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**AMENDMENTS TO
DECLARATIONS AND COVENANTS
OF
COLORADO COMMON INTEREST
COMMUNITIES**

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AMENDMENTS TO DECLARATIONS AND COVENANTS OF COLORADO COMMON INTEREST COMMUNITIES

Amending Community Association documents can be challenging. Some say impossible. But did you know that the law has changed, and is easier, especially for the informed Board and in Communities that reach out to, are transparent to and inclusive of the Owners. Costs for attorney involvement can be quoted, estimated, and sometimes fixed on a flat fee basis. Outreach to the Owners by the Board and any Committee involved are most important, and lead to successful amendments, particularly with the flexibility now allowed in Colorado law. If amendments are to be pursued, it will mean building consensus on why the amendments should be sought and what the proposed amendment should include, while obtaining and maintaining Community support. It will mean communicating, explaining, and then communicating and explaining again. It will mean working closely with the Association attorney and other professionals, including management. It means getting a large or super majority of Owners, or if a special state statute is to be utilized, at least ½ of the required owners - many of whom are not especially interested in Association affairs - to consent or vote in favor of the proposed amendment.

Amending the Declaration or Covenants is NOT an impossible task, but does require leadership and outreach to the Owners. It may be well be worth the energy, for the sense of Community that can be fostered and to resolve problems in the Declaration or Covenants.

This article focuses on amending Covenants or Declarations. Amending articles of incorporation and bylaws is also often useful, and generally should be done when the Declaration or Covenants are amended.

To help an Association determine whether to pursue amending Covenants and Declarations consider the following seven-step plan.

STEP 1: DETERMINE IF AN AMENDMENT IS NEEDED.

How can you tell if the documents need to be amended? An amendment may be appropriate if the Declaration or Covenants:

1. Does not comply with current state or federal law (many changes have been made to state law over the past several years).
2. Is ambiguous and difficult to interpret and enforce.
3. Does not provide the Association with sufficient power to create and/or successfully enforce rules and regulations.

4. Does not allow the Board to efficiently operate the Community or provide tools to solve or to address Community concerns (such as outdated restrictive covenants).
5. Contains developer "boilerplate" language that is no longer applicable.
6. Sets unreasonable restrictions on the Community.
7. Does not provide the proper means for the Association to effectively solve specific problems (such as annexing additional property, exercising rights incidental to ownership of common elements, and levying assessments).
8. Does not have a mechanism to correct previous legal problems (for example, not all properties are properly annexed).

STEP 2: FIND OUT WHAT IS REQUIRED AND WHAT THE LAW ALLOWS FOR.

If amending the Declaration or Covenants makes sense, the next step is to determine how it can be done. Colorado law on Declaration or Covenant amendments in Common Interest Communities has been made more flexible by recent amendments to the Colorado Common Interest Ownership Act (CCIOA) made by the Colorado legislature. Ask the Association's attorney to review those changes and answer the following questions:

Can the Declaration or Covenants be amended? The typical answer is, "Yes, BUT..." Most Declarations or Covenants require a specific percentage of the Ownership and mortgagees (usually first mortgagees) to vote in favor of a proposed amendment. If the Declaration or Covenants do not address this, state statutes now provide amendment options. The Association's attorney should advise the Association if the desired amendment can be accomplished in what period of time, and what steps the Association will need to take.

What consent or voting percentages are required? Often the Declaration or Covenants most in need of revising require a percentage consent or vote that is very difficult to obtain. For example, 80 percent of the Ownership and 100 percent of the mortgagees is not unusual. Those standards appear to make amendment of the Declaration or Covenants impossible. However, state law caps the approval requirement for most residential Common Interest Communities at 67%. Unfortunately, even a lower percentage, such as 67%, can be hard to obtain.

There are other considerations as well. If an Owner or mortgagee fails to consent or vote, is that deemed consent or a vote for the proposed amendment? Are there specific legal procedures for providing notice or for collecting Ownership consents or votes? Must voting be done at an Ownership meeting? Are consents required to be notarized? Are there any helpful provisions in the other governing documents? The Association's attorney should be able to

provide the Association with the flexible procedures now in state law and to also answer the above questions.

Will an amendment solve the problems the Association has been experiencing?

The Association must carefully consider the goal of the amendment. Amending the Declaration or Covenants to seek to modify behavior of Owners, occupants or pets - barking dogs, loud stereos - is rarely successful. Behavior problems are better left to rules, rules that should be reasonable and easy to enforce. The list in Step One could be the basis for a proposed amendment; or, the Board may wish to poll or survey the Community to identify significant issues prior to beginning an amendment to ascertain Community support. Frequently, owners are able to react to a report on identified problems with the Declaration or Covenants better than identifying the problems themselves.

STEP 3: DETERMINE WHO SHOULD DRAFT THE PROPOSED AMENDMENT.

