



## **AMENDING DOCUMENTS**

# **REPAIRING, REPLACING OR IMPROVING GOVERNING DOCUMENTS**

June 29, 2009

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## AMENDING DOCUMENTS

### REPAIRING, REPLACING OR IMPROVING GOVERNING DOCUMENTS

1. **INTRODUCTION**

A community association's governing documents (the Articles of Incorporation, Bylaws, and Declaration or Covenants) typically fall within three categories: the good, the bad, and the ugly.

The Association should consider repairing, replacing or improving these documents, if they are bad or ugly. Maybe also if they are good!

2. **AMENDMENT SELF TEST**

Take this quick self test to determine whether where your documents are good, bad or ugly and whether they should be repaired, replaced or improved.

Yes    No

- |                          |                          |  |
|--------------------------|--------------------------|--|
| <input type="checkbox"/> | <input type="checkbox"/> | The declaration contains declarant or developer rights which have expired, never expire, or provided for two classes of voting.  |
| <input type="checkbox"/> | <input type="checkbox"/> | The governing documents conflict with state law (CCIOA, Senate Bill 100, Senate Bill 89, etc.) or federal law.   |
| <input type="checkbox"/> | <input type="checkbox"/> | The declaration contains use restrictions which are impractical or no longer desirable or have been overridden by state law (shake shingle roofing requirements, for example).                         |
| <input type="checkbox"/> | <input type="checkbox"/> | Covenants in the declaration are frequently violated or are not enforced.  |
| <input type="checkbox"/> | <input type="checkbox"/> | The declaration contains covenants which the board believes should not be enforced, because they are no longer appropriate for the community (a restriction prohibiting home businesses, for example). |
| <input type="checkbox"/> | <input type="checkbox"/> | The association can only raise assessments to a certain level because of an "assessment cap" based upon a percentage of the previous year's assessments or the consumer price index.                   |

- The association has consulted with legal counsel several times for assistance in interpreting the governing documents.
- The documents for the community are not current and in step or stride with the owners in the community.
- Maintenance responsibilities are clearly allocated to the association or the owners.
- The association has difficulty in obtaining a quorum at the annual meeting.
- The articles of incorporation do not expressly permit the association to limit the personal liability of directors
- The bylaws do not contain an indemnification provision.
- One or more of our governing documents is more than 15 years old.
- The governing documents conflict with each other. (For example, articles authorize 3 directors but the board has been operating with 5 directors.)
- The board and members are overwhelmed and confused by the content of the articles of incorporation, bylaws and declaration.

If you answered "no" to all of the above, the governing documents need not be changed and amendments are not needed.

If you answered "yes" to between 1 and 6 of the above, the governing documents should be considered for amendment. If you answered "yes" to more than 6 of the above, the governing documents are putting your community at risk and should be carefully considered for amendment.

3. **TO AMEND OR NOT**

(a) **Must Associations seek to amend the Community documents?**

No. But there are compelling reasons to do so, as follows:

- ✓ Members are entitled to rely on the governing documents and have expectations that the Association and the Board will follow these documents.

- ✓ Failure to enforce covenants (even if outdated) may, in some instances, be a breach of the Association's and/or the Directors' duties.
- ✓ Directors may be misled as to their duties and responsibilities by outdated documents.
- ✓ Reserved, but expired developer rights and no value or guidance to Owners and the Board or the Association.
- ✓ The personal assets of the directors, officers and other volunteers may be at risk in the event the Association is sued and loses.
- ✓ Problems that may arise later can be solved now proactively, instead of reactively.

**(b) What documents should be amended?**

The basic community association documents which may need repair, replacement or improvement (by a partial amendment or by a complete amendment and restatement) are:

- Declaration (or Covenants or CC&Rs or Protective Covenants)
- Articles of Incorporation
- Bylaws
- Rules and Regulations (including Policies and Procedures)

**(c) Should amendments be considered? Then, sought?**

Whether the Association should seek to amend one or all of these documents depends on the issues to be addressed in amendments and political or relationship issues in the Community (among Owners and the board and management).

If the Association is planning to seek substantial amendments to its Declaration, it should also consider amending its Articles of Incorporation, Bylaws and Rules and Regulations to avoid any conflicts among the documents.

