

CONSIDERATIONS FOR AMENDING CC&RS

ON THE HILL



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Benjamin Franklin said, “The only things certain in life are death and taxes.” If Mr. Franklin were alive today and living in a community association, I am confident that he would add amending an association’s governing documents to his list of life’s certainties. It is not a question of “if” but “when” a community association should amend its governing documents, primarily its declaration or CC&Rs. This article focuses on reasons why a community association should amend its CC&Rs and whether an association should proceed with a stand-alone amendment or an amended and restated set of CC&Rs.

A question often asked by owners and management committees is “Why do we need to amend our documents?” Clarification is a primary reason to amend. If owners do not know what covenants, conditions, and restrictions apply to them, then it is unlikely they will comply with them. In recent years, the Utah legislature enacted amendments to both the Condominium Ownership Act and the Community Association Acts which amendments include provisions concerning insurance requirements and reserve funds. An owner relying solely upon an association’s pre-amendment CC&Rs may run afoul of these amendments. For example, an owner purchasing insurance based upon the provisions in the CC&Rs may not be aware of the owner’s statutory obligation in the event of a loss.

Clarification is further necessary when an association has multiple prior stand-alone amendments or the language is ambiguous. If an association needs a lengthy matrix to cross-reference the amended provisions of its CC&Rs, it is time to restate and amend the CC&Rs. Associations may also find themselves repeatedly seeking legal opinions to interpret ambiguous provisions, such as whether the association or an owner has certain maintenance responsibilities. These repeated legal opinions, and perhaps an eventual lawsuit, will likely cost more in the long run than an amending the CC&Rs to eliminate to the confusion.

Another reason to amend an association’s CC&Rs is to adopt the actual practices followed by the association. In a recent conversation with an association’s president, I asked if he had reviewed a certain provision in the CC&Rs concerning enforcement. I cringed at his response. He stated, “I have no idea what the declaration says. I’ve never read it.” He went on to say that the management committee had been enforcing certain provisions in the association because it had always been done

that way as long as anyone could remember. Unfortunately, many of these enforcement practices ran contrary to the association’s CC&Rs. Ignoring certain CC&R provisions is not uncommon and an association should amend to reflect the reality of the association and reduce its liability for non-compliance or decide to commence enforcement of the provisions already in its CC&Rs.

Additional considerations for amending may include, but are not limited to, implementing or removing rental restrictions, eliminating irrelevant declarant provisions, or converting to or from a fifty-five (55) and older community.

When deciding to amend its CC&Rs, an association should analyze whether to utilize a stand-alone amendment or completely amend and restate the CC&Rs. Stand-alone amendments are appropriate when the association wants to address a small, select set of issues, such as insurance, rental restrictions, or clarifying ambiguous language for a specific provision. Since stand-alone amendments are generally short, relatively speaking, owners quickly understand the proposed amendment(s) and the reason why the association is seeking to amend. Stand-alone amendments are often a less expensive approach to amending and restating the CC&Rs as a whole.

However, when an association is looking at amending several provisions of its CC&Rs or the association already has multiple prior stand alone amendments in effect, it may be more cost effective and less confusing to proceed with completely amending and restating the association’s CC&Rs. It is beneficial for both owners and the association to have one set of the amended and restated CC&Rs to refer to when living in and operating the association. On the other hand, it may take more work for a management committee to assist the owners in understanding and digesting the amended and restated CC&Rs to obtain the necessary votes to approve the amendments.

When deciding whether to amend its CC&Rs, an association should consult with its attorney to ensure that the proposed amendment complies with applicable law both substantively and procedurally. The attorney should advise the association on whether a stand-alone amendment or an amended and restated set of CC&Rs is more beneficial given the association’s situation and issues being addressed through the proposed amendment(s). Most importantly, the association’s attorney should be involved with the drafting of proposed amendments and with determining the procedure to amend.

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