

Chapter 4

CLT Bylaws Considerations

This chapter deals with basic considerations involved in drafting bylaws for various types of CLT organizations. Model bylaws for “classic” CLT organizations are presented in Chapter 5-A. Detailed commentary on these model bylaw is presented in Chapter 5-B.

The Role of Bylaws for a CLT

What are bylaws? As noted in Chapter 3, “Incorporation and Basic Structural Considerations,” bylaws establish rules for the governance of the organization. They are a binding legal document, but they are established internally, by the members and/or board of directors after the corporation has been established through the filing of articles of incorporation. Bylaws do not need to be filed with a government agency in the process of creating the corporation, but some government agencies, including the IRS, require that they be submitted in connection with subsequent processes.

Bylaws must be fully consistent with the articles of incorporation, but they are much more detailed than the articles with regard to the governance of the organization. Though bylaws are not formally adopted until after articles are filed, it is strongly recommended that they be *drafted before* the articles are filed – both to ensure consistency with the articles and because the drafting of bylaws is *the* process by which the specific shape of the CLT will be determined. The group that creates the CLT normally does not want simply to pass on to the eventual members and/or directors of the organization the responsibility for answering the many questions that this process must address. (The initial members and board are not legally obligated to adopt the previously drafted bylaws, but there is normally enough continuity between the founders and the initial members and board so that it is assumed that what has already been drafted will be adopted.)

Bylaws must also be consistent with the state’s not-for-profit corporation law. The group that drafts the bylaws (or the attorney working with that group) should be familiar with this law (usually easy to access on the internet and usually not so technical or extensive that it is hard to read). In general, not-for-profit corporation laws give a good deal of latitude to those drafting bylaws (sometimes requiring that an organization do certain things *unless* the bylaws specify otherwise). It is important to know what the law does require, but it is generally not necessary to incorporate the language of the specific state law in the bylaws (though some attorneys may recommend this practice in order to guarantee strict consistency with the law).

The Importance of CLT bylaws. Founders of new organizations sometimes view bylaws as a kind of formal requirement that will not really have much bearing on what the organization does in the future. In fact there is a tendency for some nonprofits to “leave their bylaws behind” as they adapt their structures and procedures to changing personnel and changing needs and problems. For nonprofits that do not have significant assets and do not enter into long-term contracts, this kind of organizational fluidity may or may not cause serious problems. A CLT, however, is not that kind of organization.

The future of a CLT may seem hypothetical at the time when its bylaws are drafted, but imagine a time when it has a hundred or more households leasing land from it, all of them with an interest in CLT decisions that may affect their security and equity as homeowners.

Neighbors of these homeowners, though not living on CLT land, are also realizing that the CLT has come to have an impact on their neighborhood(s) and that they, too, have an interest in its decisions. Some of these neighbors are homeowners; some may be tenants who are interested in becoming CLT homeowners. Others who may have an interest in the CLT's actions include public officials, merchants, representatives of other nonprofit organizations, and advocates for a variety of other local interest groups.

The membership (in the case of a classic CLT) and the board of directors will not simply be people who have come together because they share a common concern for the community. They will indeed have this common concern, but they will also represent differing interests and perspectives within that community. Clearly, an organization that includes and affects these varied interests must be guided in its decisions by rules that are respected by all participants. The bylaws will provide these rules, and it is important that they be rules that will allow the CLT to work through future decisions in a systematic and even-handed way.

Typical Contents

Bylaws vary considerably in their length and the extent to which they spell out detailed rules. The model bylaws for classic CLTs presented in the next chapter are quite detailed in most respects. They include detailed provisions relating to the membership and board structures that are essential features of the classic CLT's governance. They also include provisions relating to stewardship issues that should be a concern of any CLT, regardless of how it is governed.

The outline presented below is *not* a model; it is only a sketch of basic subject areas that a group developing bylaws for any form of CLT organization should consider.

