

FAQs

(frequently asked questions)

Amending & Updating Condo CC&Rs & Rules

9/15/20 Edition | by Arthur Meirson & David R. Gellman

This article is provided as a resource for understanding the rules for amending and updating condominium governing documents (CC&Rs, Bylaws, Rules, etc.) in San Francisco, and summarizes those rules as they are understood on the publication date. Updated versions of this article may appear on the firm's website at www.g3mb.com.

California condominium Homeowner Associations (HOAs) are subject to a confusing mixture of regulating forces (including the personalities of the HOA members). There is broad state regulation of condominium HOAs under the Davis-Stirling Common Interest Development Act, and under provisions of the California Corporations Code. There are also internal governing documents (CC&Rs, Bylaws and Rules) which vary from one HOA to the next. And there are local laws, like San Francisco's rent control and permissive occupancy requirements, which can conflict with the HOAs own governance documents.

Because HOA governing documents do not automatically update themselves to stay current with changes in state regulations, or to address changes over time within the Association or in physical aspects of the property, every HOA eventually faces the need to amend and update its governing documents. This article will be helpful in understanding how HOA governance documents may successfully be modified.

Recent legislation has drastically limited the ability of HOAs to restrict Unit rentals, effective 1/1/21, and **requires that all California HOAs amend their CC&Rs to conform to the new rules no later than 12/31/2021**. Failure to comply can result in a civil penalty of up to \$1,000, plus reimbursement of damages incurred by Owners, such as lost rental income (see within).

Effective January 1, 2020, Civil Code §5551 requires that in buildings of **3+ multifamily dwelling units**, California Homeowners Associations are required at least **once every 9 years** to hire a licensed structural engineer or architect to conduct a "reasonably competent and diligent visual inspection" of all decks, balconies, stairways and walkways with a walking surface elevated more than 6 feet above ground level, that are supported in whole or in substantial part by wood or wood-based products, together with "associated waterproofing systems" (flashings, membranes, coatings, and sealants), to determine whether these exterior elements are in a "generally safe condition and performing in accordance with applicable standards."

What Laws & Documents Govern Condominiums?

THE DAVIS-STIRLING ACT

All residential (and mixed-use) condominium properties in California are organized under, and governed by, the **Davis-Stirling Common Interest Development Act** (Cal. Civil Code §4000 et seq.). The **Davis-Stirling Act** by no means regulates *everything* affecting the status and operation of residential Homeowner Associations (HOAs), but its reach is

comprehensive. Wide and weighty subjects like HOA decision-making, finances, dues, repairs, reserves, rentals and re-sales are dealt with in great detail, but so are minutia, such as the installation of electric vehicle charging stations, or the number of allowable pets.

THE CALIFORNIA CORPORATIONS CODE

The **California Corporations Code** sets forth the state's laws governing general corporations and LLCs, nonprofit corporations (like HOAs), corporations for various special purposes (such as co-operative corporations), and unincorporated associations. Small condominium projects originally created with an *incorporated* HOA frequently re-organize as *unincorporated* associations, to extract themselves from some of the more burdensome regulations of the **Corporations Code** (and to stop paying an annual \$800 minimum California Franchise Tax).

CALIFORNIA CODE OF REGULATIONS

The **California Code of Regulations**, Title 10, Chapter 6, Article 12 regulating subdivisions, sets forth a list of "Reasonable Arrangements" to which condominium governing documents and HOAs must adhere, including the requirement that each Unit in a Homeowner's Association is entitled to an *equal vote*, even if HOA dues and assessments are *not* shared equally (§2792.18(a)).

THE UNRUH CIVIL RIGHTS ACT

California's **Unruh Civil Rights Act** and certain federal laws prohibit many types of discrimination in housing, and prohibit such conduct by condominium HOAs. The **Unruh Act** specifically authorizes "senior citizen only" housing under strictly limited circumstances (such as properties of at least 35 dwelling units which have been developed, substantially rehabilitated, or substantially renovated for, senior citizens).

