

Hot Topics in Amending Declarations & Bylaws

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Hot Topic to Identify and Address

- 1) Establishment of Use Restrictions and Rules and Regulations
- 2) Enforcement of Use Restrictions and Rules and Regulations
- 3) Architectural Control
- 4) Maintenance (Association v. Homeowner responsibility)
- 5) Establishment of Annual Assessment
- 6) Collection of Assessments
- 7) Special Assessments
- 8) Remote Meetings, Electronic Voting & Electronic Notices
- 9) Rentals
- 10) Nuisance standards
- 10) Pet Restrictions and Emotional Support Animals
- 12) 21-year rule and filing of verified claim

Establish Use Restrictions and Adopting Rules and Regulations

- The Covenants, Conditions & Restrictions (“CC&R”) along with the Association Bylaws set forth the basic framework for operating and managing the Association. The CC&R should contain a section on Use Restrictions setting forth generalized restrictions on the use of the property.
- However, to allow flexibility and the ability to address new or ongoing issues the CC&R should explicitly permit the Board to establish and adopt Rules and Regulations without a vote of the members.
- The Rules and Regulations should set forth clear and definitive rules as to the prohibited uses and alterations of the units or property.
- Common topics: Satellite dish, deck, patio slab, garden, sky lights, pets, car/boat/trailer storage, fences and outdoor hot tubs.

ENFORCEMENT OF USE RESTRICTIONS AND RULES AND REGULATIONS

- Use Restrictions and any Rules and Regulations are only as impactful as the Association's ability to enforce.
- The governing documents should have a provision regarding the ability to levy fines, charge interest and take additional legal action. Many CC&R's only provide an enforcement mechanism for the failure to pay assessments. The CC&R must provide the process of enforcement or permit the Board of Directors to adopt a process of enforcement for violations of use restrictions or rules and regulations.
- An example of enforcement provision is the following "escalation" policy:
 - 1) The owner is provided a notice of violation from the Association along with a stated fine (or without a fine) providing the owner 30 days to remedy the violation.
 - 2) If the violation is not remedied in 30 days the owners receives an additional fine along with a warning the failure to remedy the violation in the next 30 days will result in a referral to legal.
 - 3) If the violations continues for an additional 30 days then a legal notice from an attorney or your HOA manager setting forth the "final" demand.

Architectural Control Committee

- The Association can elect to adopt certain architectural controls.
- Establish and appoint an architectural control committee
 - The Committee can review an owner's proposed changes or additions to the unit.
 - The committee can present recommendations to the Board to either approve or deny the requested change or addition.
- Common topics: Satellite dish, deck, patio slab, garden, sky lights, front doors, etc.

Maintenance: Association v. Homeowner responsibility

- Governing documents adopted prior to the construction of an HOA can often be vague and difficult to interpret or enforce. Maintenance is often set forth in the CC&R as the “Association Responsibility Elements.”
- For example, a CC&R may indicate the HOA is responsible for “exterior” maintenance. The details are important! Who is responsible to maintain decks, windows, patios, landscaping, common or “party” walls, etc.
- Defining maintenance responsibility is critically important for budgeting and establishing annual assessments.
- Example: Water and sewer lines, where to make the distinction between owner responsibility and HOA responsibility.

ESTABLISHMENT OF ANNUAL ASSESSMENT

- The CC&R should explicitly set forth the procedure and authority for the Board to establish the annual assessment.
- Some CC&R's allow the Board to increase the annual assessment by a maximum percentage but require owner approval for a greater increase. For instance, a CC&R can permit a Board to raise the annual assessment by 5% but require owner approval for a larger increase. Limiting the ability of the Board to raise the annual assessment can have unintended consequences if unforeseen expenses arise.
- The annual assessment should be based upon a budget prepared and adopted by the Board.

COLLECTION OF ASSESSMENTS.

- The CC&R should explicitly provide for the collection of annual assessments.
- It is generally advisable the CC&R allow the Board flexibility to collect on a monthly or quarterly basis.
- The CC&R should permit the collection of interest and fines for the failure to timely pay an assessment.
- The CC&R should permit the Association to file a lien and for the recovery of costs and attorneys fees for any action to enforce payment of assessments.

SPECIAL ASSESSMENTS

- The CC&R should allow for the collection of a special assessment separate and apart from the annual assessment.
- Many CC&R's require a special assessment be for the purposes of capital improvements or operating deficits.
- Should the consent of the owners be required for implementation of a special assessment?
 - Some CC&R's require an affirmative vote of members at a special meeting
 - Some CC&R's allow the Board authority to enact a special assessment

Remote Meetings, Electronic Voting & Electronic Notices

- § 504.821 — Regular and special meetings of directors (nonprofit corporations). Under this statute, unless the articles or bylaws provide otherwise, the board may permit participation by remote means: “a board may permit any or all directors to participate ... by or conduct the meeting through the use of any means of communication by which all directors participating may simultaneously hear each other ... A director participating by this means is deemed to be present in person at the meeting.”
- 504.702A — Remote participation in meetings of members (nonprofit corporations). This allows members to participate remotely.
- Iowa Code only permits remote meetings/participation. Be sure to review the CC&R and Bylaws. If the governing documents require “in-person meetings” the governing documents must be followed.
- Ideally the CC&R or Bylaws address remote meetings/participation remotely. However, care must be taken to ensure participants can hear and participate remotely.
 - Teleconference: A person familiar with video meetings should operate and control the virtual meeting.

