
WHY AN ASSOCIATION SHOULD CONSIDER AMENDING ITS GOVERNING DOCUMENTS

Introduction

The governing documents for an Association are the Covenants, Conditions and Restrictions ("CC&Rs"); Bylaws; Rules, Regulations, and Procedures (i.e., notice and hearing procedures, architectural committee procedures, etc.); and Articles of Incorporation. Like state and federal laws and municipal ordinances governing citizens' conduct, the governing documents are the foundation for governing an Association. Many of these documents were written, however, by the developer--an entity no longer involved with the Association--who drafted these documents with its own interests in mind and not that of the Association or its members. The developer may also have included "boilerplate" provisions required by the Department of Real Estate or mortgage lenders. Frequently, governing documents drafted by developers are without regard to the individual Association's needs, needs that have evolved throughout the Association's years of existence. Additionally, many governing documents were written before the 1985 enactment of the Davis-Stirling Common Interest Development Act, as well as before other changes in state and federal statutory and case law relating to Associations. As a result, many provisions are often contrary to the law and fail to adequately serve the needs and desires of the Association and its members.

Purpose of Governing Documents

Although Associations are managed and governed by the Board of Directors, the governing documents provide the authority, instruction and guidelines to Board Members in handling the day-to-day activities of the Association. The governing documents also provide the Association's members with information on how to conduct themselves within the Association context. A well-written, up-to-date set of governing documents provides members with structure, certainty, and order in their day-to-day Association living. This structure, certainty, and order is intended to achieve the purpose of governing documents--to increase the value, desirability, and attractiveness of the separate interests, and the Association as a whole.

When Amendments Are Necessary

If governing documents do not comply with state or federal law, the Board of Directors cannot enforce the illegal provisions without possibly subjecting itself to personal liability. There may also be criminal penalties for violating certain state and federal laws. Illegal provisions in governing documents may also cause lenders to deny loan applications for the purchase of a separate interest located within the Association, thereby limiting members' ability to sell their property and decreasing the value, desirability, and attractiveness of the Association.

Significantly, an Association's Bylaws should be up-to-date and otherwise consistent with the law. Bylaws are the governing documents that provide both members of the Board of Directors and owners with the guidance necessary for the day-to-day operation of the Association. For example, Bylaws often contain provisions regarding notice requirements for a meeting. If an Association's Bylaws are contrary to the law, actions taken at meetings could be invalidated.

On January 1, 2003, the California legislature enacted Section 1367.1 of the *California Civil Code*. This new law has far-reaching effects in the area of collection procedures and notice requirements. An Association that fails to comply with the pre-lien notice requirements set forth in *Civil Code* Section 1367.1 must start the notice process over from the beginning, at the Association's cost! New *Civil Code* Section 1365.1 requires an association to include in its annual financial disclosures to members certain notices, including a notice relating to nonjudicial foreclosure. Additionally, new *Civil Code* Section 1353.5 prohibits governing documents from limiting or prohibiting owners from displaying the American flag. Because of these and other recent changes in the law, we highly recommend that Associations consult with legal counsel to assure their governing documents are in compliance with the law.

Governing documents often fail to provide Board Members with the mechanisms necessary for handling particular, recurring problems. This causes Board Members, who are volunteers, to operate without sufficient guidance--thereby requiring them to spend excessive amounts of their time developing rules, regulations, and procedures to supplement the governing documents.

Boards of Directors are often subject to criticism and challenges by owners for acting without sufficient authority. All too often Board Members are forced to take action not pursuant to any provision in the governing documents, but instead to "fly by the seat of their pants." This causes a breakdown in the Association's government-type structure and is contrary to the purpose of the governing documents.

Furthermore, governing documents often contain developer provisions that may be inadvisable or irrelevant to the post-developer Association. Provisions concerning the enforcement of bonding obligations by the developer and giving developer members a three-to-one voting advantage over the general membership, permitting the developer to appoint a majority of the Association's architectural committee for a specified period of time, and permitting annexation of additional property to the development, are just a few of the many developer provisions often found to be either inadvisable or irrelevant.

Last, but not least, amendments to the CC&Rs can increase or reduce the Association's, and the owners', responsibility to repair, replace and maintain common area, exclusive use common area and even interior damage to units.

