

LEGAL FILE

WHY AMEND DOCUMENTS?

*By Neal McCullob, Esq. and
Kenneth M. Clayton, Esq.*

Part I of a Series

Document amending is one of the most exciting tasks for any community association. To help, Common Ground is featuring a two-part series on the subject. Part I begins below. Part II by George Grasser, Esq., which will appear in the March-April issue, will offer some helpful hints on the process of amending.

By choosing to live in an association development, community association residents have the unique ability to restrict certain types of behavior and, more importantly, to require certain standards of property upkeep. The description of those restrictions and standards is contained in the association's documents which can be amended from time to time to conform to the wishes of the association members.

Amendments to documents can be drafted for a whole range of purposes.

For example:

- Limiting sale, lease or other transfer of a unit.
- Restricting parking
- Improving the assessments collection system
- Limiting the size, type and visibility of signs.
- Streamlining a process.
- Defining what is or is not a pet.

In addition to increasing restrictions, amendments can be used to eliminate unreasonable and overly restrictive provisions in association documents. Amendments can be used to provide the board with great ability to deal with future problems, especially where the composition of the occupants is changing. Amendments can also be used to ensure that a quality of a common area cannot be changed.

An association of primarily investors may want to protect their investments against future leasing and renting restrictions. In such a case, an amendment might be drafted to require 100 percent approval of the unit-owners before any leasing

restriction can be placed on units or unit sale or transfer. Conversely, in an association where units are primarily used as residences, the association may want to ensure that the association never develops a transfer nature by requiring 100 percent unit-owner approval before any leasing restrictions are relaxed. With a little creative thinking, amendments can be drafted to achieve a host of goals and to tailor the association to the needs and dictates of its unit-owners.

A word of caution before amending to insert the *super majority* or 100 percent approval requirement-it is imperative that the amendments and their future consequences be carefully thought out. Some associations are prevented from solving serious problems because they cannot get the percentage of unit-owner approval required by their documents for amending the problem provisions. To the degree that unit-owners have faith that their boards are acting in their best interests and will continue to do so in the future, they may want to give the board broader powers, using documents which are easily amended, so that future problems can be effectively solved.

One means of accomplishing broader board power is with *empowering clauses*. These clauses give the board power to regulate an area, but neither force regulation nor prescribe the method of regulation. For example, the power to regulate the use of skateboards and bicycles on the common elements might be provided for use in the event that the skateboards and bicycles become a problem.

Fix Errors. While a majority of amendments may deal with the rules and regulations, there are many other circumstances which make amendments necessary. Condominium documents are complex by their very nature, and errors are not uncommon. Frequently, documents must be amended to correct

unintentional errors. Sometimes the problem is simply a *scrivener's error* (or drafter's mistake), for which some states have a statutory remedy.

Make More Reasonable. A common problem in documents is provisions which are totally unreasonable and/or infeasible. In these instances, the board may determine that it is necessary to rewrite the documents to correct the situation. Or some provisions may be unintelligible; the board in this case may decide to amend these provisions to either

SHOULD WE AMEND?

First ask:

7. Can the problem be solved?
8. Is an amendment the best means of solving the problem?
9. Have other measures been tried and failed?
10. Will the amendment solve the problem?
11. Is the amendment reasonable and enforceable?
12. Can the amendment be more narrowly drafted so as not to be confusing, overburden-some or unrealistic?
13. Does the amendment conflict with any statute, law or municipal ordinance?
14. Are the terms and words used within the amendment sufficiently defined?
15. Do the documents permit such an amendment?
10. How will amendment requirements be made known?