



HindmanSanchez

To Amend Or Not To Amend

HindmanSanchez P.C. *Attorneys at Law • Denver & Fort Collins*
5610 Ward Road., Suite 300, Arvada, Colorado 80002-1310 **Tel** 303.432.9999 **Free** 800.809.5242 **Fax** 303.432.0999 www.hindmansanchez.com



Hindman Sanchez

To Amend Or Not To Amend

Sooner or later most every homeowners association is faced with the question of whether or not to amend its legal documents. Here are some common questions and answers:

1. Are associations legally required to amend their documents? No, but:
 - Directors can be misled as to their duties and responsibilities by relying on outdated provisions.
 - The legal documents may provide certain time limits for notices of meetings that may no longer be practical or required by law.
 - Members may be misled into believing the documents accurately describe members' rights and obligations, legal procedures, etc.
 - Documents may fail to take advantage of liberalized rules regarding meetings, director proxies, participation by members, telephone meetings, mail balloting, etc.
2. What documents will the attorney need to review in order to update the association legal documents?

Verifying legal descriptions in deeds to common area and even units is also a good idea, as incomplete descriptions or typographical errors are often carried forward year after year. The ideal time to correct problems is when the association legal documents are being given a major overhaul. There may be inconsistencies between the map and the Declaration or the legal documents and the deeds. This may require amendments to the map or corrective deeds.

3. What documents should be amended?

The basic legal documents that may need amending are:

- Articles of Incorporation
- Bylaws
- Declaration of Covenants, Conditions, and Restrictions or condominium Declaration (Declaration)
- Rules and Regulations
- Architectural/Design Guidelines and Forms

In addition to the three basic documents (Articles of Incorporation, Bylaws, and Declaration), the attorney should also review the community map (plat map, condominium map, etc.). It is also helpful to provide your attorney with your current rules and regulations as well as any opinion letters that have been prepared regarding any problems for your community.

4. Why should association documents be amended?
 - To eliminate obsolete provisions.
 - To eliminate provisions no longer observed or enforced.
 - To eliminate provisions that conflict with current laws.
 - To eliminate developer language and privileges no longer being used, such as two-class voting or exemption from use restrictions.
 - To improve poorly drafted documents by clarifying ambiguous provisions.
 - To tailor documents to fit the living experience of owners/members.
 - To redo documents to grant the association the necessary powers to operate effectively.
 - To provide for changes in technology (satellite dishes, home office use, etc.).
 - To make documents more "user friendly" - through better organization, a table of contents and descriptive headings, etc.
 - To eliminate or correct mistakes and errors.
 - To take advantage of recent changes of the law.

5. How often should association documents be amended?

Association documents should be reviewed approximately every 5 years and then revised as necessary to incorporate changes in statutory and case law as well as changes in the community.

6. Is it necessary to retain counsel to amend, or can members do it by themselves?

The analysis of association documents to determine whether or not amendments are desirable, and, if so, how the documents should be amended, requires a degree of expertise which can only be provided by legal specialists (i.e, an attorney with extensive experience drafting association documents). Unless an association has such an attorney as a member, and that attorney is knowledgeable on community association law and willing to contribute his or her time to amend the documents, the association should retain legal counsel for that purpose.

7. Can an association save money by creating a first draft in-house?

Attempts by boards or committees appointed by boards to save on attorneys' fees by creating an initial draft of the documents, seldom, if ever, results in any savings. An experienced association attorney can quickly review a set of documents that was drafted some years ago and determine whether they are salvageable or should be scrapped in favor of a more modern format. However, when presented with a draft that purports to update the legal documents, the attorney is forced to read every sentence very carefully and to compare it with his own checklist of current legal requirements. This process can be quite time-consuming.

If an association wants to be helpful in providing its attorney with some suggestions or amendments, it should provide a list of points to cover, such as the number of directors, the length of the term of office, the number of pets, the number of vehicles, etc. In other words, give the attorney the basic facts, or the basic principles, but do not try to draft the actual language. That is what you are paying the lawyer to do.

8. What should it cost to amend association documents?

The cost to amend can vary widely, depending upon the type of community development, the age and condition of the legal documents and the number of drafts and meetings. The fees can be as low as \$500 for a single issue amendment, and anywhere from \$4,950 or higher for a complete updated set of the three basic legal documents.

