



WHAT ARE GOVERNING DOCUMENTS?

The documents setting forth the rights and duties of an Association and owners are commonly referred to as Governing Documents. Most often this term is intended to include Articles of Incorporation (or Association), Bylaws and the Declaration of Covenants, Conditions and Restrictions (often referred to as the Declaration or CC&Rs). The term also includes, for example, the Voting Rules, Schedule of Fines, Architectural Guidelines, etc. The Davis-Stirling Act at Civil Code §1351(j) sums it up as : "Governing Documents" means the declaration and any other documents, such as bylaws, operating rules of the association, articles of incorporation, or articles of association, **which govern the operation of the common interest development or association.**"

Articles of Incorporation: For corporations, this is generally a brief document with the primarily objective of describing the corporation's purpose. In order to better track Associations, Articles are now required to contain a statement that the Association manages a common interest development under the Davis-Stirling Act, the address of the onsite office (or if there isn't one, the project's nine digit zip code), the front street and the nearest cross-street. The name and address of the managing agent must also be included. The Articles are filed with the Secretary of State. Typically an unincorporated Association has "Articles of Association" which serve the same purpose, but is not filed with the Secretary of State.

Bylaws: The Bylaws set forth the procedural and housekeeping requirements by which the Association operates. The focus should be process, not substance. Typical Bylaw sections address purpose, members, member meetings, election of Directors, Board meetings, committees, Board authority, voting, and amendment. Provisions will incorporate mandatory statutory procedures as well as variations where statutes permit flexibility. The Bylaws are not recorded or filed but an official set should remain with the Association's records.

Declaration of Covenants, Conditions and Restrictions: Also known as the Declaration or CC&Rs, this document typically sets the balance of rights and responsibilities for those with an interest in the property. The rights and responsibilities of each owner, resident, the Association and secured lenders should also be set forth here. CC&Rs are recorded in the County real property records.

Rules and Policies: An Association may adopt policies and rules to educate owners, provide consistency over time and fill in details not covered by the other Governing Documents. The Association is required to have a Collection Policy, Voting Rules, Architectural Alteration Approval Procedures. Additional policies often include Enforcement Policy & Schedule of Fines, IDR/ADR, Parking Rules, Pool Rules, etc. Generally the Board, by majority vote and with prior notice to owners, can adopt policies and rules consistent with the other Governing Documents. There is flexibility here to "fill in the gaps" in or supplement the other Governing Documents.



LEGISLATIVE SUPPLEMENTATION AND PREEMPTION

The legislature has enacted certain statutes to assist associations with old or unworkable Governing Documents. Most of these are located in the Davis-Stirling Act (starting at Civil Code § 1350) and the Corporations Code (starting at Corporations Code §7110). To put these statutes into context with Governing Documents, they should be read with three concepts in mind:

- **Governing Documents Come First.** With one approach, the statute will alert the reader that it applies only if the existing declaration does not address the subject. You may see words such as "Unless the declaration otherwise provides ..." This means you look to the declaration first, and only if it fails to address the subject do you look to the statute for authority. This approach is also used in Corporations Code to fill in gaps in bylaws.
- **The Statute Comes First.** With the other approach, the statute will alert the reader that it preempts the declaration or other Governing Document. You may see words such as "Notwithstanding any provision of the governing documents to the contrary ..." Under this approach, if does not matter what your document says, you follow the statute.
- **No Guidance Provided.** Most of the Davis-Stirling sections do not refer to how they relate to the Governing Documents. This leaves the reader to decide on a case-by-case basis which is likely to be controlling.

Typically documents drafted after enactment of the Davis-Stirling Act in 1986 include the text of many of those statutory provisions. Be cautious, however, with documents more than a few years old. Annually the legislature revises these statutes. Changes are not often readily apparent so especially on matters of importance, the two should be carefully compared.

To prolong the life of revised declarations or bylaws, statutory cross references may be provided in lieu of the full text. Full text may be provided but with a notation such as "see generally Civil Code § xxx." Some revised documents give the Board, without a vote of the members, limited authority to update the document to reflect changes in statutes that would preempt the old declaration provision. Safeguards to this extraordinary Board power may include such requirements as (a) procuring opinion letters from legal counsel or a C.P.A., (b) advance notice to owners of the Board's intended action and the proposed changes and/or (c) unanimous Board approval.

THE ART OF INTERPRETATION: TIPS YOU CAN USE

- Attempt to see the intent of the provision in context.
- View the words in their ordinary sense unless a technical sense or special meaning is expressed. Be sure to check the definitions. Review the definitions section of the DavisStirling Act at Civil Code § 1350.
- Don't bend or push a meaning to cause mischief or absurdity.
- The document should be interpreted as a whole and in conjunction with the other Governing Documents.
- Determine how the association and owners have interpreted the provision in the past.
- Give significance, if possible, to every word or part, and harmonize the parts by considering a particular clause or section in the context of the whole.
- Keep in mind that the legislature, at Civil Code §1370, endorses liberally construing the declaration in order to facilitate the operation of the association.