RENTALS

- The CC&R should address how or if a unit may be leased to a person(s) who are not the owner of the unit.
- The failure to address leasing in the CC&R means the owner may use the unit as a “rental.”
- How to restrict rentals?
 - Establish a “cap” or limit on the number of rental units in the Association
 - Require a signed lease be presented to the Board for approval
 - Require a background check for potential renters
 - Require a unit be owner occupied for a period of time. For instance, require that a Unit cannot be leased for more than three (3) years within any continuous five (5) year period.
 - Short term rental can also be restricted.

Defining a “Nuisance”

- Most CC&R’s have vague nuisance language (e.g., “offensive activity”).
- Secondhand smoke migration from cigarettes and cannabis.
 - Should restrict time, place and manner for smoking
- Odor disputes.
- “No Owner, occupant, guest, or tenant may create or permit any odor that unreasonably interferes with the use and enjoyment of another Lot/Unit or the Common Areas.”
 - Odors considered “unreasonable” include, but are not limited to: Smoke (tobacco, cannabis, vaping) Strong cooking odors, chemical or solvent odors, pet or animal odors
- Noise standards. Music, parties, late night noise
- Need for objective standards (decibel levels, time-of-day limits).

PET RESTRICTIONS AND EMOTIONAL SUPPORT ANIMALS

- Definition of Emotional Support Animal: An animal that provides emotional/therapeutic support to a person with a disability. (Federal Fair Housing Action and Iowa Code Sections 216 & 216.8B.)
- An HOA is a housing provider and must comply with federal and state laws regarding ESA.
- HOA must provide a reasonable accommodation even if animal violates established pet restrictions.
- The HOA may still enforce animal use restrictions (i.e. pet waste, leash regulations, etc.).
- Iowa Code permits HOA to request information from the health care provider.
- Iowa provides a “Form” for the health care provider which can be located on the website for the Iowa Civil Rights Commission
- The “form” itself is not required but an HOA can request all information contained in the form.
 - Verification client has a disability
 - Does ESA alleviate one of more symptoms
 - Did health care provider receive a separate fee
 - ESA letter must be renewed every 12 months
 - HOA can request a letter for each animal.
- HOA may only deny for a “direct threat” or “undue burden.”

FINDING OF DISABILITY AND NEED FOR ASSISTANCE ANIMAL

This form is used to make the required finding pursuant to Iowa Code section 216.8C.

TO BE COMPLETED BY PATIENT/CLIENT/REQUESTER

Patient/Client/Requester's Name: _____

Address: _____

Telephone: _____ E-mail: _____

I intend to request that _____ [name of housing provider] permit me to keep an assistance animal as a reasonable accommodation in housing for my disability. In connection with that application, I am requesting that you, my health care provider, complete this form regarding my disability.

Patient/Client/Requester's Signature

Date

TO BE COMPLETED BY HEALTH CARE PROVIDER/ LICENSEE

1. Does your patient/client identified above have a physical or mental condition that substantially limits a major life activity? ☐ Yes ☐ No

2. Does or would an assistance animal alleviate one or more of the symptoms or effects of the condition?
☐ Yes ☐ No

If yes, what particular assistance does the animal provide to your patient/client?

3. As the health care provider/licensee listed below, have you received a separate fee, additional fee, or other form of compensation solely in exchange for making this written finding? ☐ Yes ☐ No

4. This letter was issued on _____. It will expire after 12 months or at the expiration of the term of your patient/client's rental agreement, whichever is greater.¹

By signing below, you certify you: 1) have had a relationship with the patient/client for at least thirty (30) days; 2) have met with the patient/client in person or by telemedicine; 3) are sufficiently familiar with the patient/client and their disability, prior to writing the finding, to make the finding; and 4) are legally and professionally qualified to make the finding.

Health Care Provider/Licensee's Name (printed): _____

Signature: _____

Date: _____

This document may contain privileged and confidential information and/or protected health information intended solely for use by the recipient housing provider. Please exercise care to avoid dissemination.

¹ Unless you as the health care provider/licensee provide a shorter expiration date.

Bonus: Renewing Use Restrictions

- Restrictive covenants that constitute “use restrictions” automatically extinguish after a period of 21 years pursuant to Iowa Code Section 614.24.
- The Association can extend its restrictive covenants for another 21 year period by filing a verified claim with the County Recorder’s office before the expiration date pursuant to Iowa Code Section 614.25.
- A “verified claim” must:
 - Must be filed in the county recorder's office;
 - Must set forth the nature of the interest;
 - Must set forth the manner in which the interest was acquired; and
 - Must set forth the time the deed, conveyance, or contract was recorded
- However, the term “use restriction” does not apply to “[a]n agreement between two or more parcel owners providing for the sharing of costs and other obligations for real estate taxes, insurance premiums, and for maintenance, repair, improvements, services, or other costs related to two or more parcels of real estate regardless of whether the parties to the agreement are owners of individual lots or incorporated or unincorporated lots or have ownership interests in common areas in a horizontal property regime or residential housing development.” Iowa Code Section 614.25(5)(b).
- The best practice is for the Association to call a special meeting to consent to filing a verified claim.

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