ARTICLES

Articles of Incorporation or Association are found in larger condominium projects, where the benefits of representative governance via an elected corporate Board of Directors and Officers are clear. Corporate **Articles** establish a non-profit entity, registered with the California Secretary of State, and pull governance of the HOA Board and Officers under the provisions of the **Corporations Code** (triggering an annual \$800 minimum Franchise Tax). Smaller HOAs, typically consisting of fewer than 10 residential units, are far less likely to have an *incorporated* HOA, and typically operate as *unincorporated* Associations (as allowed under Civil Code §4080). These HOAs have no **Articles** (and never will).

CC&RS

The **Declaration of Covenants, Conditions and Restrictions (CC&Rs)**, are permanent, recorded covenants containing a legal description of the condominium project, the name of its Homeowner Association, and restrictions on use of various portions of the condominium project by HOA members, their tenants and guests. **CC&Rs** can restate and augment the provisions of the **Davis-Stirling Act**, but they *cannot nullify or over-rule* any of its provisions.

BYLAWS

Bylaws, which deal with HOA *governance* (meetings, elections, voting), typically are required when the HOA is governed by an *elected* Board of Directors. With incorporated HOAs, Bylaws must conform to the requirements of the **California Corporations Code**; in *unincorporated* HOAs, the influence of the **Corporations Code** is more tenuous. In smaller

HOAs, it is quite common for provisions which might otherwise appear in **Bylaws** to be included in the **CC&Rs** instead. **Bylaws** cannot nullify, over-rule or bypass any of the provisions of the **Davis-Stirling Act**, or of the condominium **CC&Rs**.

MAP

A condominium **Map** (also called a Parcel Map or a Final Map) is a large-format drawing prepared by a licensed land surveyor, printed on mylar plastic, and recorded with the City to create a condominium subdivision. It is often confused with a condominium **Plan** (see below) but serves a completely different function. **Maps** are drawings of the entire parcel on which the condominium project is situated, showing lot-lines and the *two-dimensional* footprint of all structures.

PLAN

A condominium **Plan** (also called Unit Diagrams or Exhibit B) is a multi-sheet 8½ x 11 drawing prepared by a licensed land surveyor, attached and recorded as an exhibit to the condominium **CC&Rs**. **Plans** are *three-dimensional* descriptions of the entire condominium project, showing each level of every structure, precisely defining the boundaries of individual units, Common Areas and Exclusive Use Common Areas (parking, decks, storage, etc.). In condominium projects dating back more than 15 years, the **Plan** was not prepared separately, but was instead drawn directly on the condominium **Map**.

RULES

HOAs may create **Rules**, which are less permanent, but legally enforceable *restrictions on use* of various portions of the condominium project. To be enforceable, any **Rule** must be in writing, within the Association's authority, adopted by the Association in good faith, and be *reasonable* (Civ. Code §4350). HOA **Rules** must be *consistent with California law* (including the **Davis-Stirling Act**), the **CC&Rs**, and any **Bylaws**). **Rules** can be revoked by the HOA in the same manner in which they are created.

LOCAL LAWS

Certain local laws, like San Francisco's rent control and tenant occupancy ordinances can, and often do, butt heads with HOA governance rules, skewering HOAs and their members on the horns of seemingly intractable dilemmas. For example, an HOA may wish to restrict the number of adult occupants in a condo unit, but City laws may allow for much higher occupancy if the unit is rented to tenants. San Francisco isn't likely to pay any attention to your governing documents in seeking to advance its political and social agendas.

Does the State Enforce Condo Governance?

Not directly, no. The **Davis-Stirling Act** and the **Corporations Code** create the basic legal framework under which all California HOAs must operate. **CC&Rs**, **Bylaws** and **Rules** expand on that framework by adding more specific regulations. *Enforcement* is left to the HOA, or to individual homeowners seeking to compel their HOAs or their condo neighbors to follow the rules (Civil Code §5975). However, housing discrimination falling under the **Unruh Civil Rights Act** is subject to state supervision and prosecution.