While Board Owners and/or Committee Owners should help prepare a proposed amendment, an attorney experienced in community association law should draft the amendment's form and content. Provisions in the Declaration or Covenants should be carefully worded and in compliance with Colorado state statutes, federal statutes and case law. The Board and/or Committee should also encourage Community involvement in proposed amendments through repetitive and frequent invitation to the Owners, and ideally, through an Amendment Committee.

If a limited amendment is desired, the Attorney for the Association should aid in advising the Association and drafting the proposed amendment to be consistent with and comply with other provisions of the Declaration and other governing documents.

Are there alternatives to a proposed amendment to the Declaration or Covenants? Sometimes a good alternative is to make changes through rules and regulations or polices and procedures. Even when an Association expects to amend the Declaration or Covenants successfully, the Association should also consider rules, regulations, polices and procedures. Rules can be an excellent way to embellish provisions in the Declaration or Covenants while allowing flexibility. Additionally, consider whether the proposed amendment to the Declaration or Covenants will necessitate amendments to the rules.

The Association should carefully review its rulemaking authority and its ability to adopt certain rules. For instance, a rule permitting what the Declaration or Covenants expressly prohibits will be invalid and unenforceable if challenged. A Declaration or Covenant amendment may be the only option for some changes.

STEP 4: BEFORE DRAFTING IS STARTED, CHECK THE DOCUMENTS FOR OTHER PROBLEMS.

If the Association decides to seek to amend a provision in the Declaration or Covenants, carefully examine the document for other provisions that do not work or might not work in the future. Plan and think ahead. Given the time and expense involved in amending the Declaration or Covenants, it is often more efficient to make other desired or needed or anticipated changes at one time.

- Consider lowering the Ownership percentage needed to approve a subsequent amendment.
- Consider clarifying the procedure and revising the mortgagee approval requirements, to comply with current Fannie Mae and Freddie Mac guidelines (which have changed substantially since many original Declarations were recorded.) For example, current guidelines require amendments to Condominium Declarations to only be approved by 51 percent majority of all eligible mortgagees (those that register with the Association). For single family or townhome communities, current guidelines DO NOT require amendments to be approved by any mortgagees.
- Avoid being too specific. Allow for flexibility and don't underestimate technological changes. A good example is use restrictions prohibiting satellite dishes. Do not simply remove the restriction; instead, include a provision empowering the Board to enact and enforce use restrictions pursuant to the Association's rules and regulations.
- Seek input from homeowners and advice from other professionals regarding the scope of a proposed amendment. Determine how your Community is best served - by simply fixing one item? By solving other problems? Or by amending and restating the Declaration or Covenants in their entirety?
- Consider the cost of a proposed amendment, in two ways: the time spent by Board, Owners and other volunteers in securing approval for the amendment and the likelihood of succeeding and costs with the Association's attorney.
- Determine whether the amendment to be proposed may be controversial. If the amendment the Association seeks to make is particularly controversial, the Association may have better success if that controversial subject is the only amendment proposed to the Owners for approval.

STEP 5: IF THE ASSOCIATION PROCEEDS TO SEEK AMENDMENTS, SOLICIT COMMUNITY SUPPORT.

As the Board and/or Committee drafts the proposed amendment, and then approves the proposed amendment for referral to the Owners for consent or voting, seek and obtain Community support by informing Owners of the intent to amend and the progress being made. By continually seeking involvement of the Owners and by receiving their input early and throughout the drafting and consensus-building process, the Board and/or Committee will know if Owners are satisfied with the proposed amendment.

Seeking and obtaining support also allows the Association to educate Owners on the need or reasons for the proposed amendment. Then, when the Association distributes consent forms or asks for votes in favor of the proposed amendment, progress and momentum will not be delayed or lost while Owners are brought up to speed. Education can be done through informational meetings and printed materials, such as newsletters, flyers, and letters. The size of the Association, the number of on-site Owners, and the proposed amendment itself - its length and complexity - will help determine the strategy.

It is not enough to explain to Owners why the amendment is needed. Also explain why the support of each Owner is needed, particularly if the percentage required to approve the amendment is high. Finally, don't forget to listen to your Owners' comments. They may be able to point out issues the Board or Committee had not considered.

STEP 6: DEVELOP A STRATEGY FOR SUCCESS.

Without a clear strategy, the proposed amendment will probably not be approved. The strategy will depend in large measure on the consent or voting procedure required by the Declaration or Covenants. Generally there are two procedures: taking a vote at a meeting of the Owners, or adopting the amendment by written consent.

If a meeting is required, the Association must consider legal issues such as notice and quorum requirements, and practical concerns, like the date, time, and location of the meeting. Attendance and participation must be as convenient as possible. The use of proxies, preferably directed, will be critical for success. Lessons learned over the years from obtaining quorums for annual meetings will apply here.