I. NAME AND PURPOSE

The name of the organization should be stated exactly as it appears in the articles of incorporation. Any inconsistency (e.g., using the abbreviation "Corp." in one document and "Corporation" in the other) may cause the IRS to return a tax-exemption application.

It is not necessary to include a statement of purpose in the bylaws, but, if you choose to do so, the statement should be fully consistent with the statement of purpose in the articles of incorporation. The safest way to avoid inconsistencies that might raise questions is to repeat the statement from the articles word for word.

II. MEMBERSHIP

This article can be omitted if the organization is not a "membership corporation" as defined in Chapter 3 and if your state's not-for-profit corporation law does not require that the members of the board of directors be identified as the members of the corporation.

For membership corporations such as "classic CLTs," this article is important. It may distinguish between different categories of membership (e.g., "leaseholder members" vs. "general members,"(in the case of classic CLTs) or individual members vs. institutional members. It will define who qualifies for membership; the role of the members in electing the board of directors (if they have a role); the rights of members; the obligations of members (including payment of dues, if required); when and how membership may be terminated, etc.

III. BOARD OF DIRECTORS

This is obviously an important part of any bylaws. Normally the article will cover the following topics, in greater or lesser detail.

- *Number of Directors*: either requiring a specific number or minimum and maximum numbers.
- *Terms of Directors*: number of years (sometimes varied for initial directors in order to create “staggered” terms); limits, if any, on number of terms to be served.
- *Election*: who is eligible for election, who elects, what are the processes for nomination and election, how are vacant seats to be filled.
- *Meetings of the Board of Directors*: annual meetings, other regular meetings, special or emergency meetings, notices of meetings, quorums for meetings, decision making processes, minutes.
- *Duties of the Board of Directors*: broadly defined duties (responsibility for general management of the affairs of the Corporation, including financial management), and specific duties such as election of officers, authorization for signing of checks, deeds, leases, contracts, etc., authorization for borrowing, approval of annual budgets, etc.
- *Committees*: what specific committees are required (if any), who is eligible to serve on committees (only board members, or others as well?), who appoints members (usually the President).

IV. OFFICERS

This article identifies the officer positions to be filled – most commonly President, Vice President, Secretary and Treasurer (sometimes by other names) – and states how and when they are to be selected (typically they are elected by the board at its annual meeting), and how long they are to serve. Usually the duties specific to each officer position are then stated, in more or less detail.

V. CONFLICT OF INTEREST POLICY

A conflict of interest policy is important for charitable organizations – particularly for those such as CLTs that manage relatively large sums of money and control valuable real estate – since none of the assets of such organizations must be allowed to “inure to the benefit” of the individuals who control the organization. A sample conflict of interest policy appears in Article V of the Model Classic CLT Bylaws presented in chapter 5-A. A sample of a more elaborate policy is presented by the IRS in an appendix to the Form 1023 Instructions, which is accessible online. (Organizations applying for 501(c)(3) tax exempt status are not required to copy this sample, but do need to affirm that they have adopted a conflict of interest policy.)

VI. STEWARDSHIP

Any organization identified as a community land trust – regardless of its corporate structure – will necessarily have a major concern with the stewardship of land and (in most cases) housing on behalf of the community it serves. The founders of the CLT will normally want to establish the intended principles of stewardship in the bylaws, so that those who govern the organization will be formally obligated to observe these principles. In the Model Classic CLT Bylaws presented in chapter 5-A, these principles are addressed in Articles VI and VII. Even those organizations that do not adopt the classic model in other respects should look carefully at these articles and consider how to adapt them to whatever corporate

structure they are establishing.

VII: AMENDMENT OF ARTICLES OF INCORPORATION AND BYLAWS

This article will state how amendments are to be approved. Bylaws of membership organizations such as classic CLTs may require approval by both the board and the membership. It is common for bylaws to require a supermajority vote (e.g. two thirds or three quarters) for approval of amendments, and to impose special requirements for notices of meetings in which amendments are to be considered (sometimes calling for longer notice, and often calling for inclusion of the specific amendment resolution to be voted upon).