How are HOA Governing Documents Affected by Changes in State Law?

The **Davis-Stirling Act** and the **Corporations Code** are both *dynamic* sets of rules, subject to change every time the state legislature finds reason to do so. And whenever the **Davis-Stirling Act** or the **Corporations Code** are amended, the governing regulations for *every California HOA* adjust in lock-step, even though the condo owners may have no idea that their rules have changed. The state doesn't send out notices to HOAs – owners have to

keep on top of changes in the laws on their own. Because of the dynamic nature of state laws affecting condominiums, *all HOA governing documents – CC&Rs, Bylaws and Rules – become out-of-date over time, and therefore require periodic review and updating.* (Recent legislation requires that CC&Rs or HOA Rules which limit rentals be revised to remove certain rental restrictions by 12/31/21; see below).

How are HOA Governing Documents affected by Physical Changes to the Property?

CC&Rs and Condominium **Plans** are inextricably tied to certain physical aspects of the condominium property – the dimensions of the units and the location and assignment of **Exclusive Use Common Areas (E.U.C.As)** such as “deeded” parking and storage areas. **CC&Rs** and **Plans** must be amended whenever there is a change in the perimeter boundaries of a condo unit, or following certain modifications to, or re-assignment of, **EUCAs**.

When are Amendments Necessary or Desirable?

Articles tend to be highly standardized, one-page forms which, once they have been filed, are practically never amended. However, a small HOA shifting to *un*incorporated status will want to terminate its corporate status with the California Secretary of State.

CC&Rs are amended (i) when changes in the physical layout or design of the units or common areas render the **CC&Rs** incompatible with “the facts on the ground”; (ii) when owners desire to expand or modify their usage restrictions (e.g., to restrict smoking); and (iii) when necessary to conform the **CC&Rs** to periodic changes in the **Davis-Stirling Act**. (Recent legislation requires that CC&Rs which limit rentals be revised to remove certain rental restrictions by 12/31/21; see below). While the California legislature makes minor changes to the **Davis-Stirling Act** nearly every year, in 2014 the **Act** underwent a major re-write. Updating HOA documents to acknowledge those changes is recommended. Generally, **CC&Rs** which are more than 10 years old are suspect; CC&Rs dating back more than 20 years with no subsequent amendments are certainly overdue for updating.

For HOAs with **Bylaws**, amendments are made when owners desire to modify their governance rules (usually to conform to changes in the **Davis-Stirling Act** or the **Corporations Code**).

Maps are rarely amended, unless there is change in the number of condominium units.

Plans are amended whenever there is a change in the perimeter boundaries of the condo units, for example, when a unit expands (horizontally or vertically) into an adjacent area which wasn’t part of its original square footage, or following certain modifications to, or re-assignment of, **Exclusive Use Common Areas** (see, **EUCA Easements**, below).

Rules, often established by simple majority decision, can be quickly and easily modified when the owners desire to change their internal regulations in a less permanent manner than by amending their **CC&Rs** or **Bylaws** (for example, to establish or update a schedule of fines for owner non-compliance).

What are the Risks of Operating with Outdated HOA Governing Documents?

When **CC&Rs** (and **Bylaws**) are more than a few years old, large sections will likely have been superseded by changes in the state’s governing laws, the **Davis-Stirling Act**, impairing their usefulness as a roadmap for resolving any disputes or disagreements, or for enforcing homeowner obligations. It is usually better to remedy this before a dispute situation occurs, rather than trying to deal with both the dispute and the need to update **CC&Rs** (and **Bylaws**) simultaneously.

What are the Most Common Amendments?