GOVERNING DOCUMENTS: MECHANICS OF APPROVAL

The most common method for revising Articled, Bylaws and CC&Rs is a vote of the membership. Most *original* documents require member approval by at least seventy five percent of the voting power of the association. The percentage of member approval is not surprisingly one of the sections most commonly changed in the revision process. The preferred percentage of approval depends on the size of the association, the type of document being revised and the extent of apathy.

Amending the CC&Rs, Bylaws, Articles

Civil Code § 1363.03(b) requires that member voting on amendments to the Governing Documents shall be held by double envelope secret ballot. This includes all of the formalities used in election of directors. It requires planning, attention to detail and time.

Don't forget that when the Board endorses or promotes support for the member approval of documents, Civil Code Section 1363.03(a)(2) requires equal no cost opportunities for any member advocating a point of view on the subject. If separate mailings are to be avoided, it is important to advise members of this right and provide a cut off date for inclusion of their material in Association mailings.

Petitioning the Court for Assistance

If all else fails, the Court may afford some relief. Civil Code § 1356 provides a mechanism for court-ordered approval of amendment to the Declaration if certain requirements are met. After petitioning the Court, if the requirements are met, the Court may reduce the percentage of approvals required from a higher percentage down to a simple majority.

For Court assistance in passing changes to the Articles or Bylaws, Corporations Code §7515 provides relief. Under that statute, if the Association determines that it is impractical or unduly difficult to obtain the consent of owners, a petition for relief can be filed with the Court. The Court is given wide flexibility to modify or dispense with the membership approval requirements in the documents themselves.

Adopting or Amending Rules or Policies

Civil Code §1357.110 governs the process of adopting and/or amending rules or policies. Once a draft is ready for Board approval, it is necessary to distribute a copy to members at least thirty days prior to the Board's decision on and final adoption of the document. Owners can use this time to provide input to the Board before any final Board decision is made. If a change to a rule or policy reflects existing Governing Document provisions or statutory changes, there is no need for the 30 day member review period. The Board can simply adopt and distribute the updated policy on its own motion.



THE BALLOTING PROCESS

You've gone through the drafting and review stages. Along the way, you have kept your members informed about the amendment process and invited any interested member to review the drafts and/or submit suggestions. The Board now has a finalized set of proposed amended Governing Documents ready for presentation to the Members for their vote and (hopefully) approval. Consider the following sequence:

- A week or so prior to distributing the documents and ballot materials, publicize (for example, in a newsletter article, posting in a prominent place in the Common Area, member mailing, etc) to the members that the documents are about to be delivered. If anyone would like to submit a Position Paper related to the proposed amendment, they may submit a one page document, to be received by the Association no later than ____ (set a specific due date & time deadline) which will be included in a mailing to all members immediately following delivery of the documents and balloting material.¹
- Appoint the Inspector(s) of Election.
- Mail to each member
 - a copy of the proposed documents,
 - a cover memo generally describing the amendments and the Board's endorsement,
 - include voting instructions²
 - the ballot along with the inner "secret" envelope and the return envelope
- Within a week or so following distribution of the proposed documents and balloting material, if any members have submitted Position Papers, prepare a mailing to all Members which includes those Position Papers.
- No less than 30 days later (assuming enough ballots have been returned to reach any required quorum), hold a duly noticed open Board meeting (for which the agenda was posted at least 4 days in advance and which agenda included the tabulation of the ballots).
 - Have the Inspector(s) of Election open and tally the ballots and report the results to the Board.
- Within 15 days following the tabulation of the ballots, "publish" the results.³

¹ This practice of providing the opportunity for equal access is set forth in Civil Code §1363.03(a)(1) which states that an Association shall: "Ensure that if any candidate or member advocating a point of view is provided access to association media, newsletters, or Internet Web sites during a campaign, for purposes that are reasonably related to that election, equal access shall be provided to all candidates and members advocating a point of view, including those not endorsed by the board, for purposes that are reasonably related to the election. The association shall not edit or redact any content from these communications, but may include a statement specifying that the candidate or member, and not the association, is responsible for that content."

² Be certain to include the deadline by which ballots must be returned, as well as a statement that the Board may extend that deadline in order to achieve quorum.

³ The statute is not specific as to what "publish" entails. Civil Code §1363.03(g) states, in part, "Within 15 days of the election, the board shall publicize the tabulated results of the election in a communication directed to all members. "



GOVERNING DOCUMENT AMENDMENTS: POPULAR SUBJECTS TO ADDRESS

IF YOU ARE AMENDING YOUR DOCUMENTS
AND HAVEN'T ASKED YOURSELF THESE QUESTIONS,
YOU MAY BE MISSING AN OPPORTUNITY

Pets

- Restrictions on type?
- Weight, size and breed limitations?
- Accommodations for disabilities?
- Clear rule making authority?
- Numbers?