Amending the governing documents in the preceding circumstances will assure that Boards: (1) will not be subject to personal and/or criminal liability for enforcing illegal provisions; and (2) will have the tools needed to handle and successfully resolve specific problems--such as collecting assessments, remedying problems with residents who repeatedly fail to comply with the governing documents and tenants who are nuisances to other residents, and executing maintenance, repair, and replacement

responsibilities and architectural enforcement. Associations will also experience a higher percentage of compliance by the individual members as irrelevant and unnecessary developer provisions are stricken, thereby providing for a more understandable set of rules and regulations for the owners.

Procedures Available For Amending Governing Documents

Governing documents can be amended in one of several ways. First, Associations may amend their governing documents pursuant to the express provisions provided for amendments in the governing documents themselves. In this case, most governing documents require a vote of the membership. Typically, the percentage of votes needed to pass an amendment is high--generally 67 percent to 75 percent. As most Board members can attest, it is extremely difficult, and sometimes impossible, to obtain the votes necessary to meet this requirement. Therefore, one of the first, and perhaps the most important, amendments that should be made is to reduce the percentage of votes necessary for amending the governing documents to a simple majority.

Second, Section 1355 of the *Civil Code* provides that CC&Rs that do not contain a provision permitting their amendment may in fact be amended (unless there exists an express provision prohibiting amendments). In such case, the Board of Directors may amend the CC&Rs if: (1) the proposed amendment is distributed to all members not less than 15 days and not more than 60 days prior to any approval being solicited; (2) a simple majority of the members vote in favor of the amendment; and (3) the amendment is recorded in each county the development is located.

Third, Section 1355.5 of the *Civil Code* permits the Board of Directors to amend the governing documents without a vote of the owners to delete provisions relating to the developer after the developer has terminated its involvement in the association. As discussed above, developer provisions complicate the governing documents and make them difficult to enforce, understand, and abide. The Board of Directors may also revise the rules, regulations, and procedures of the Association without membership approval, if the Board is given the authority to draft such provisions in the CC&Rs or Bylaws.

Fourth, Associations may obtain a court order to amend their CC&Rs. Section 1356 of the *Civil Code* permits an Association whose CC&Rs require more than 50 percent of the members to approve the amendments to petition the Court to obtain a court order reducing the percentage of votes necessary to amend the CC&Rs. Section 1356 requires the petition to describe: (1) a reasonably diligent effort to solicit the necessary votes and enable the homeowners to vote on the amendments, including noticing a meeting of the homeowners or a vote by written Ballot and efforts beyond those required by the CC&Rs; (2) the number of affirmative and negative votes actually received; (3) the number or percentage of affirmative votes required to pass the amendment; and (4) any other facts relevant to the amendment.

Lastly, Section 7150 of the *Corporations Code* provides that, under certain circumstances, the Board of Directors of an Association may amend its Bylaws without the vote of the individual owners. This is significant in that Bylaws serve as the primary

source of enforcement authority. For instance, Bylaws provide members with the notice required to satisfy “due process.” If an Association’s Bylaws are defective or otherwise lacking in providing the requisite notice, the Association may not be able to successfully enforce its governing documents. Under certain circumstances, Associations may amend their Bylaws to cure such defects without the vote of its members.

The general amendment process begins with suggestions for changes from each Member of the Board of Directors. The input of the owners can also be obtained, at the Board’s discretion. The Association should then seek the advice of legal counsel to determine what provisions are illegal, irrelevant, inadvisable, and otherwise to obtain recommendations for commonly used provisions and provisions suitable for their particular Association. Then, the proposed changes in their exact language should be drafted and presented to the owners with a written Ballot for voting. If the owners approve some or all of the changes, the approved changes should be reduced to a written amendment to be recorded. Although Bylaws are not recorded, they should be prepared in the form of a formal amendment to be retained in the Association’s corporate records. All amended documents must be distributed to all owners and residents.

Even if the Board of Directors does not or cannot amend its governing documents through one of the above processes, they should annually review the Association’s governing documents to identify those provisions which are illegal, irrelevant, inadvisable, and should otherwise not be enforced due to changed circumstances.

Conclusion

Governing documents are the foundation for governing an Association. Many governing documents were written by the developer--an entity no longer involved with the Association--who may have used “boilerplate” provisions required by the Department of Real Estate or lenders. Many are contrary to state and federal law, and otherwise do not adequately address the particular needs and desires of the Association and its members. As a result, amending the governing documents becomes crucial to assure the Board of Directors are afforded adequate instruction and guidelines in handling the day-to-day activities of the Association. Governing documents also provide members with the structure, certainty, and order necessary for their day-to-day Association living, thereby increasing the value, desirability, and attractiveness of the separate interests as well as the Association in general.