Over the years, G3MH lawyers have seen a wide range of amendments to condominium governing documents, some for highly specialized reasons. However, certain trends have emerged. The list below, in no particular order, includes the most common reasons condominium owners have sought our assistance in amending their HOA governing documents:

- Updating documents to track changes in state law
- Modernizing old documents based upon drafting models created for large projects, and which are poorly suited for small HOAs
- Adding smoking restrictions
- Addressing Airbnb-type rentals;
- Clarification of responsibility for window maintenance
- Switching from an incorporated to an unincorporated HOA
- Insurance carrier requirements
- Mortgage lender requirements
- Remodels which expand units
- Transfer of parking or storage spaces

Some of these examples can be accomplished via amendment of HOA **Rules**; others will require amending the **CC&Rs**.

What are the New Rules Governing Rental Restrictions?

Many condo **CC&Rs** and **Rules** limit the number of rentals in the association by imposing a cap on the number of units which may be rented at any one time, and may also require leases to be at least six months or one year to avoid a high turn-over of residents. California Assembly Bill AB-3182 has amended the **Davis-Stirling Act**, effective 1/1/21, *voiding all rental caps more restrictive than 25%, and prohibit any restrictions on lease terms longer than 30 days*. HOAs may still limit rentals up to a maximum of 25% of all Units, and require leases to be at least 30 days, but nothing beyond that. (Accessory Dwelling Units and Junior Accessory Dwelling Units are not counted towards the 25% cap).

All California HOAs with non-compliant CC&Rs or Rules are required amend their governing documents to conform to the requirements of AB-3182 no later than December 31, 2021. Failure to comply can result in a civil penalty of up to \$1,000, plus reimbursement of damages incurred by Owner, such as lost rental income.

The \$1,000 penalty isn't the biggest problem, however. Because AB-3182 *voids* all existing non-compliant rent restrictions, HOAs which fail to amend **CC&Rs** and **Rules** that don't meet the new law's requirements will cease to have *any* rent restrictions. As of 1/1/21, HOAs with lease term requirements longer than 30 days will be prohibited from enforcing *any* lease term limits, and until their governing documents are amended, they will have *no enforceable restrictions on short-term vacation rentals* (AirBnb, etc.)

How to Amend a Condo Plan?

An Amended **Plan** is prepared by a licensed land surveyor. The **Davis-Stirling Act** demands that *every condo owner of record* sign a written attestation approving any amendment of a condominium **Plan**, and requires that *every lender holding a recorded deed of trust or mortgage* against any of the units must sign as well. If a unit is held subject to a life estate, both the life tenant and all holders of remainder interests must sign (Civ. Code §4290 & §4295). The Amended **Plan** is recorded as an attachment to Amended **CC&Rs**.

How to Amend Bylaws?

Bylaws are typically amended by a majority vote of the HOA Board of Directors. However, some changes may also require an affirmative vote of the owners.

How to Amend Articles?

HOA **Articles** are rarely, if ever amended. More typically, a small HOA moving to *unincorporated* status, will need to dissolve the corporation by application to the California Secretary of State's office.

How to Amend CC&Rs?

Under the **Davis-Stirling Act**, amendment of **CC&Rs** requires approval "by the percentage of members required by the declaration and any other person whose approval is required by that declaration." If the **CC&Rs** are silent on the minimum percentage required, an amendment may be authorized by a majority of all owners. (Civ. Code §4270). Voting by secret ballot is required under Civ. Code §5100.

Except in HOAs where a developer retains special rights via two classes of voting membership, an owner is entitled to *one vote for each unit owned*. If a unit is owned by *more than one person*, each such person will be a member of the HOA, but there will still be only *one vote* for that unit.

If a member of the association owns *multiple* units, that person has multiple votes *as an owner*, i.e., one vote for each unit owned. However, if the HOA is governed by an elected Board, owners of multiple units do **not** have extra votes at Board Meetings. (Corp. Code §7211(c).) (Application of cumulative voting rules in electing Board Members typically applies only to larger HOAs, and is outside the scope of this article.)

Since recent legislation (AB-3182) requires that all HOAs amend their governing documents by the end of 2021 to conform to California's new rules on rental restrictions (see above), it would appear that a vote on such an amendment isn't necessary; AB-3182 itself doesn't address this issue.

How to Amend Rules?