VIII: DISSOLUTION

This article spells out the process for *authorizing* the dissolution of the corporation – typically in terms that parallel those of the amendment process described above – supermajority approval, perhaps by both membership and board, in meetings with special notice requirements. The process must comply with the state’s requirements for dissolution of a corporation (as well as the IRS requirements for dissolution of a 501(c)(3) organization); however, the bylaws do not need to spell out all of the steps that must be taken to complete the dissolution process with the appropriate state offices under applicable laws.

ARTICLE IX: MISCELLANEOUS PROVISIONS

Miscellaneous provisions that may be presented in this article include: definition of the corporation’s fiscal year, provisions for the disbursement and deposit of funds, the lending or borrowing of funds, and provision for indemnification of officers and directors if they incur expenses resulting from an action against the corporation.

Basic Drafting Considerations

Internal consistency. Though bylaws are made up of many separate rules, it is obviously important that these rules be consistent with each other. It is not an easy matter to maintain this consistency as you draft and revise bylaws, article by article and paragraph by paragraph. Any time that you consider adding, deleting, or changing particular provisions within your draft bylaws, you will need to think about what other changes may then be required in other parts of the draft in order to avoid contradictions and confusion.

It is also important to be sure that terminology is used consistently throughout the bylaws – especially in the case of key terms to which specific meanings are assigned. For instance, in Article II of the Model Classic Bylaws, the term “general members” is defined as meaning members who are not CLT lessees. It would then be very confusing if the term were used elsewhere in the bylaws to mean members-in-general, including lessee members.

Specificity vs. flexibility. To what extent should bylaws spell out detailed procedures that must be followed in certain situations? To what extent should they establish only general rules that give the board of directors freedom to adopt and revise policies to deal with situations as they evolve? There is no one general answer to these questions. A degree of flexibility is important. The founders of a CLT cannot possibly anticipate all of the complicated situations that will be faced in the future, and they should be wary of prescribing detailed procedures for dealing with what they cannot foresee. At the same time, the founders should establish a procedural framework that is specific enough so that future members and board will be able to concentrate on the substance of their work and will

not have to spend a great deal of time and energy debating procedural questions. The founders also have good reason to establish some specific provisions to ensure that the essential features of the CLT are not compromised as the organization addresses future opportunities and problems.

The Model Classic CLT Bylaws presented in the next chapter deal in considerable detail with matters relating to the membership and board structures that are essential to the classic CLT model. CLT organizations that have not adopted – or have adopted only part of – these governance structures may have less need for the level of specificity found in the model bylaws. However, they may still have reasons to adopt very specific bylaws provisions relating to the CLT’s stewardship functions.

“Realism” vs. “idealism.” The CLT model is based on an ideal of democratic local control, and it should demand of its members and directors a certain commitment of time and energy in support of this ideal. At the same time, if a CLT is to succeed in the real world, its bylaws must provide rules and procedures that are realistic in what they require of members and directors. We may believe that all directors ought to attend all Board meetings, but we recognize that it would not be realistic to establish a 100% quorum for these meetings or to require the removal from the board of a director who misses a single meeting.

How much should requirements be modified in order to allow for busy and conflicting schedules, occasional forgetfulness, normal human frailty? How rigorous must the requirements remain in order to command the commitment of time and effort necessary to the organization’s success? People will not necessarily agree on the answers to these questions. Some of those involved in drafting bylaws may think certain specific requirements are overly rigorous, while others may think they are not rigorous enough. They will need to find a compromise that is acceptable to both sides.

The issue of realism is also related to the issue of specificity vs. flexibility discussed above. In some situations, it may seem that the best way to assure sound decisions and to protect the interests of all affected parties is to require an elaborate decision-making process with a number of specific checks and balances built into it. Yet, if the process is made too complicated, there is a danger that it will short-circuit – that people will lose patience with the elaborate requirements of their bylaws, or will simply forget them, and will improvise simpler (perhaps inadequate) procedures.

