

# TURNING BAD DOCUMENTS INTO GOOD ONES

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[Amending Your Governing Documents](#)

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## INTRODUCTION

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

Take this quick self-test to determine where your documents fall:

### Yes No

**Q Q** Our association's covenants contain declarant or developer rights that never expire or provide for two classes of voting.

**Q Q** Our association's covenants contain use restrictions that are impractical or no longer desirable (shake shingle roofing requirements, for example) or covenants are violated which have never been enforced and which we do not believe should be enforced because they are no longer appropriate for our community (A restriction prohibiting home businesses, for example).

**Q Q** The Board 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.

**Q Q** We have consulted with legal counsel more than three times within the last year for assistance in interpreting our governing documents, including maintenance responsibilities.

**Q Q** We have not been able to obtain a quorum at our annual meeting.

**Q Q** Our Articles of Incorporation do not expressly permit us to limit the personal liability of directors.

**Q Q** Our Bylaws do not contain an indemnification provision.

**Q Q** One or more of our governing documents are more than fifteen years old.

**Q Q** Provisions of the various documents conflict with each other. (For example, your Articles authorize 3 directors but you have been operating with 5 directors).

**Q Q** Our Board and Members are overwhelmed and befuddled by the content of the Articles of Incorporation, Bylaws, and Declaration.

If you answered "no" to all of the questions, your documents probably fall within the "Good" category. If you answered "yes" to between 1 and 6 questions, your documents fall within the "Bad" category, and if you answered "yes" to between 6 and 10 of the questions, your documents fall within the "Ugly" category.

**So where do you go from here . .**

## TO AMEND OR NOT TO AMEND

**DO YOU HAVE TO AMEND YOUR DOCUMENTS?** No. But there are compelling reasons to do so: Directors may be misled as to their duties and responsibilities by outdated documents.

- Failure to enforce covenants (even if outdated) may, in some instances, be a breach of the Directors' fiduciary duties.

- Members are entitled to rely on the governing documents and have expectations that the Board will follow these documents.
- The developer may be able to exercise residual development rights to further build out the project or exercise other controls over 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.

**WHAT DOCUMENTS SHOULD BE AMENDED?** The basic community association documents which may need amending are:

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

Whether you should amend one or all of these documents depends on the issues to be addressed in amendments. If the association is planning to make substantial amendments to its Declaration, it should consider amending its Articles of Incorporation, Bylaws, and Rules and Regulations to avoid any conflicts among the documents. If major amendments to the Bylaws are being made, the Articles of Incorporation should also be amended. Limited amendments can be made to any one of the governing documents without amending the others. You should check with your association's attorney to make sure that there are no conflicts between the amendment and the other documents.

**HOW OFTEN SHOULD GOVERNING DOCUMENTS BE AMENDED?** Association documents should be reviewed every five years to ensure that the governing documents incorporate changes in statutory and case law. If your governing documents are ten years old or older and have not been amended, you should consider having them reviewed by your association's legal counsel. Changes in Colorado law governing nonprofit corporations and the Colorado Common Interest Ownership Act (CCIOA) may influence your decision to amend.

### **HOW TO TURN YOUR BAD DOCUMENTS INTO GOOD ONES**

By now, you have taken the test at the beginning of the outline and have determined that your documents are not Good, but Bad or Ugly. You have read the compelling reasons why you should amend and have decided to proceed with amendments. How do you turn your bad documents into good ones?

**1. MAKE A LIST OF THE ISSUES AND POINTS THAT YOU WOULD LIKE COVERED.** You know your 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.

**2. CONSULT WITH YOUR ATTORNEY.** Amending your 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 than in defending a lawsuit or correcting amendments which were not properly done.

**3. DETERMINE IF YOU NEED LIMITED AMENDMENTS OR A NEW DOCUMENT.** Your association's attorney should be able to review your governing documents, meet with you to discuss your "wish list" and recommend a course of action. Your attorney should be knowledgeable about potential conflicts among the proposed amendments and the provisions of all of your governing documents.