If the HOA is governed by an *elected* Board of Directors, HOA operating **Rules** are approved by the Board's majority vote. If the HOA is governed *without* a Board (or if each unit is entitled to one seat on the Board) HOA **Rules** are imposed by majority vote of the *owners*, with one vote allowed for *each unit owned*. **Rules** may be reversed the same way they are enacted, except that there is a special procedure (Civ. Code §4360) under which a minority of owners may demand a special meeting of all owners to over-ride a Board decision; if successfully reversed by the owners, the **Rule** may not be re-adopted by the Board for one year.

There are special notice and meeting (Civ. Code §4360 & §4365) provisions for creating or amending HOA **Rules** relating to:

- Use of units, Common Areas or Exclusive Use Common Areas
- Architectural or esthetic standards governing alterations of units
- Member discipline and monetary penalties
- Delinquent assessment payment plans
- Dispute resolution procedures
- Procedures for reviewing and approving changes to units and common areas
- Procedures for elections

What are EUCA Easements, and how do they Affect the Amendment process?

Exclusive Use Common Areas (EUCAs) – certain defined areas associated with condominium units, such as exclusive decks, parking spaces, storage areas, etc. – are described in the condominium **Plan** and deeded to particular units via easements which show up in title (examine the legal description attached to a condominium Grant Deed for an example). When deeded **Exclusive Use Common Area** are re-assigned, or when such spaces are added or eliminated, in addition to the required amendment of the **CC&Rs**, the deeded easements which appear in the chain of title to the units must also be modified, typically by terminating old easements which are no longer valid, and creating new easements to accommodate the changes. This can require a *unanimous owner vote* to amend the condominium **Plan**, and may trigger *Lender Approval requirements* (see below).

Are Some Amendments Prohibited?

Amendments cannot nullify, over-rule or bypass any of the provisions of the **Davis-Stirling Act** or the **Corporations Code**. For example, amendments cannot be used to place restrictions on the transfer of units, to prohibit leasing units, to prohibit pets, or to bar the installation of solar panels on a shared roof or of electrical vehicle charging stations.

What Amendments can be Vetoed by a Single Vote?

Many amendments to condominium governing documents can be authorized by a majority or super-majority vote, as specified in the **CC&Rs** or **Bylaws**. However, some types of amendments are treated exceptionally:

- Amendments to a condominium **Plan** (requires the signatures of *all record title owners* (and their mortgage lenders).
- Amendments of provisions of the **CC&Rs** which by their own terms require a unanimous unit owner vote, or at least the affirmative vote of all affected owners.
- Amendments where a specific voting percentage is expressly required under the **CC&Rs** or **Bylaws**.
- Amendments in a 2-unit HOA.

Can Owners Force CC&R Amendments?

Yes, but only under highly limited circumstances. The **Davis-Stirling Act** (Civ. Code §4235) allows for a simplified, non-voting amendment procedure solely to update cross-references to sections of the **Act** cited in **CC&Rs** and **Bylaws**. Civ. Code §4275 allows owners and HOAs to petition the court for approval of *reasonable* amendments to **CC&Rs** with less than the percentage of affirmative votes otherwise required under the **CC&Rs**, if the required minimum number of votes isn't obtainable, but *more than 50%* of the votes are in favor of the changes.

When is Mortgage Lender Approval Required?

When condominium units are subject to mortgage loans, the written consent of at least some percentage of the mortgage lenders may be required to amend **CC&Rs**. *Written consent of all mortgage lenders is required to amend a condo Plan*. No lender consent is needed to amend **Bylaws** or **HOA Rules**. While lender consent is usually readily granted, the process can take anything from a few days to several months; each lender is different, and lender policies and personnel change frequently. When a lender consent issue arises in connection with a pending sale, it can be difficult to complete the process within a typical 30-60 day closing timetable.

Are there any State Requirements for Condo Amendments?