If amendments are not being sought to the Declaration, but are sought to the Bylaws, the Articles of Incorporation should also be considered for amendment. Limited amendments can be made to any one of the governing documents without amending the others. Check with your association's attorney to make sure that there are no conflicts between the amendment and the other documents.

**(d) How often should governing documents be amended?**

Association documents should be reviewed periodically (for example, every 5-7 years) to ensure that the governing documents remain relevant to the Community and to incorporate changes in statutory and case law.

If the governing documents are 10 years old or older and have not been amended, the Association should consider having them reviewed by the Association's legal counsel.

Changes in Colorado law governing nonprofit corporations and the Colorado Common Interest Ownership Act (CCIOA) may influence the Association's decision on whether to seek amendments.

#### 4. **HOW TO IMPROVE, REPAIR AND REPLACE DOCUMENTS**

How do Associations repair, replace or improve their documents?

(a) **Make a list of the issues and points that the Association would like covered.**

Board Members and management know the Community best. Brainstorm with Community members to come up with a "wish list" of your Community's needs and wants. Be creative as to how these needs and wants could be translated into amendments.

(b) **Find out what is required to have amendments approved.**

Colorado law has changed the way documents can be amended, especially declarations. Amendments to declarations are now easier to accomplish. Find out what is required to amend each of the Association's documents.

(c) **Consult with your attorney.**

Amending the governing documents is a complex legal process. Be wary of undertaking this process without the assistance of legal counsel. You can save a great deal of time and money by working with an attorney who specializes in community association law from the beginning of the process, rather than defending a lawsuit or correcting amendments which were not properly or adequately done.

(d) **Determine if the Association needs limited amendments (a repair) or a new document (replacement and improvement).**

The Association's attorney should be able to review your governing documents,

meet with the Board, a committee and/or management to discuss the “wish list” and recommend a course of action. The Association’s attorney should be knowledgeable about potential conflicts among the proposed amendments and the provisions of all of the governing documents.

(e) **Get the Community involved in the drafting process.**

It is essential that members of the Community be involved and also actually participate in the drafting process from the beginning. Often preliminary drafts can be reviewed by the Board or by a committee and management. Once the Board or committee is satisfied with the initial drafts, additional member input should be sought. Member input can be sought at informational and discussion meetings, or by notifying members that drafts are available for comment. Block meetings or informational meetings are frequently used in successful amendments. If members feel informed, involved and listened to during the drafting process, the Association will have a much easier time getting approval when the amendments are ready to be finalized.

(f) **Determine what tools the Association will need to educate your members.**

If the Association is undertaking substantial amendments to the governing documents, the Association will most likely seek new “Amended and Restated” governing documents. These proposed amendments will not track with your old documents. The Association may want to have some additional “tools” available to explain to members the changes which were made. These tools can include summaries, cross reference charts (which list the old section and the corresponding new section), and question and answer sessions.

(g) **Develop a plan for approving your amendments.**

The Association should make sure that every member of your Community receives a copy of the proposed amendments. The Association can begin soliciting member approval through this mailing. However, the most successful way to accomplish amendments is to meet face-to-face with as many of the members as possible. This can be accomplished by dividing the Community into blocks or precincts and having meetings with these limited groups of Owners. Alternatively, the Board or document amendment committee members can go door-to-door to solicit approval. Another successful means of obtaining Owners’ votes is to have consent forms available at any regular event which Owners typically attend, such as the distribution of parking passes or pool keys. The Association should have its attorney prepare the appropriate ballot or consent

form to make sure that approval of the amendments is legally correct under the current governing documents.

Many declarations include mortgagee approval requirements for all or certain types of amendments. Unfortunately, it is generally difficult to get mortgagees to respond to requests for approval of declaration amendments. Colorado law now includes a statutory procedure that may be utilized to address mortgagee consent requirements. If the declaration requires first mortgagees to approve amendments, the new statute allows the association to obtain approval as follows:

- Send written notice and a copy of the proposed amendments to each first mortgagee at its most recent address as shown on the recorded deed of trust or recorded assignment.
- The Association must also cause the dated notice and information on how to obtain a copy of the proposed amendment to be printed in full at least twice on separate occasions at least one week apart in a newspaper of general circulation in the county where the Community is located.
- If a first mortgagee does not deliver a negative response to the Association with 60 days after the date of the notice, the first mortgagee shall be deemed to have approved the proposed amendment.