9. What is better - fixed fee or an hourly rate?

The advantage of a fixed fee is that the association can budget for that amount, and the membership knows what to expect. But fixed fees do not always result in lower fees because attorneys tend to set fixed fees based upon their estimates of how much time it will take at their hourly rate. Most attorneys will include some "cushion" in the fixed fee to protect themselves against unanticipated variables.

Beware of fixed fees that are set unrealistically low, because they may be "loss leaders" intended just to get the association's business, with the expectation that other business will follow for which higher rates can be charged. Like everything else in life, the rule is "You get what you pay for." The hourly rate is not always reflective of how much the job will cost. The "bottom line" should be the total fee charged, regardless of hourly rate, but equally important is the quality of the job and the efficiency of the service.

10. What variables determine the cost of amending project documents?

The following are examples of variables which can affect the total cost of amending legal documents:

- Repeated revisions.
- Multiple additions.
- Word smithing efforts by the directors, committees or members.
- Asking an attorney to explain in writing the reason for a particular amendment or amendments.
- Meeting with an attorney multiple times.
- Asking an attorney to help the board "sell" the amendments to the membership.
- Asking an attorney to write a detailed summary of the amendments for the members.
- Asking the attorney to draft a letter to the members, or a ballot, proxy, notice of meeting to vote on amendments, etc.
- Misjudging the members' desire and willingness to have the project documents amended.
- Being unfamiliar with your documents and not knowing which provisions are creating problems.
- Asking an attorney to prepare a comparison of amended documents to the existing documents.

Boards would be well advised to seek member approval of the amendment concept before committing association funds to the amendment process. Ideally, the association should have enough funds on hand, either through a special assessment or funds “earmarked” for the purpose of amending the documents, before authorizing an attorney to start drafting.

11. Is it better to record amendments to existing documents or revise the entire document?

If the legal documents are reasonably up-to-date and in fairly good shape, only one or two sections may need to be amended. In such case, it is preferable to record some simple amendments rather than to create a whole new document. However, if the documents are in need of multiple amendments, or are extremely outdated (for example, over 10 years old), it is far better to start with a brand new up-to-date set of documents. It is more efficient, and therefore less expensive, for an experienced attorney to provide an up-to-date modern format for the legal documents, tailored to fit the project, than to try to review each and every paragraph of existing documents and decide which paragraphs to keep, delete or modify.

12. What is grandfathering?

An association may wish to amend its documents, but be reluctant to impose new restrictions on current members. For example, an association may wish to prohibit keeping of pets on the premises but will allow members who presently have pets to keep their pets until the members move out, or until the pets die. A “grandfather” clause is used to exempt current owners from a particular rule, for a specified period of time.

13. How long should it take to amend HOA documents?

Three to four weeks is a reasonable time for an attorney to produce an acceptable first draft of updated and amended documents. However, the entire amendment process may take 6 - 12 months depending on the resources allocation, the community involvement and whether mortgage approved is required.

14. What happens after the documents are revised?

The current documents will indicate what vote is required for approval of amendments. While some older documents require a super majority approval such as 75% to 80% of the total membership and first mortgagee (i.e., lender) consent, Senate Bill 05-100 which was signed into law on June 6, 2005, places a cap on how high the percentage of votes allocated to the association may be required to amend the documents. An association’s declaration may provide that it may be amended by the affirmative vote of any percentage that is more than 50% of the votes allocated to the association, but that percentage may not exceed 67%. Therefore, any provision in a current document that requires a percentage larger than 67% is void as contrary to public policy and will be deemed to specify a percentage of 67%. As part of the amendment process, the percentage required for approval of amendments, if greater than 67% in the current documents, should be changed to comply with Senate Bill 05-100 and set a requirement of 67% or a lower percentage; such as a simple majority.

If the association can not obtain the necessary owner approval, there is a statutory procedure available to seek court approval of an amendment to the Declaration. To take advantage of this statute, the association must obtain the approval of at least one-half of the stated owner approval, even if the percentage required in the current documents is greater than 67%; hold two meetings; and, provide at least one mailing to owners of the proposed changes. If this is done, the court must approve the changes unless one-third of the owners, mortgagees or the Declarant files objections with the Court.

If the association documents can be amended either by vote or written consent, the directors have to make a choice as to which process to use. If directors decide to have the vote taken at an annual or a special meeting, then the association must follow the established procedures for noticing and holding a meeting, and conducting the election. This usually involves the use of proxies, with the vote at the meeting being a combination of proxies and votes of members who are present at the meeting. If written ballots are permitted, a form of ballot may be circulated to the members with an appropriate notice indicating what the time frame is for collecting a sufficient number of written ballots, so that the President and Secretary can declare that the amendment has been approved.

