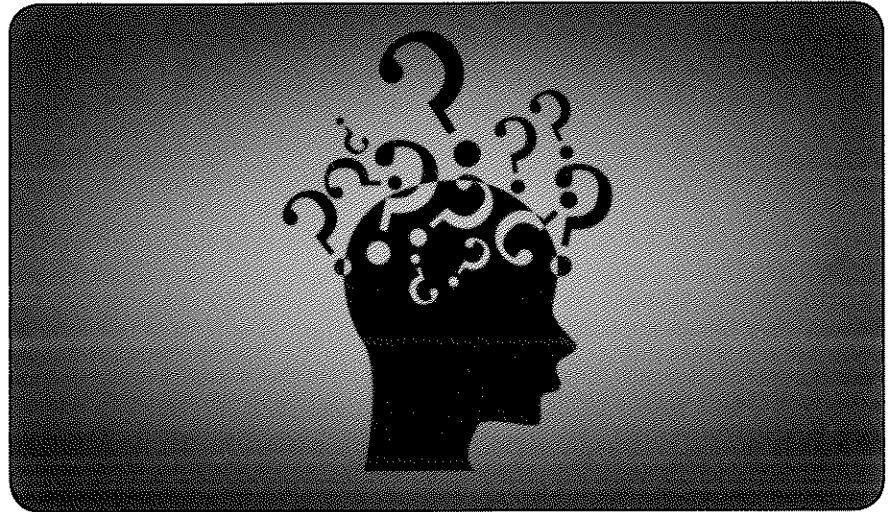


# The Why and How of Amending and Restating Association Governing Documents

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Association boards and managers are routinely faced with governance issues related to outdated and unclear governing documents. Boards faced with such issues should consider a restatement (a complete rewriting) of their association's CC&Rs and bylaws.

## Why Adopt Amended and Restated Governing Documents?

Amended and restated CC&Rs and bylaws can help boards: (1) bring outdated governing documents in line with current laws, e.g., the Davis-Stirling Act, the Corporations Code, fair housing laws, the Federal Telecommunications Act, etc.; (2) clarify ambiguities and inconsistencies in existing documents; (3) establish new and different maintenance and repair responsibilities; (4) include language that is clear and not "legalese;" (5) avoid the extra cost of having to continuously amend the original documents; and (6) incorporate any amendments into a single reference tool.

Specifically, a restatement of an association's CC&Rs and bylaws can help a board adopt lawful, appropriate and commonly used restrictions relating to items such as:

- Assessment collection and assessment increases
- Document enforcement and member discipline
- Architectural guidelines
- Elections/voting
- Director qualifications
- Pets
- Hard surface flooring
- Rental restrictions
- Vehicle and parking issues

## Procedural Requirements for Submitting Proposed Amendments

Civil Code §1363.03(b) requires that voting on proposed amendments to an association's governing documents be conducted by the secret ballot, double envelope procedure used for director elections. This process requires that the board appoint an inspector of election and distribute a secret ballot, two envelopes and voting instructions to all

members at least 30 days in advance of the meeting where the votes will be tabulated, along with a copy of the proposed amended and restated documents. At the meeting where the votes will be tabulated (this can occur at either a board or member meeting), an inspector of election must validate any proxies, determine if quorum has been met, open the ballot envelopes and tabulate the votes.

### Member Approval Requirements

Most CC&Rs and bylaws require that a supermajority of the members approve amendments to the documents, typically between 67% and 75% for CC&R amendments and between 51% and 67% for bylaw amendments. This can be a challenging number of affirmative votes to obtain, especially when an association historically barely or rarely obtains quorum for director elections. And, a restatement will require work on the part of the board and management to combat member apathy.

Tools such as letters from association legal counsel pointing out any major changes from the current documents and the benefits to the association of the proposed new governing documents; town hall meetings to discuss the proposed documents and information posted in the common area can help gain member support and votes for a restatement.

If an association is unable to obtain the supermajority approval required under its CC&Rs, Civil Code §1356 provides that if more than 50% of the association's members voted in favor of the proposed amended and restated CC&Rs, the association may petition the Superior Court to reduce the percentage of affirmative votes needed for the restatement. When making its decision, the Court will take into consideration factors such as whether voting on the restated CC&Rs was conducted in accordance with statutory requirements, whether a reasonably diligent effort was made to

permit all members to vote, and whether the restated CC&Rs are reasonable. If the Court reduces the approval requirement for the restated CC&Rs to the number of approvals actually received, the Court will issue an order affirming the same, and that order must be recorded with the restated CC&Rs.

### Lender Approval May Be Required

Many CC&Rs and some bylaws require that a certain percentage of first mortgagees (and sometimes a certain percentage of all mortgagees) must approve amendments to those documents. While this approval may seem difficult to achieve, a procedure approved in a 2008 California Court of Appeal case (*Fourth La Costa Condominium Owners Assn. v. Seith*) may be available to the association.

In *Fourth La Costa*, the association sent balloting materials to the mortgagees via certified mail with a return receipt requested, informing the mortgagees that a signature on the return receipt would be deemed written approval and consent to the proposed amended CC&Rs unless the first mortgagees returned a ballot within 30 days. A board should consult with legal counsel to determine if the procedure used in *Fourth La Costa* would be appropriate under the association's governing documents.

Amending and restating an association's governing documents is a challenge. However, if the manager lays out a plan and brings together a dedicated team that includes board members, legal counsel and enthusiastic homeowners, it can be effectively accomplished.

#### ABOUT THE AUTHOR



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