**4. GET THE COMMUNITY INVOLVED IN THE DRAFTING PROCESS.** Representatives from your association must participate in the drafting process from the beginning. Often preliminary drafts can be reviewed by the Board or by a committee. Once the Board or committee is satisfied with drafts, member input should be sought. Member input can be sought at informational and discussion meetings, by notifying members drafts are available for comment, or block meetings. If your members feel informed, involved, and listened to during the drafting process, you will have a much easier time getting their approval when the amendments are ready to be finalized.

**5. ASCERTAIN WHAT TOOLS YOU WILL NEED TO EDUCATE YOUR MEMBERS.** If you are undertaking substantial amendments to your governing documents, you will most likely get new "Amended and Restated" governing documents which will not track with your old documents. You 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.

**6. DEVELOP A PLAN FOR APPROVING YOUR AMENDMENTS.** You need to make sure that every member of your community receives a copy of the proposed amendments. You 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 your members as possible. This can be accomplished by dividing your community into blocks or precincts and having meetings with these limited groups of owners. Alternatively, members can go door-to-door to solicit approval.

Another successful means of obtaining owners' vote to have consent forms available at an event that everyone attends, such as the distribution of parking passes or pool keys. You should have your legal counsel prepare the appropriate ballot or consent form to make sure that approval of the amendments is legally correct under your current governing documents. Your documents may require mortgagee approval. Make sure to check with your attorney regarding the necessary approvals.

### **IF ALL ELSE FAILS, PETITION THE COURT.**

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

- 1.** All owners must receive at least two notices (by any means consistent with the Colorado Revised Nonprofit Corporation Act) of the proposed declaration amendment;
- 2.** 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;
- 3.** At least half of the owners required under the existing declaration must vote for the proposed declaration amendment;
- 4.** 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 is 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.
- 5.** A hearing is scheduled on the Petition within 45 to 60 days after filing the Petition;
- 6.** A notice of the Petition and notice of the hearing must be sent to owners, first mortgagees, and the declarant within ten (10) days after the hearing date is set; and
- 7.** The court is required to grant the petition unless 33% of the owners, 33% of the lenders, or the declarant objects to the amendment.

### **HOW TO WORK WITH LEGAL COUNSEL**

Good communication between your association and its attorney is imperative to accomplish an amendment. Here are some tips which will allow you to ensure that your legal counsel knows what your association wants to accomplish.

- Schedule a meeting with your attorney before you begin your amendments. Be prepared to discuss your "wish list". Have your 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 associations similar to yours.
- Know what the costs are upfront. 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, mailing, long-distance telephone calls, etc.)?

- Meet with your attorney after drafts have been completed to address questions and revisions.
- Utilize your attorney's knowledge and expertise in developing a plan for owner approval.
- Have your attorney verify the percentages of owners and mortgagees who must approve the amendments.

Short of litigation, document amendments can be one of the biggest legal expenses your association will ever have. Because the legal work is complex, detailed, and must be tailored to your community, the price can be hard to control. You can keep your legal costs to a minimum by:

- Using an attorney who is familiar with community association law and has drafted numerous amendments and governing documents similar to yours.
- Avoiding numerous revisions, additions, and wordsmithing of the attorney's work. If you make your wish list clear upfront and discuss with your legal counsel the specifics of the changes before the documents are drafted, revisions and additions can be significantly reduced.
- Investigating the needs and wants of your community prior to constructing your "wish list".
- Utilizing your attorney for "sales" efforts on a limited basis. If you have met with your attorney prior to the drafts of the amendments and after the drafts of the amendments, you should be up to speed on what changes were made and why these changes were made. You may get a better value for your money by having your counsel annotate the proposed amendments or prepare a cross-reference chart than by having counsel appear at meetings to answer questions.