

5--Practical Tips on Changing Your Documents

Before making changes to your documents, understand what percentage of Owners must approve the change. It may be easier to get Owners to approve a single purpose amendment; though this does increase the chance of accidentally drafting conflicting provisions. Getting Owner approval will be easier if Owners understand the changes and why the amendment is necessary. Town Hall style meetings, "get out the vote" efforts, and making voting easy will also help get Owner approval. If the Owners vote against the amendment, ask them why and adjust accordingly before trying again. Finally, keep in mind the cost of the amendment and balance against the potential benefits to the community. Many amendments pay for themselves the first time an event like a water leak occurs.

Declarations typically specify the required approval by the Owners of the property necessary to amend them. This is typically a supermajority of 60%¹ (minimum required for Old Act condos), 67% (minimum required of New Act condos² and WUCIOA³), or some other stated majority. Seventy-five percent is common.

Some revisions require every Owner to approve. Statutes and Declarations may state that 100% is required to make certain revisions like changing boundaries or restricting the use of a condo Unit. HOAs require 100% to change an essential quality of the document, which is often not certain until a court rules.⁴ If the wrong percentage is obtained, the amendment will be invalid.

This approval percentage is based on the total number of votes, not just those who cast votes. Voting for most condominiums is based on the percentage ownership interest each Owner has in the community. New Act condos and WUCIOA⁵ communities can have voting percentages that differ from that, and it is common to give each Owner an equal vote.⁶ HOAs are almost always one

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vote for each property owned, though we have seen some with one vote per Owner, regardless of the number of Lots owned.

Bylaws must be amended by the terms stated within them (though the Declaration may have a different requirement.) Bylaws often require the same supermajority vote as the Declaration, but Bylaws can by their own terms allow for a simple majority of all Owners, a majority or supermajority of all Owners present at a meeting (where a Quorum is present), or amendment by the Board alone. Getting the approval of members who appear at a meeting is easier than getting approval from all Owners. Some communities have attempted a single purpose amendment to reduce the required approval for future amendments, hoping to make future amendments easier to pass.

Single purpose amendments are relatively easy to pass. One issue before the membership; one vote. Sometimes only a single paragraph or sentence is changed. That makes it easy for Owners to understand and make decisions. A caution on such simple amendments though; many Declaration amendments have created a conflict with another portion of the document. This becomes problematic because two separate provisions clearly lead to different outcomes for a question presented, and disputes can arise about the intent of the document.

Amendments to shift insurance deductibles to Owners in condominiums are a popular example of a problematic single purpose amendment. The goals are to make Owners responsible for things they do and control, and to shift high deductibles for HOA insurance policies to Owners, who can insure those amounts at low cost on individual policies. (This can be a "win-win" in reducing unplanned repair expenses for the Association).

An amendment that changes how insurance is handled by the Association should touch on sections within the document about how assessments are made (for the deductible or uninsured amounts) and should address the damage and destruction section (on how repair costs are allocated among Owners). Frequently, the new insurance section will clearly allocate the deductible to be an expense borne by the Unit Owner, but the damage and

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destruction section may just as clearly allocate the cost in excess of insurance proceeds to the community as a common expense. It is not possible to reconcile the two. It is important to make sure that a single purpose amendment considers, and is consistent with, the rest of the document.

The problem in getting most amendments passed, and especially a complete Restatement passed, is apathy of the vast majority of Owners. Most Owners do not care about the documents, have not read them, and, unless they have been accused of violating them, do not give them a second thought. These “apathetic many” are the greatest obstacle to successful revision of your documents.

One new twist is that, as of July 2018, your community can change its Governing Statute to WUCIOA. This change provides the community the rights and obligations of that statute and can be adopted with as little as 30% participation, if 67% of the votes agree. For many older condos, and most HOAs, this statute provides better clarification and protections for both Owners and the Association as a whole.

There is an effective process for getting amendments done that require community approval:

1 – Identify Needs and Goals

First, identify the need. Many communities suffer through several events where they cannot understand the documents, or where the documents lead to conclusions they do not like, before considering a change. Some learn about changes other communities have made and like those ideas. Often, they will then seek assistance in trying to determine if there are other changes that they might consider while they are working on the issues they already know. Some attorneys offer a service of reviewing the documents to advise the Association about problems they identify, opportunities for taking advantage of new laws, and generally make recommendations as to the content and readability of the documents. This is often the first step our clients take.

It is difficult to assist a client who does not have some goals or specific changes in mind. Decide if you are looking to make it

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easier to read, looking to provide missing provisions, or looking to change rights and obligations. Knowing what you want makes the process easier and more efficient.

Some communities want to have all risk of living in the community shifted to the Owners who are responsible or affected. Other communities consider this a truly shared community, where everyone shares in expenses and contributes when any individual Owner is affected. There is not a "right" way to balance risk, obligations, and costs among Owners; what you do should reflect the values and desires of your community (not those of the developer or your attorney).

An attorney can make suggestions about possible changes and provide options for addressing particular issues, but Boards or committees should do the final decision making about what will be changed. The attorney can then use the Association's proposed list of changes to redraft the documents.