15. What can be done to obtain member support for amending documents?

To enhance the chances of a favorable response from the membership to proposed amendments, appoint a committee, broadly based, to solicit input and support from members, communicate regularly with owners and keep them advised of the progress and status of the amendment process.

16. What happens if necessary approval is obtained?

The amended Declaration is recorded in the county real estate records. The original Amended Declaration with the recorder's stamp on it, must be kept with the official records of the association. The Amended Articles of Incorporation are filed with the Secretary of State. A copy of the filed amended Articles of Incorporation and executed Bylaws must also be kept in the association's permanent records. Copies of the amended documents should be provided to all of the members. The old documents must also be kept in the association's archives for historical reference purposes.

17. Authority to amend the Declaration/Ruling of the Colorado Supreme Court Ruling of the Court:

On June 16, 2003, the Colorado Supreme Court issued its decision in the case of Evergreen Highlands Association v West. The decision in this case was as follows: The Court upheld the validity of a 1995 amendment to the declaration of the Evergreen Highlands community.

Additionally, the Court held that even in the absence of an express covenant, the original declaration for Evergreen Highlands was sufficient to create a common interest community by implication, since the declarant deeded common area to the Association and the Association had the power to impose assessments to pay for the maintenance of common areas.

Factors supporting the Amendment of the Declaration:

In finding the amendment adding a covenant to pay assessments valid, the court ruled that the scope of the amendment was within the modification clause of the declaration. The court found the amendment valid based on the following factors:

- The amendment was made according to the modification clause of the declaration (a modification clause allowing owners to "change or modify" the declaration allows for adding new covenants)
- The owner that challenged the amendment knew that the declaration was subject to modification (subject to the consent of 75% of the owners)
- The amendment was reasonable and not burdensome (the Association's current annual assessment is at \$50.00)
- The amendment supported the purposes of the Evergreen Highlands community (maintenance of the common area of the community "undoubtedly enhances" property values)

Background of the Case:

The Evergreen Highlands Community was created in the 1970's and initially did not have covenants requiring owners to pay assessments even though the developer deeded a 22 acre park to the Association. The Association initially used voluntary dues contributed by many owners to maintain the park area and to provide other services. In 1995, over 75% of the owners approved an amendment that added an assessment covenant obligating each owner to pay assessments to the Association. The amendment also made membership in the Association mandatory for all owners and established lien rights of the Association. Currently, and for the past several years, the assessment of the Evergreen Highlands Association is \$50.00 per year. The Court determined that the 1995 amendment was permissible and within the scope of the modification clause that permitted seventy five percent of the owners to change or modify the Declaration.

The modification clause of the Declaration provided as follows:

These covenants shall run with the land and shall bind all parties and all persons claiming under them . . . provided, however, that the owners of seventy-five percent of the lots which are subject to these covenants may release all or part of the land so restricted from any one or more of said restrictions or may change or modify any one or more of said restrictions, by executing and acknowledging an appropriate agreement . . . and filing the same (Emphasis added.)

Appellate History:

Prior to the case coming before the Colorado Supreme Court, the 1995 amendment adding the covenant to pay assessments had been upheld at trial, but reversed by the Colorado Court of Appeals. The Colorado Court of Appeals held, in November of 2001, that adding a new covenant was not permissible under the modification clause of the declaration, because that clause "only allows changes to the existing covenants."

Practice Pointers/What does the case mean for your association?

The ruling of the Colorado Supreme Court in Evergreen Highlands Association v West confirms several practical points:

- All amendments and modifications to a declaration should be made according to the amendment and modification terms of the declaration and applicable state law
- Periodically remind all owners that your declaration is subject to change by following the terms of the declaration or applicable state law
- Periodically remind all owners of various provisions in your declaration
- Amendments that are reasonable and not burdensome are most likely to be held valid, if challenged
- Before raising assessments, educate and make owners aware of the value of association services, and how these services add to property values, quality of life and a sense of community
- Involve owners in budget committees and establishing or changing the goals and objectives of the community

Recommendations:

We recommend that communities with covenants and declarations keep their covenants relevant to their community with periodic amendments or modifications. Additionally, if there are parts of the covenants/declaration that are not working well, those provisions should be amended, in a manner that will be upheld if challenged.

