



Reasons to Amend an Association's Documents

The most common reasons for amending association documents are the following: to delete or modify restrictions that are outdated, ambiguous or unreasonable; to comply with changes in federal, state and local laws or ordinances; to delete or modify provisions inconsistent with the management and operation of the association; to delete provisions regarding the rights of the developer after the developer is no longer in control; to correct provisions that conflict with other governing documents (bylaws, articles of incorporation and rules and regulations); and to remove unlawful restrictions, such as language that violates the Fair Housing Act, pursuant to A.R.S. Section 33-534, for both planned communities and condominium associations.

Because there are several requirements which must be met prior to amending an association's documents, an association should prepare a strategy for amending the documents to assure that they meet the needs of the association and are enforceable.

Mulcahy Law Firm, P.C. has successfully assisted hundreds of associations in the process of amending documents using the following five step plan.

A Five Step Plan for Amending Documents

Step One: Determine what is required to amend the documents.

- The board of directors should check the specific language of the association's documents. Typically, there is a provision in each document which outlines the proper procedures to amend the CC&Rs, articles of incorporation, bylaws and rules and regulations. Most documents require approval of membership to amend. In some *rare* cases, the association's board of directors can amend the documents without the approval of a percentage of the membership. However, the Condominium Act (A.R.S. Section 33-1227(A)) requires an approval of 67% of the votes within the condo association or any larger percentage if the declaration specifies to amend the CC&Rs.
- The rules and regulations can be promulgated and amended in most associations by a majority vote of the board. However, in some *rare* cases, some associations require a vote with approval by a percentage of the membership to amend the rules and regulations.
- The association should consult with legal counsel to assist with determining what is required to amend the documents.

Step Two: Review the documents for changes and draft the proposed changes.

- The board of directors may want to form a committee to research and prepare amendments to the association's documents.
- The amendment committee can solicit the ideas of committee members, board members and owners regarding changes to the documents and draft the proposed changes.



- It is important that the association's legal counsel review the documents and assist in the drafting of proposed changes during this step so that the documents are legally proper and enforceable.

Step Three: Educate and solicit community support of the proposed changes.

- The board and/or amendment committee should schedule a town hall meeting, coffee and/or circulate newsletters and other printed materials to educate and inform the membership of potential changes. The board or committee should also welcome feedback from owners on the proposed amendments.
- The owners' comments should be discussed by the board and/or amendment committee with the association's legal counsel, and final changes to the proposed amendments should be made at this time based upon the owners' feedback

Step Four: Develop a plan and a reasonable time frame for obtaining approval of the proposed amendments.

- The amendment committee and legal counsel should create strategic steps for completion (owner meeting/use of mail-in ballot) with a timeline and proposed dates for voting. Ballots should be mailed to the owners and progress should be evaluated by the board every 30 days.

Step Five: Finalize and record the CC&Rs.

- Once the amendments to the CC&Rs have been approved as specified in the documents, the CC&R amendments must be placed into final form and recorded at the county recorder's office within 30 days of obtaining the requisite vote to become enforceable. Bylaws and rules do not need to be recorded, but should be maintained with the official records of the association. Legal counsel should assist with this process.

Kalway v. Calabria Ranch

A recent Supreme Court ruling may impact a community association's authority to amend its CC&Rs. In *Kalway v. Calabria Ranch*, the Arizona Supreme Court placed restrictions on a community association's ability to create new, affirmative obligations to the CC&Rs via amendment, without obtaining unanimous consent of the owners. The primary issue in *Kalway* is whether the original CC&Rs provided adequate notice to the owners of a potential future amendment. If it did not, such an amendment would require unanimous approval of the membership. The Supreme Court further explained its reasoning as follows:

The restriction itself does not have to necessarily give notice of the particular details of a future amendment; that would rarely happen. Instead, it must give notice that a restrictive or affirmative covenant exists and that the covenant can be amended to refine it, correct an error, fill in a gap, or change it in a particular way.

The original declaration must give sufficient notice of the possibility of a future amendment; that is, amendments must be reasonable and foreseeable.



Arizona Statutory Requirements for Planned Community CC&R Amendments

A.R.S. Section 33-1817(A)

- A. Except during the period of declarant control, or if during the period of declarant control with the written consent of the declarant in each instance, the following apply to an amendment to a declaration:
1. The declaration may be amended by the association, if any, or, if there is no association or board, the owners of the property that is subject to the declaration, by an affirmative vote or written consent of the number of owners or eligible voters specified in the declaration, including the assent of any individuals or entities that are specified in the declaration.
 2. An amendment to a declaration may apply to fewer than all of the lots or less than all of the property that is bound by the declaration and an amendment is deemed to conform to the general design and plan of the community, if both of the following apply:
 - a) The amendment receives the affirmative vote or written consent of the number of owners or eligible voters specified in the declaration, including the assent of any individuals or entities that are specified in the declaration.
 - b) The amendment receives the affirmative vote or written consent of all of the owners of the lots or property to which the amendment applies.
 3. Within thirty days after the adoption of any amendment pursuant to this section, the association or, if there is no association or board, an owner that is authorized by the affirmative vote or the written consent to the amendment shall prepare, execute and record a written instrument setting forth the amendment.
 4. Notwithstanding any provision in the declaration that provides for periodic renewal of the declaration, an amendment to the declaration is effective immediately on recordation of the instrument in the county in which the property is located.

