



When is the Right Time to Amend Your Governing Documents?

From time to time we are asked whether an association should amend its CC&Rs. As one can expect, there is no black and white standard. Many factors go into the decision and age of the documents alone is not determinative. But among the key factors driving a CC&Rs amendment is a change in the law that renders CC&Rs outdated. A recent amendment to Civil Code Section 4775, addressing exclusive use common area responsibility, is one example.

Among the most fertile ground for community association disputes is the line between repair and maintenance of exclusive use common area. Many CC&Rs, particularly those in older communities, do not adequately identify or define maintenance and repair responsibility for exclusive use common area components such as patios, balconies, doors and similar components. And when there is uncertainty between owner and association about who repairs what, enforcement challenges and disputes are inevitable. In the absence of well-defined CC&Rs, we look to existing Civil Code Section 4775 which currently provides:

"Unless otherwise provided in the declaration of a common interest development, the association is responsible for repairing, replacing, or maintaining the common area, other than exclusive use common area, and the owner of each separate interest is responsible for maintaining that separate interest and any exclusive use common area appurtenant to the separate interest."

The problem with the above language is that it is vague and ambiguous and for years left much to interpretation as to what exactly the owner was responsible for and where the maintenance began and repair or replacement ended. Fortunately our legislature has heard our concerns and provides a degree of relief in the following amendment to Civil Code Section 4775(a)(3) as follows:

"Unless otherwise provided in the declaration of a common interest development, the owner of each separate interest is responsible for maintaining the exclusive use common area appurtenant to that separate interest and the association is responsible for repairing and replacing the exclusive use common area."

This revised language seeks to clarify the line between maintenance of the exclusive use common area and repair and replacement of that exclusive use common area. Although the amendment was signed into law during the 2014 legislative session, the law does not take effect until January 2017, giving associations an opportunity now to amend their CC&Rs to specify maintenance and repair responsibility for balconies, patios and similar exclusive use components. Otherwise, the statutory language will control, leaving associations to be responsible for and fund what could be costly exclusive use common area repairs.

Other factors driving the decision to amend CC&Rs, communities know when it is time to make changes. It becomes apparent when the board and the owners are spending considerable time addressing routine issues: who is responsible for repairs or damage, what rights do I have to rent or alter my property, and what are the limitations on the board's authority to impose and collect assessments? The struggle is often deciding when and where to implement those changes. If you find yourself asking these types of questions, it may be time to consider the Three Rs for your Governing documents: 1) a Review of the existing documents, 2) identify specific provisions for Revision; and, 3) evaluate the need for, and whether your community will support a complete Restatement.

Review

The first step in deciding whether to amend or restate the governing document is to review what you have. Associations should form a committee of owners and board members who can focus on the task at hand, working with legal counsel to help them identify the provisions in need of amendment. Many communities come to legal counsel already armed with a list of provisions to update or amend. Community history and custom and practice are particularly helpful in developing this list. The board should also consider reaching out to owners to discover other

issues that challenge the community. Often either an informal survey or questionnaire will generate more than enough material for a new draft.

What follows is a list of the types of issues, questions and concerns that often lead to a community's desire to make changes to the documents. Deciding whether to revise (amend a few provisions in the current governing documents), or to restate (draft an entire new set of documents) will depend on the number of items the community wishes to tackle.

- Do the CC&Rs contain Declarant or developer rights, or provide for two classes of voting, when the developer is no longer involved in the property?
- Do the CC&Rs contain adequate definitions of all common area and individually owned components? Are the defined terms clear and unambiguous?
- Is the community concerned about the number of rentals within a community?
- Do the CC&Rs have a disciplinary process that is clear, fair, and reasonable, and complies with minimum due process protections for owners?
- Do the CC&Rs contain use restrictions which are outdated, no longer applicable to the community, or not enforced.
- Does the association have adequate, clear, and easy to understand standards in place to inform owners about permissible modifications and the architectural approval process?
- Are there outdated limitations on how much the association is permitted to spend on capital improvements or common area repairs without membership approval?
- Do the CC&Rs contain references to old Civil Codes or requirements or outdated laws. (e.g. Civil Code Sections 1350-1378)?
- Has the association consulted with legal counsel more than three times within the last year for assistance in interpreting its governing documents with respect to maintenance and repair responsibility, restriction enforcement and/or insurance coverage matters?
- Does the association struggle to achieve quorum for ownership meetings or key association votes?

Once the board has a general list of items that need to be addressed, the community should consult its or with legal counsel to identify other unresolved or problematic provisions. In addition to voluntary changes the community wants to make, communities might be surprised to learn that their documents contain provisions contrary to current laws, outdated industry practice, or other requirements they may not have known existed. Learning a little more about what information belongs will give the communities a thorough interest in moving the revision process forward.

To Amend or Restate?

Answering "yes" to one or two of the above issues suggests that your community should at least consider amendments to your governing documents. Amendments are usually best for those limited situations where the community decides that for the most part the CC&Rs serve the community well but could benefit from some refinement or the addition of some essentials; overall documents remain sound. For example, if your CC&Rs are unclear about balcony maintenance requirements, or if your community is ready for some type of leasing provision, a simple, relatively inexpensive one or two issue amendment would be sufficient. Further, if your documents contain the outdated Civil Code references (Civil Code 1350), the association can offer a simple amendment to replace outdated references without needing to change the substance of the document or requiring a complete re-write of your CC&Rs. Civil Code Section 4235 facilitates the association to update their CC&Rs to incorporate the current Civil Code sections and to replace the outdated ones.

Restatement

Restatement refers to a complete rewrite of the association's CC&Rs. Through this process, the association maintains the essential, community specific provisions but ends up with a completely new, updated CC&Rs. When the documents have too many missing maintenance requirements, incorrect code references, or unenforceable restrictions, it can be detrimental to basic governance. Boards and owners who cannot rely on the accuracy of the information presented in the documents will effectively view them as useless. That works against both the interest of the board and the owners.

So if your community finds itself answering, "yes" to several of the above factors; if the documents are unreadable, filled with legalese, inconsistent with current law, and difficult to understand, interpret and enforce, the governing documents are probably suitable for restatement, and your community could benefit from a restatement that is consistent with updated Civil Code references, legal requirements, industry practice, and other provisions tailored exclusively for the community's specific needs.

Whether in the end you eventually decide to amend or restate your CC&Rs, or do nothing, the best place to start is by a survey of your community: 1) evaluate the issues that come before the board on a regular basis; 2) consider the issues addressed by legal counsel on an annual basis. Is there a pattern or commonality? Would a clear CC&Rs provision aid the board in enforcement and perhaps reduce legal fees or disputes?; 3) review the reasons the board is fining owners or the other frequent enforcement issues the association encounters over the year, and consider whether a more clearly stated use restriction section would encourage compliance and aid the board in enforcement. And finally, consider surveying your owners about their CC&Rs. Feedback from owners about their concerns, their level of understanding and their opinion about whether the CC&Rs fit the needs of the community can assist that board in making the decision about whether to amend, and begin the important process of building community support for the amendment process should the board decide to take on the amendment or restatement process.

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