Rental Restrictions

- Minimum lease terms?
- Owner occupancy and duration?
- Percentage caps on rentals?
- Owner liability for tenant?
- Option of direct recourse against tenant?
- Assignment of rents or tenant liability for delinquent assessments?
- Grandfather clause?

Vehicles & Parking

- Describing types restricted?
- Examples of vehicle related nuisances?
- Applicability to public streets within subdivision?
- fines? Towing?
- Garage use and storage?
- Driveway use?
- Debris boxes and moving Pods?

Smoking

- Common Area generally?
- Restricted Common Area?
 - Decks, balconies, yards
 - Open windows and doors
- Within the residence?

High Risk Components

- Washing machine hoses?
- Refrigerator ice maker lines?
- Water heaters?
- chimney flues?
- Dryer vents?
- Shut off valves?
- Emergency escape ladders and exits?

Architectural Alterations

- Intrusions into Common Area?
- Time to decide or deemed approved?
- Contractor licenses and insurance?
- Successor liability for predecessor alterations?
- Debris boxes?
- Duration of job?
- Building permits?
- Regulating type of work and timing?
- Regulating access?
- Change order approval?
- windows and door integration?
- Changing nature of aesthetics?

For the Adventurous

- Child day care?
- Half way house?
- Satellite dishes?
- Occupancy limits?
- Non-commercial signs?
- Protocol for leak troubleshooting & repairs?

Bylaws

- Reduced quorums?
- Annual meeting required?
- Member good standing & suspensions?
- Approval of minutes?



DOCUMENT AMENDMENTS CAN HELP MITIGATE THE IMPACT OF SUBPRIME FORECLOSURES

by Glenn H. Youngling, Esq.

Some of the provisions you can add to updated CC&Rs will provide tools to more efficiently deal with the subprime mortgage crisis, and the Board's efforts to collect delinquencies as well as maintain the complex. Subjects you will want to address include:

- Board Authority to Accelerate Assessments.
- Assignment of Rents or Tenant Liability for Assessments.
- Owner Acceptance of Conditions (and Liability) for Alterations or Damage Caused by Predecessor.
- Confirmation of Board Authority to Borrow.
- Obligation to Provide Owner and Tenant Contact Information.
- Authority to Perform Exterior Maintenance or Repairs and Assess the Owner (i.e. bank who took title).
- Reimbursements Assessment Authority Including the Power to Non-judicially Foreclose for Owner Damage to Common Area.



WILL THERE BE A NEW DAVIS-STIRLING AND SHOULD WE POSTPONE UPDATING OUR GOVERNING DOCUMENTS UNTIL IT IS IN PLACE?

The California Law Review Commission is a non-partisan state entity that studies the law in order to discover defects and anachronisms, and recommends legislation to make needed reforms. Traditionally it stays away from controversial issues. The Commission has been given broad authority to review the law of common interest developments and answer the question:

Whether the law governing common interest housing developments should be revised to clarify the law, eliminate unnecessary or obsolete provisions, consolidate existing statutes in one place in the codes, establish a clear, consistent, and unified policy with regard to formation and management of these developments and transaction of real property interests located within them, and to determine what extent they should be subject to regulation.

In December of 2007 the Commission completed its work on a proposed new Davis-Stirling Act. The end product has been introduced as Assembly Bill 1921 (Saldana). Even as it now moves through the legislative process, some additional changes are being made. If it does pass (and is not vetoed by the Governor) the new law will not take effect until January 1, 2010 to provide time for familiarization, transitions and perhaps yet further edits. While the bill has strong support among legislators, there are industry groups and individuals who believe that due to its size and complexity, it has not been sufficiently vetted to become law. In the coming months we will learn if it does indeed become law. For those considering amendment of their CC&Rs or Bylaws, the question is whether or not they should wait until the applicable law becomes clear.

Consider that with a few limited exceptions it was the intent of the Commission to change as little content as reasonably possible. While the Davis-Stirling statutes may be renumbered and the language fine tuned, the fundamental concepts will remain familiar and largely consistent with the old version.

If enacted, this will be a significant step in the history of the Davis-Stirling Act but understand that the Act has been evolving since it became law in 1985. More than a hundred changes have been made over the years and it is likely that annual revisions or additions will continue (although hopefully at a reduced rate).

The new Act if enacted will contain a correlation table that cross references the old statutory numbers with the new. Also, it is likely that there will be a provision that reference in any document to one of the old statutes will be deemed to apply to the new counterpart.

New CC&Rs and Bylaws can be amended according to their terms. The new terms may give the Board authority to update date provisions to conform the old references or text to the new law. If the Board is given such unilateral authority, it will be especially important to educate owners about the process, provide drafts well in advance of any Board decision and permit member input before finalization.

If waiting for the possibility of new law is a significant consideration in deciding when to update documents, balance that against the risks inherent in continuing to rely on documents that may be outdated, ambiguous and/or silent in important areas.