Another important consideration is the effect that your bylaws – and the procedures they establish – will have on the composition of your membership and board of directors. Bylaws that require too great a commitment of time from members or directors, or that require a commitment to an inflexible schedule of meetings, may discourage participation by busy people – and in particular by lower-income people who are juggling multiple jobs (probably with inflexible work hours), childcare, and other responsibilities.

It should be said, however, that the most “realistic” bylaws are not necessarily those that make the least demands and impose the least restrictions on members and directors. It is unrealistic to ask too much of people, but it is equally unrealistic to think that the organization can succeed without ever inconveniencing its members or directors. CLT bylaws must make certain demands on people. They must also place certain restrictions on the possibility of self-serving decisions by members and directors (such as a decision to change the resale formula in order to grant more equity to lessees).

In many respects, then, CLT bylaws must be a carefully balanced set of compromises, based on a clear vision of the real world in which the CLT will operate, as well as on a clear vision of what it is intended to achieve. The best general advice to those drafting bylaws continues to be: “Imagine the future – realistically.”

HOME Program Issues

One very specific consideration in drafting bylaws involves the federal “HOME Investment Partnership Program,” which has become an important resource for CLTs and as such has sometimes affected their bylaws. The program, established by the Cranston-Gonzales National Affordable Housing Act in 1990, provides block grants to states and qualifying municipalities to support affordable housing efforts. Each of these “Participating Jurisdictions” (“PJs”) must reserve at least 15% of its HOME funds for investment in housing that is to be “developed, sponsored or owned” by nonprofit organizations that the PJ has certified as “community housing development organizations.” In addition, the PJ may use up to 5% of its grant to provide operating support to such organizations. For these reasons, it is generally very much in the interest of a CLT to be “certified” by its PJ as a “CHDO” (pronounced “chodo”), as these organizations are called.

CHDO status for CLTs. Adopting the language of the 1990 Act, the HOME Program Regulations (at 24 CFR 92.2) define a community housing development organization as an organization that, among other things, “maintains accountability to low income community residents by:

- (i) Maintaining at least one third of its governing board’s membership for residents of low-income neighborhoods, other low-income community residents, or elected representatives of low-income neighborhood organizations. For urban areas, community may be a neighborhood or neighborhoods, city, county, or metropolitan area.; for rural areas it may be a neighborhood or neighborhoods, town, village, county, or multi-county area (but not the entire state); and
- (ii) Providing a formal process for low-income program beneficiaries to advise the organization in its decisions regarding the design, siting, development and management of affordable housing.”

As defined in the Housing and Community Development Act of 1992¹, a community land trust “is a community housing development organization that [among other things]...

Has a board of directors which includes a majority of members who are elected by the corporate membership and is composed of equal numbers of (1) lessees, (2) corporate members who are not lessees, and (3) any other category of persons described in the bylaws of the organization; and

Is not required to have a demonstrated capacity for carrying out HOME activities or a history of serving the local community within which HOME-assisted housing is to be located. [*See Appendix B for the full text of the federal definition.*]

In the past, some public officials (both inside and outside of HUD) interpreted the 1992 legislation to mean that any organization that otherwise conforms to the statutory definition of a CLT is by definition a CHDO. However, other officials assumed that if a CLT is to be considered a CHDO it must first meet the basic CHDO requirements established by the 1990 legislation (except for the explicit exclusion regarding demonstrated capacity and history of service). In 2001, the HUD Office of Affordable Housing published a notice affirming the

latter interpretation:

For the purpose of receiving CHDO set-aside funds to produce HOME-assisted housing, CLTs must undergo the same designation process as any other nonprofit organization seeking CHDO status (See CPD Notice 97-11, “Guidance on Community Housing Development Organizations (CHDOs) under the HOME Program.”). However, Section 233(f) of NAHA exempts CLTs from two of the requirements applicable to other CHDOs....²

Given this interpretation, a CLT seeking certification as a CHDO is required to show that at least one-third of its board of directors meets the “low-income test” deriving from the 1990 legislation.

