual Report with State in order to maintain corporate status. Failure to do so in Michigan results in loss of corporate status. If sued, you do not have a corporate shield to protect the individual members from personal liability. In addition, some one else may take your corporate name.

2. Cooperative Statute: In Michigan, attached to the end of the Nonprofit Corporation Act is a chapter that deals specifically with cooperatives. It allows a housing cooperative to “opt in” in order to take advantage of its provisions. Thus, it is important to know whether your cooperative did so, because it has provisions that are inconsistent with the other sections of the Nonprofit Corporation Act.

- D. Robert’s Rules of Order: while not normally thought of as a “governing document, it has this status since the Bylaws often make it the “fall back” resource to supply parliamentary procedure when the articles and bylaws are silent.

Examples:

Motion for reconsideration [may be made by one on the prevailing side]

Motion to adjourn [always in order and not debateable]

- E. Federal, State & Local Regulatory Framework: again, it is important to recognize that cooperatives operate within the broader body of law and even though this is not generally regarded as “governing documents” the articles, bylaws, etc. can be preempted by changes in these laws.

Example: Effect of Michigan Elliot-Larsen Civil Rights Act

upon proxies that limit the right of a married member to appoint only his or her spouse - violation of marital discrimination prohibition

F. Contractual & Covenant Framework: As with federal, state & local laws,

the cooperative must operate within the parameters of its contracts and covenants. Contracts can be breached but exposes the cooperative to liability for damages.

Example: covenants which run with the land, which limit the cooperative as to its use of property; thus, you may not be able to build or use an adjacent lot owned by the cooperative.

Example: if the cooperative refinances, the lender may impose some conditions that must be honored to avoid a default and foreclosure of the mortgage

### III. The Hierarchy of Governing Documents:

A. The interplay between the governing documents require legal expertise.

B. With the foregoing caveat, the general hierarchy is:

1. Federal, state & local law, including corporate law
2. The HUD Regulatory Agreement and associated HUD laws
3. Covenants & contracts
4. Articles
5. Bylaws
6. Roberts Rules
7. Board Policies

### IV. How to Change the Governing Documents

A. To amend the articles or bylaws, the cooperative must follow the process described within these documents themselves. If HUD is still involved, it must approve of them. If these documents do not proscribe the process, then you must resort to the state corporate law for direction.

V. When HUD is no longer involved

A. Two Schools of Thought

1. The “Do Nothing School”

Rationale: By operation of law, the obsolete references in the articles and bylaws are void; thus, it is unnecessary to amend them.

1. The “Avoid Confusion School”

Rationale: Few people, including members, judges and future boards understand cooperative law; thus, it is best to eliminate unnecessary confusion where possible. In addition, when the mortgage is paid off, most members are excited and expecting to address the future of the cooperative, and are usually receptive to change.

B. Matters that may be addressed:

1. Remove references to HUD, the Regulatory Agreement, FHA Commissioner.
2. Consider cleaning up problems that have occurred over the years:
  - A. Quorum
  - B. Voting Procedure
  - C. Proxies
  - D. Any other concerns unique to your cooperative
3. Consider taking advantage of corporate law benefits that have been made available since the original incorporation of your cooperative, such as the liability limitation for officers and directors

VI. When a Coop is transformed from Limited Equity to Market Rate:

- B. Many cooperatives, when they have paid off the original mortgage, and no longer have to abide by HUD restrictions, opt to move from limited equity to market rate - allowing members to transfer their memberships for whatever a buyer is willing to pay. In such case, modifications will be necessary to the bylaws - such as the equity table for transfer values. Qualified legal assistance is strongly recommended. Note: We are not recommending this but merely mention it as an option to consider. It is beyond the scope of this class and requires much due diligence including an analysis of your members’ economic status and the market for coop units in your surrounding area.

## VII. Managing Your Documents

- A. Why is this important?
- B. How to manage your documents:
  - 1. Safeguard the documents in a vault
  - 2. Create clarity
    - a. Date the documents
    - b. Get rid of unadopted versions
    - c. Place notations on approved documents that tie back to meeting minutes
    - d. Have the President and Secretary attest to authenticity

## VIII. Summary: the 7 lessons of Knowing Your Governing Documents

- A. Although many cooperatives have “boilerplate” clauses, this is misleading and every cooperative must be viewed within its own environment, taking into account the entire universe of applicable governing documents. Do not assume that your cooperative is governed in the same manner as others.
- A. The universe of governing documents consists of the “visible” - articles; bylaws; and HUD regulatory agreement - as well as the “invisible” - the state corporate statute; federal, state & local law; Roberts Rules, etc.
- A. Make sure you keep your governing documents protected; one of the worse things that can happen is to not have certainty in this area. Follow the procedures of safeguarding and keeping them in order.
- A. To be effective, you must recognize the interaction of the various governing documents we have identified. Qualified legal assistance is required for more sophisticated issues, as it can become quite complex.

- A. There is a hierarchy that must be considered. For example, if state law prohibits some act, then it preempts bylaws that allow that act.
  - A. HUD plays a dominant role while the original mortgage is still in effect; once it is gone, so goes the Regulatory Agreement. This provides you with an opportunity to address problems of the past, eliminate confusing language that will then be obsolete, and consider other options such as moving from limited equity to market rate - if it makes sense for your cooperative [this is a rather involved decision that is beyond the scope of this class, and requires an analysis of your members' economics as well as the market conditions of the surrounding area].
  - G. From time to time, amendments are desirable. Make sure you comply with all requirements, including HUD approval if it is still in the picture.
- IX. Finale: Discussion of strategic moves to lock the cooperative into remaining a cooperative in the future.
- A. Amendments to bylaws: require large percentage of members to approve; restrict authority of board, etc.
  - B. Covenants running with the land; place title into a trust
- A. Amendments to articles