Exercise caution before adopting a law firm's boilerplate Declaration, which simply matches the firm's most current version of what they provide to other clients or to developers of new communities, with little regard for your particular values, customs and practices which have evolved with your community over time. When this is done, we have seen provisions that Associations relied on for decades lost (for example the ability of Old Act condos to terminate utilities for nonpayment of dues). On the other hand, adopting model language, or statutory language which is on point, may substantially reduce the cost for an Association to significantly improve their documents.

You also need to confirm that any restated documents read in a way that you understand and accomplish your objectives. If you cannot understand the documents, neither will the Owners.

2 – Simplify the Process for Your Owners

Prepare a short summary of the changes for Owners. We advise no more than two pages of bullet point terms to explain the major changes. This includes explaining philosophical changes and pointing out key provisions like rental restrictions or changes in

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insurance deductible allocation. This document summarizes the Declaration changes the way that a voter pamphlet summarizes proposed laws. You need a document that Owners are likely to read, because they often will not read the full Declaration.

3 – Communicate with Your Members

Distribute information to the Owners about the proposed changes. This can be done early in bullet point terms to get feedback from Owners, though some Boards and committees choose not to present a lot of options to the membership. Fewer issues before the Owners means less confusion.

Town hall meetings are an excellent way to gain support for amendments and to make sure that the changes you propose are acceptable to the community. We have seen good success with communities that take a summary of proposed changes, perhaps including those from an attorney review, to the membership in advance of starting the project. This introduces the membership to the process, so it is not a surprise when they are asked to vote and allows them to contribute early on if they want to participate or would object to particular changes. Often having an attorney or Association manager present is helpful. Keep in mind though, that some people distrust attorneys, and would be more receptive to information from Board members or managers they trust.

A second town hall meeting might be conducted after an initial draft of the new document is prepared and approved by the Board. This meeting is generally intended for answering questions, allowing Owners to voice concerns, and to get final opinions from the community prior to finalizing the documents for a vote. Again, this gives Owners advanced notice of an upcoming vote and helps them understand the process and the need for their participation. Having the attorney who drafted the document present to answer questions and provide options for revision of controversial provisions can be helpful.

Sometimes, communities hold a third Association meeting when the actual vote is held. To allow the best chance of a successful vote, collect directed Proxies (like mail in votes) well in advance of

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the meeting. If done properly, this meeting is simply to collect the votes, but it may draw in the apathetic many who ignored the process previously and now are concerned about how the changes may affect them. You will need to explain again all the reasons for the changes. Again, the presence of your attorney and manager may make such a meeting easier.

4 – Get Out the Vote

Door to door requests to vote or personal phone calls to Owners are almost always required. Close-knit condos usually have an easier time getting votes than HOAs, because more people know their neighbors and Board Members, and are more likely to trust that their interests are being taken into consideration. Volunteers who go door to door need not be Board Members but do need to know what they are encouraging their neighbors to vote on.

Collecting written consents or directed Proxies early is important. Most Owners who receive a packet of papers and a ballot, usually more than 50 pages of documents, will set it aside. Even the most responsible Owners may forget about it. Visits, emails and phone calls help remind them. Keep track of those who have responded and stay vigilant in contacting unresponsive Owners.

5 – Be Timely

If you approach the date of your deadline for voting short of approval, the Board usually has the authority to change the voting deadline. Give yourself enough time to make another pass at getting votes from unresponsive Owners. Some communities have open ended voting and take more than a year to collect enough votes to pass amendments. However, when that much time passes, it is harder to assert that the required percentage of Owners agreed to the amendment(s) at one point in time. If a Unit or home sells before the required approval is achieved, the new Owner must cast a new vote. The first vote is void because the person is no longer an Owner. WUCIOA has set a new standard of eleven months to collect written consent for an amendment.⁷

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6 – Adjust as Needed

If amendments do not pass because Owners vote against them, ask for feedback from dissenting Owners and revise to address specific concerns. If influential opposition exists, invite them to the process of editing the documents so that they can better understand the revisions and why they are being made, or so they can help edit to address specific concerns. If you can achieve support from influential members of the community, it may lead to votes from some of the apathetic Owners.

7 – Separate Issues

Often Owners will reject the document because of a single provision or the wording of a few sentences. Sometimes different Owners reject different sections. Voting separately on separate sections could allow you to adopt portions of a restated Declaration, even if you do not pass every provision proposed. Restatements may fail because a few Owners object to different things, even though a majority may agree on every provision.

Decide whether to have a ballot with a single yes/no on a Restatement, or several separate yes/no votes on particular sections or issues. You balance simplicity of a single vote (yes/no) against more likely success of some changes if you vote on each section separately. How the Board chooses to structure the vote largely depends on the level of trust the Owners put into their Board and the process used. The more trust is instilled in the Board, the more likely a single vote is to succeed.

