

2--What Documents Define and Control My Association?

A Common Interest Community is primarily controlled by its Declaration and CC&Rs. These documents outline the property rights and obligations of the community. These documents are supplemented by the Bylaws. The property covered by the Declaration and CC&Rs is usually defined by maps and plans. These maps and plans contain the physical boundaries of the community. They would also contain information about easements and other obligations not necessarily recorded in the Declaration. Finally, there may be equitable servitudes running with the property that are not recorded in any of these documents.

The condominium Declaration, or an HOA's Covenants, Conditions and Restrictions (CC&Rs) are the primary documents that control the property rights and obligations for Units or Lots within a common interest community. For condominiums, they create the individual pieces of real estate that can be purchased and sold, and they control the rights and obligations of the individual Owners and the Association as a whole. These documents also create the Association that manages the Owners and may contain guidance on how the Association operates and is managed through a Board of Directors.

These documents are recorded in the county and courts take the position that every buyer has read and understands every requirement contained within them. There is no excuse for Owners who have not read the documents; they are binding on the land and the Owners, even if they were not given directly to the Owner. Because recording with the County constitutes public notice, every Owner is deemed to have accepted them when they made their purchase.

The operation of the community, the conduct of the Owners, and the allocation of expenses are all controlled by the Declaration.

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The community should be operated, and Owners should conduct themselves in accordance with the Governing Documents. If you want a different outcome, you need to change the documents to reflect those changes.

Frequently, Associations do not conduct their affairs in accordance with the Governing Documents. Customs and practices that seem fair and reasonable may conflict with the written requirements. At times, the recorded documents are silent on how a community functions and these customs and practices are written within policies and rules adopted by the communities over time. This can be problematic, because these new restrictions and obligations are not recorded with the county.

The general rule, and the way that statutes are written, is that a restriction on property can only be binding if it is recorded, and a new restriction is only binding on a property if it is written and is signed (in front of a notary) by the property Owner who is to be bound. This is known as the "Statute of Frauds" and makes it easier to determine what alleged rights and obligations control a property. But there have been several cases where courts have looked at what equitable rights and obligations should be applied to property to allow homeowner Associations to enforce restrictions where the recorded documents are silent, missing, or flawed. The courts ask: "What is fair?"

Often the Declarations, which do appropriately designate the formation of the Association, will include provisions that would appropriately be in the Bylaws. Examples include stating when the annual meeting must occur, the number of Board Members, how they are elected and removed, etc. This may have occurred historically because some such provisions are provided in statutes, or because Bylaws were not prepared in advance of the Association being created. It may have been that the developer wanted to have a single document that contained all the information necessary for both the property rights and for management of the Association.

The Declaration must contain those provisions that affect a property Owner's rights to use the property. It should contain all

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provisions that deal with what happens to the property and what obligations are tied to the property. Restrictions on use such as prohibitions on rentals, businesses, pets, etc. must be contained in the Declaration. A description of Owners' rights in the event of destruction or condemnation belongs in this document along with provisions on how to amend the document. Some statutes, like the Washington Condominium Act (RCW 64.34) state specific contents that are required in a condominium Declaration.

The Declaration will typically contain a legal description of the property bound by the document. This is often a long list of compass directions and distances that is virtually impossible to understand except by surveyors. Along with every Declaration is a Survey Map and Plans for a Condominium or Plat Map for an HOA ("Maps and Plans"). Maps and Plans are recorded along with the Declaration, usually at the same time (and they will usually have recording numbers that are sequential).

Maps and Plans are essential to understanding what property is bound by the Declaration. For condominiums, the description of the property in the Declaration almost always refers to the plans to show the description and location of each Unit. Deeds for Units in condominiums often only describe the property as a particular Unit number, with no other legal description, such that the only way that the Owner can identify the Unit is by reference to the plans. Note that most condo Declarations contain a provision stating that the actual Unit boundaries are as the building is constructed, not what is shown on the plans. So, if you discover an error, and the boundaries of the Unit are not what is shown on the plans, you still only get what was actually built.

Maps and Plans often contain additional information that may be missing from the Declaration. We find easements and obligations required by the city or county for maintenance that are only on the Map and Plans and are not mentioned in the Declaration. This could be because the county only allowed a subdivision of the property if certain restrictions were placed on portions of the property (like obligations to maintain wetlands, native growth protection areas, retention ponds, etc.). These restrictions would

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apply to the property as a condition of the separation of the land into smaller parcels, required of the developer regardless of what other restrictions may be placed on the property when the community is created with a Declaration. Sometimes for condos it is not possible to know the boundaries of the Units without reference to notes contained only on the Plans.

When a boilerplate Declaration is used to form the community, these prior obligations are often just missed. Often the developer fails to mention them in any of the promotional material to sell the Units or homes. Usually such obligations come to the attention of the Association years later, often by notice of violation from the government.

Just because Declarations may be silent about these obligations, it does not make them invalid. They are in recorded documents and the courts consider every buyer to have read (and agreed to) every document recorded on the property at any time in the past. One recommendation is to insert into the Declaration any definitions or obligations contained in the Maps and Plans or any prior recorded documents, because then all obligations would be in one document. At a minimum, note those obligations and refer the reader to the other recorded document.

There can also be rights and obligations running with the property that are not written down on any recorded document. This generally requires special circumstances and fact patterns that create what are known in the courts as equitable servitudes. These might occur in HOAs where the developer made promises about the community but did not write them into the documents. It can occur when members of the community agree to how something is to be done in the community for an extended period of time, including payment of assessments, even if it was never written down. Equitable servitudes are created by a court to recognize rights or obligations that run with property. This is because of the Statute of Frauds, which is legislation that requires that any obligation running with land must be recorded. Only the court can rule with any certainty that equity (fairness) requires that

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the Statute of Frauds be disregarded, and that unrecorded obligations are binding on property.

If the way that you want the community to operate does not match the documents, then you can and should change the recorded documents to reflect the changes. Virtually all Declarations have provisions within them to allow changes if approved by some stated majority of the Owners. These changes are binding on all Owners if the changes are consistent with the general scheme of the original development. Courts have enforced changes against Owners who voted "no" to those specific changes in many cases but have also invalidated some changes because they found that the new restriction was not consistent with the original plan of development.