The documents may require mortgagee approval. Make sure to check with your attorney regarding the necessary approvals.

5. **CONSIDER PETITIONING THE COURT FOR DECLARATION AMENDMENTS**

In some instances, associations may have difficulty amending a declaration because owners are apathetic and do not vote, rather than because members oppose the amended declaration. In such instances, the court petition procedure, outlined below, is a good option.

Colorado law requires District Courts to approve proposed declaration amendments which meet the following criteria:

- (a) **Required Prior Notices.** All owners must receive at least two notices (by any means consistent with the Colorado Revised Nonprofit Corporation Act) of the proposed declaration amendment.
- (b) **Member Meeting Requirement.** The Association must hold at least one

member meeting (called and held in accordance with the Association’s governing documents) to discuss the proposed declaration amendment;

- (c) **Minimum Owner Vote or Approval.** At least half of the owners required under the existing declaration must vote for the proposed declaration amendment.
- (d) **Petition May Be Filed.** A petition must be prepared and filed with the Court requesting that the Court approve the proposed declaration amendment.

The petition is required to include:

- ✓ A summary of the procedures and requirements for amending the declaration that are set forth in the existing declaration;
  - ✓ The proposed amendment to the declaration, the effect of and reason for the proposed amendment, including a statement of the circumstances that make the amendment necessary or advisable;
  - ✓ The results of any vote taken with respect to the proposed amendment;  
and
  - ✓ Any other matters that the Association believes will be useful to the Court in deciding whether to grant the petition; and
  - ✓ As exhibits – copies of the declaration as originally recorded and any recorded amendments to the declaration; the text of the proposed amendment; copies of any notices sent pursuant to the requirements of the statute; and any other documents that the Association believes will be useful to the Court in deciding whether to grant the petition.
- (e) **Hearing on the Petition.** A hearing is scheduled on the petition within 45 to 60 days after filing the petition.
  - (f) **Notice of the Hearing.** A notice of the petition and notice of the hearing must be sent to owners, first mortgagees and the declarant within 10 days after the hearing date is set.
  - (g) **Court Approval.** The Court is required to grant the petition unless 33% of the owners, 33% of the lenders, or the declarant, object to the amendment.

6. **EFFECTIVE AND EFFICIENT WAYS TO WORK WITH ASSOCIATION  
LEGAL COUNSEL**

Good communication between the Association and its attorney is imperative to successfully accomplish an amendment. Here are some tips which will allow the Association to ensure that the Association's attorney knows what the Association wants to accomplish.

- Schedule a meeting with the attorney before you begin to draft or discuss the desired amendments. Be prepared to discuss the "wish list."
- Have the Association's attorney discuss his or her recommended changes.
- Use an attorney who is familiar with community association law and has drafted numerous amendments and/or governing documents for similar communities/associations.
- Know what the costs are up front. Is the fee hourly, flat or a fee "not-to-exceed?" What is included in the fee? What costs will you be charged for (copying, faxes, long distance telephone calls, etc.)?
- Meet with the Association's attorney after drafts have been completed to address questions and revisions.
- Utilize the Association's attorney's knowledge and expertise in developing a plan for owner approval.
- Have your attorney verify the percentages of owners and any mortgagees required by the documents to approve the amendments.

Document amendments can be one of the biggest legal expenses an Association will ever have. Because the governing documents and legal work is complex, detailed, and must be tailored to your Community, the price can be hard to control.

In addition to the points above, the Association can keep legal costs to a minimum by:

- Avoiding numerous revisions, additions and 'wordsmithing'.
- Making a wish list clear up front and discussing issues with the Association's attorney before the documents are drafted. Then, revisions and additions can be significantly reduced.
- Investigating and exploring the needs and desires of your Community prior to constructing a "wish list."
- Utilizing the Association's attorney for "sales" efforts on a limited basis.

- Being up to speed on what changes were made and why these changes were made by meeting with the Association's attorney prior to the drafting of the amendment and as the drafts are finalized.
- Having the Association's attorney annotate the proposed amendments or prepare a cross reference chart, rather than having the Association's attorney appear at multiple meetings to answer questions.