If a meeting is not required, the Board must decide three things:

- Whether to mail or hand deliver the proposed amendment and consent form, and who will do it.
- If signatures must be notarized, and if the persons canvassing Owners must be notaries.
- When to begin follow-up contacts and how those contacts will be made (by mail, in person, or by telephone).

The Association's size, finances, and the number of people assisting the project will influence the Association decisions. For example, canvassing a 50-home community would be far easier than one with 500 homes.

Mailing consent forms to Owners may bring in some approvals. However, mailing is seldom as effective as door-to-door solicitation. Boards should consider a three step campaign for the greatest success:

- Mail the proposed amendments and consents to Members;

- Hold a meeting of Owners to answer questions and obtain additional consents;
- Solicit remaining consents through a door-to-door solicitation.

Obtaining mortgage approval will require its own strategy and timetable. Lenders have become more accustomed to such requests, but it is still a formidable task. Thankfully, Colorado law now provides two additional approaches to the mortgagee consent problem: one by court petition and another by mailing and publication. Obtaining the names and addresses of the current mortgagees will be needed. The Association may also need to locate and identify loan numbers, and find out whether the loan has been assigned. The Association may also need to know who has the authority to approve such requests.

These are but a few of the issues that will need to be covered. The Association's attorney can prove invaluable in answering questions and cutting through the red tape typically encountered with mortgagees.

STEP 7: MONITOR VOTING/CONSENT PROGRESS AND ADAPT.

For Associations that only need written consent of Owners to amend the Declaration or Covenants- without a formal meeting - developing a strategy is not enough. To be successful, the Board must also monitor its progress and adapt. What may have sounded reasonable and workable in the planning stage may not be working.

The Association may need to keep current records as to which Owners (and mortgagees) have consented to the proposed amendment and when. The Association may also need to review all returned consents to make sure the signatures are properly notarized (if required) and match the Ownership roster. The Board should set realistic goals and benchmarks to measure progress - for example, obtaining 50 percent of the consents one month after mailing them. It should follow up with all persons involved in obtaining consents and keep the Community informed.

Finishing in 90 days is a good target. If a strategy is not working, adjust accordingly - lost momentum is difficult to get back. The longer it takes, the less likely it is to succeed. Don't hesitate to adopt a new plan if the Association's current one is not working.

STEP 8: CERTIFY AND RECORD THE AMENDMENT.

After months of planning, drafting, Community meetings, and door-to-door canvassing the consents and votes needed are in, or the statutory process have been complied with. Is the Association done? Not yet.

Depending on the requirements in the governing documents and statute statutes, the Association's Board may need to adopt the amendment in the form of a resolution. The president and secretary may need to sign it and certify the validity of the consents and/or votes. And, the amendment must be recorded in the County (or Counties) where the

Declaration or Covenants were originally recorded. The Association's counsel should be a part of this process to aid in compliance with all legal requirements.

Then, after recording, recorded copies of the amendment should be mailed to all Association Owners, posted on websites, added to required disclosures, etc. Failure to follow the requirements set out in the governing documents and applicable statutes may serve as grounds for challenging the validity or enforceability of the amendment at a later date.

Amending Declarations or Covenants is not for everyone or every Association. But with a legitimate need for doing so, and with patience, planning and persistence, it is possible.

TIMING PROJECTIONS FOR POSSIBLE, PROPOSED AMENDMENTS

The following checklist may assist the Association in setting goals for an amendment that may be sought. These projections are estimates. The actual time needed may take longer.

Month One

- Meetings of the Board or a Committee to determine whether to proceed with a document review, to identify the problem areas, and to consider possible solutions or, to proceed directly to pursuing proposed amendments. From these meetings, the Board should determine how and if to proceed, and may determine to proceed on an incremental basis, with a document review now and with no determination to pursue amendments until the document review report has been prepared, presented and considered by the Board or a Committee. How the Association proceeds is as important as what it may seek to amend.

Months Two-Three

- Draft the initial set of documents.
- Explain the amendments which the Association is undertaking in newsletters/Owner meetings.
- Meeting of the Board and/or Committee Owners and legal counsel to review, revise and comment on the proposed documents.
- Revisions to documents and second drafts of documents finalized, assuming there is only one set of major revisions (which is very common).

Months Four-Five

- Special meeting(s) of the Owners may be held. At the meeting(s), the amendment process and anticipated changes should be reviewed.
- Make draft documents available to Owners for review and comment.
- Finalize documents based on Owner comments and distribute to Owners for approval.
- Begin to obtain consent of the Owners for the amended documents.
- Begin to obtain consent of the first mortgagees for the amended documents.

- Meeting(s) of the Board of Directors to establish a plan for solicitation of remaining consents or votes. This may include door-to-door solicitation of Owners and/or scheduling of one or more special meeting of the Owners.

Month Six - Forward

- Implement solicitation plan for obtaining the remaining consent.
- Continue to obtain consent of Owners and first mortgagees.
- Finalize and record or file documents.
- Provide recorded copies of the new documents to all owners.