Another reason to have multiple votes is that some amendments contained in a Restatement require different voting percentages. New Act condos may provide that most amendments can be made with a 67% approval of the membership, but others require 90%. Changes in restrictions on use require 90% approval and, if the existing Declaration provides that renting is a “use”, a rental cap requires 90% approval (See *Filmore v. Centre Pointe*). Requiring approval of the Restatement with a single vote would virtually ensure failure because 90% is difficult to achieve. In this kind of case, we would typically recommend at least two separate

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items on the ballots, one for adoption of the rental cap and related provisions and one for adoption of the rest of the Restatement.

8 – Make Voting Easy

Allowing voting by written consent or directed Proxies can reduce the urgency of getting enough Owners to attend a meeting in person or gathering enough votes by a specific date. Make sure that the process used is sufficient, because the easiest thing for a dissenting or unhappy Owner to challenge is the process used to vote. Often Associations will collect votes until enough votes are received to pass, or enough votes are cast in opposition that approval is impossible.

Allow votes to be changed if you are extending the time for acceptance. Your objective is the required approval at the same time. If you allow Owners who did not vote to continue voting, or allow nay voters to vote yea, then you need to also allow yea voters to change their minds.

9 – Balance Cost and Value

So how long will this process take and how much will it cost? The process is daunting and is not inexpensive. You can ask your attorney for an estimate of the cost for doing a Restatement of your Declaration. Some attorneys quote low prices to put your name on their boilerplate Restatements (under \$5,000) and some attorneys quote over \$15,000 to assist with the document revision. You may have a difficult time getting a fixed flat fee, because there are so many variables on the amount of time it will take the attorney to produce a first draft, the number of revisions that will be made, the number of meetings that must be attended, etc. How your community functions with the process is the biggest variable that the attorneys cannot control. Remember that the cost is being spread among the whole community, and on a per Owner basis it may be very reasonable. If you are looking to shift costs, like the insurance deductible, the money saved for a single damage event will often cover the entire cost of revising the documents.

Despite the challenges we described, there is great value to having a set of Governing Documents that are free of conflicts that

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make resolution of disputes difficult or impossible. This is especially important when some disputes are likely to repeat themselves, such as allocating responsibility for water leaks into or from condo Units. We have seen train wrecks where communities have disputes with interpretation of vague, ambiguous, or conflicting provisions, resulting in years of expensive litigation, and warring factions within the community. If you know you have a problem, we suggest that you fix it with a cooperative process rather than find yourself in court one day or sitting in your attorney's office being told that what you want to do or already have done cannot be supported by your existing documents.

The Governing Documents should reflect the values of your community and how the community wants to govern itself. They should be updated to reflect changes in technology and the industry in a manner desired by your individual community. If they can also be made easier to read and to understand, all the better.

¹ RCW 64.32.090(13). ("The declaration shall contain the following...The method by which the declaration may be amended, consistent with this chapter: PROVIDED, That not less than sixty percent of the apartment owners shall consent to any amendment except that any amendment altering the value of the property and of each apartment and the percentage of undivided interest in the common areas and facilities shall require the unanimous consent of the apartment owners.")

² RCW 64.34.264(1). ("...the declaration...may be amended only by vote or agreement of unit owners of units to which at least sixty-seven percent of the votes in the association are allocated, or any larger percentage the declaration specifies: PROVIDED, That the declaration may specify a smaller percentage only if all of the units are restricted exclusively to nonresidential use.")

³ RCW 64.90.285(1)(a). ("...the declaration may be amended only by vote or agreement of unit owners of units to which at least sixty-seven percent of the votes in the association are allocated, unless the declaration specifies a different percentage not to exceed ninety percent for all amendments or for specific subjects of amendment. For purposes of this section, "amendment" means any change to the declaration, including adding, removing, or modifying restrictions contained in a declaration.")

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⁴ *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wash.2d 241, 256 (2014). (“A prohibition on short-term rentals is unrelated to the 1988/1992 covenants and therefore cannot be adopted by a simple majority vote. We do not hold that homeowners can never limit the duration of rentals, as the dissent believes, just that a majority of Chiwawa homeowners cannot force a new restriction on a minority of unsuspecting Chiwawa homeowners unrelated to any existing covenant...”)

⁵ RCW 64.90.235(1)(a) (“The declaration must allocate to each unit: In a condominium, a fraction or percentage of undivided interests in the common elements and in the common expenses of the association and a portion of the votes in the association”)

⁶ RCW 64.34.224(1). (“The declaration shall allocate a fraction or percentage of undivided interests in the common elements and in the common expenses of the association, and a portion of the votes in the association, to each unit and state the formulas or methods used to establish those allocations. Those allocations may not discriminate in favor of units owned by the declarant or an affiliate of the declarant.”)

⁷ RCW 64.90.455(5)(g). (“If the association does not receive a sufficient number of votes to constitute a quorum or to approve the proposal by the date and time established for return of ballots, the board may extend the deadline for a reasonable period not to exceed eleven months upon further notice to all members in accordance with (b) of this subsection. In that event, all votes previously cast on the proposal must be counted unless subsequently revoked as provided in this section.”)