Arizona Statutory Requirements for Condo CC&R Amendments

A.R.S. Section 33-1227

- A. Except in cases of amendments that may be executed by a declarant under section 33-1220, by the association under section 33-1206 or section 33-1216, subsection D, or by certain unit owners under section 33-1218, subsection B, section 33-1222, section 33-1223 or section 33-1228, subsection D, and except to the extent allowed or required by other provisions of this chapter, the declaration, including the plat, may be amended only by a vote of the unit owners to which at least sixty-seven percent of the votes in the



association are allocated, or any larger majority the declaration specifies. The declaration may specify a smaller percentage only if all of the units are restricted exclusively to nonresidential use. The declaration may also provide that the consent of the declarant is required to an amendment during any period of declarant control pursuant to section 33-1243. Within thirty days after the adoption of any amendment pursuant to this subsection, the association shall prepare, execute and record a written instrument setting forth the amendment.

- B. An action to challenge the validity of an amendment adopted by the association pursuant to this section shall not be brought more than one year after the amendment is recorded.
- C. An amendment to the declaration shall be recorded in each county in which any portion of the condominium is located and is effective only on recordation in the same manner as required for the declaration under section 33-1211.
- D. Except to the extent expressly allowed or required by other provisions of this chapter, an amendment shall not create or increase special declarant rights, increase the number of units or change the boundaries of any unit, the allocated interests of a unit or the uses to which any unit is restricted, in the absence of unanimous consent of the unit owners.
- E. An amendment shall not terminate or decrease any unexpired development right, special declarant right or period of declarant control unless the declarant approves.
- F. Amendments to the declaration required by this chapter to be executed by the association shall be executed on behalf of the association by any officer of the association designated for that purpose or, in the absence of designation, by the president of the association.

Rental Restriction Amendments

Over the past few years, there has been a dramatic increase in the number of rental properties in Arizona. Unfortunately, in some instances, tenants do not follow association rules and restrictions and do not maintain the rental property as well as owner occupied properties. Association boards and managers frequently contact our office to request information on implementing rental restrictions in their associations. Set forth below are some suggestions for implementing rental restrictions.

Grandfather Clause

It is our opinion that associations considering adopting a rental restriction may want to consider proceeding with a proposed amendment against future owners. Accordingly, a proposed amendment to the Declaration regarding rental restrictions can contain a grandfather clause that grandfathers all current owners. The clause should state that the grandfathered owners' right to rent their units/lot shall expire upon the transfer of the title (sale) of a lot/unit.



Notify Rental Owners Regarding Liability for Tenants

The association's CC&Rs are a contract between the owner of the unit/lot and the association. Therefore, it is important for the association to notify owners of the property (landlords) of their responsibility regarding their rental unit/lot and their liability for the failure of their tenant(s) to comply with the association's governing documents. Associations should consider levying fines against the owners for violations by their tenants or, in more serious situations, file a lawsuit against owners when the association's documents are not being followed.

Restricting Short-Term Rentals

SB 1350, which passed in the 2016 legislative session, severely limits a city, town or county from prohibiting or restricting the use of/regulating (based on their classification, use or occupancy) vacation rentals or short-term rentals. There are certain limited exceptions; however, in most cases, the exception will not apply to community associations. As a result, associations can no longer rely on local code enforcement divisions to assist in prohibiting short term rentals. Rather, associations now need to rely on their own governing documents. ARS 33-1260.01(A)/33-1806.01(A) allows an association to restrict a member from using the property as a short-term vacation rental so long as the rental time restrictions are in the declaration.

Landlords Must Register Rental Properties with County

On August 6, 1999, the Arizona legislature enacted the Residential Rental Property Registration law. Pursuant to A.R.S. Section 33-1902, an owner of a residential property located in Arizona is required to file a notification form with the county where the residential property is located. The notification form contains the following information: the property owner's name, address and telephone number; the street address of the residential property; and the year the property was built. Owners who do not comply with this requirement after notification and a ten (10) day grace period are subject to a civil penalty of \$1,000 plus \$100 per month for every month the owner is not in compliance with this notification requirement.