A few PJs have treated the requirement as a matter of “performance,” asking the CLT to show, at the time it seeks CHDO certification, that at least one third of its board consists of people who are in fact “residents of low-income neighborhoods, other low-income community residents, or elected representatives of low-income neighborhood organizations.” A larger number of PJs, however, have treated the test as a structural matter, asking the CLT to show that its bylaws specifically *require* that at least one-third of its board be “residents of low-income neighborhoods, other low-income community members, or elected representatives of low-income neighborhood organizations.” In some cases, PJs have simply accepted an argument that can be made by some (but not all) CLTs: that their bylaws reserve a third of the seats on the board of directors for lessee representatives, all of whom are low-income when they first purchase their homes, and that another third of the board seats are reserved for general representatives, most of whom normally reside in the low-income community that is served. A number of other PJs, however, have required CLTs to amend their bylaws to add an explicit requirement for one-third low-income representation in order to gain certification as a CHDO.

For classic CLTs, these amendments have not replaced the classic tri-partite board structure; instead, they have been attached as a kind of overlay. It is generally not clear how the electoral process described in the classic bylaws is to ensure the election of a board that will meet the low-income requirement. In practice, this overlay of one set of structural requirements upon another, has not been a problem. CLTs have tended to achieve strong representation of low-income people and neighborhoods within their boards of directors (in fact stronger than many other types of CHDOs), without having to modify the process by which board members are elected. The current version of the Model Classic CLT Bylaws, in (Article III, Section 6) charges the membership and board of directors with responsibility for seeing that the requirement is met – “in their actions regarding the nomination and election of directors and appointment of people to fill vacancies on the board of directors” – but does not say exactly how they are to fulfill the responsibility.

Conflict of interest under the HOME program. The HOME Final Rule adds another complication of which CLTs should be aware. The Rule’s conflict of interest provision (24CFR Section 92.356) has been read by some officials inside and outside of HUD to prohibit lessee participation on the CLT’s board of directors by any lessee living in a HOME-assisted housing unit. Even though the Rule explicitly states – at 92.356(f)(1) – that the conflict of interest provision “does not apply to an individual who receives HOME funds to acquire or rehabilitate his or her principal residence,” some public officials have insisted, “just to be safe,” that a CLT limit participation on its board of directors only to lessee

representatives (and, for that matter, to general representatives) who have not been beneficiaries of HOME assistance.

Aside from arguing that the conflict of interest provision simply does not apply to CLT lessees, there is another route that CLTs may take in attempting to maneuver around local interpretations of this provision that would ban all HOME beneficiaries from the CLT board. The Rule allows HUD to grant an exemption to this provision to any PJ that requests it. One of the factors which HUD must consider in deciding whether to grant such an exemption is “whether the person affected is a member of a group or class of low-income persons intended to be the beneficiaries of the assisted activity, and the exception will permit such person to receive generally the same interests or benefits as are being made available or provided to the group or class.” Since a CLT’s lessees would typically fit this definition of a “class of low-income persons intended to be the beneficiaries” of the HOME program, there would seem to be strong grounds for an exemption allowing CLT lessees to serve on the CLT’s board of directors (especially since the Housing and Community Development Act of 1992 includes a definition of the CLT that requires one-third of the CLT’s board of directors to be “composed of” lessees).

¹ The language quoted here from the Housing and Community Development Act of 1992 was incorporated in early versions of the HOME program regulations. Unfortunately, although these specific provisions for CLTs remain a part of federal law, they are included in HUD’s streamlined “Final Rule” only by reference. Buried within earlier federal regulations, these CLT provisions are harder to find, resulting in an increase in the number of federal state, and municipal officials who are not even aware that these CLT provisions exist. Relevant portions of the 1992 legislation are included in Appendix B.

² HOMEfires: Policy Newsletter of the HOME Investment Partnership Program, Office of Affordable Housing Programs, Vol. 3, No. 10, October, 2001.