Some 5+ unit properties are still required to obtain a "Public Report" from the California Department of Real Estate (DRE) by submitting a *separate application*, with additional fees and expenses. This requirement currently applies *only* to properties where the TIC *seller/developer still owns one or more of the units*. Amending condo governing documents

while a Public Report remains active (five years) may necessitate applying to the DRE to amend the Public Report as well.

How Long does the Amendment Process Take?

Simple amendments (like new smoking restrictions) which do not involve revisions to the condominium **Plan** can be completed very quickly, sometimes within a single business day. Amendments to the **Plan** require the services of a licensed land surveyor; availability of these specialists is limited and a quick turnaround may not be possible. Drafting Amended & Restated **CC&Rs** (& **Bylaws**) is a more involved process, and should include a meeting with the homeowners to review and understand all of the changes. To a large extent, timing will depend upon the availability of the owners to meet, review and vote to approve the changes.

Should I Update my Title Insurance Policy Following an Amendment?

Following certain amendments to condominium governing documents, and especially where the boundaries of units have been altered, or changes have been made to **EUCAs**, owners may wish to contact the company that provided their *title insurance policy*, to see if an update is needed.

What Do Amendments Cost?

City Fees: There is no City review involved in amending most HOA governing documents, including **Plan** amendments, and therefore no charges, other than nominal recording fees. A significant exception, and one outside the scope of this article, would be a change in the *number* of condominium units.

Surveyor: If a Condominium **Plan** requires changes, say, to re-define **E.U.C.As** like “deeded” parking spaces, or to show the new boundaries of an expanded unit, a licensed land surveyor must prepare and sign an Amendment to Plan in proper form. Surveyors’ charges will vary, depending upon the complexity of the required revisions. Working with the surveyor who prepared the original Condominium Plan *may* result in modest cost savings.

Attorney: Goldstein, Gellman, Melbostad, Harris & McSparran, LLP (G3MH) offers condominium amendment services either on a flat-fee or hourly basis, depending on whether we are entirely re-writing your documents, or simply making minor modifications to selected provisions. Our fees vary depending on property size, and are competitively priced; please call for details.

Title: If an update to your title policy is needed, your title company can provide this service.

Lender: Most lenders typically charge from \$200–\$1,200 to approve amendments.

I Want to Amend my Condo Documents Right Away – What do I do Next?

Make an appointment today with attorneys Arthur Meirson or David Gellman at G3MH.

How do I Choose a Lawyer to Assist Me in Amending my HOA Governing Documents?

A Law Firm Assisting in Amending Condominium Governing Documents should offer you:

- A choice of experienced attorneys knowledgeable in all aspects of the amendment process (including easement deeds and terminations where EUCAs are changing);
- A long history of successfully amending condominium governing documents in San Francisco;
- Draft Amended & Restated CC&Rs (& Bylaws) utilizing color highlights to outline sections that have been updated because of changes in state law, unique sections that have been carried over from existing documents, and changes we recommend to put your documents on par with other condo HOAs;
- A meeting with the homeowners to discuss the proposed revisions, and to explain the practical effects of the new language;
- Counsel in all stages of the amendment process, including selection of a competent surveyor; and,
- Outstanding experience in mortgage lender consent requirements.

What Sets Goldstein, Gellman, Melbostad, Harris & McSparran, LLP (“G3MH”) Apart in Condo Amendments?

EXPERIENCE:

G3MH has been a respected member of San Francisco’s real estate community for thirty-five years. Our team initiated its first condominium subdivision in 1998. Since then, we have successfully created new and amended governing documents for over 3,000 condominiums. *G3MH is the only San Francisco condominium law firm providing dispute resolution services to condominium owners and associations, giving us unique insights into steps that can be taken at the amendment stage to minimize future homeowner conflicts.*

SPEED:

Our attorneys work quickly to meet your requirements, particularly when a sale is pending. Amendments which do not involve revisions to the condominium Plan can often be completed in a single business day.

ECONOMY:

G3MH provides its condominium amendment services either on a flat-fee or hourly basis, depending on whether we are entirely re-writing your documents, or simply making minor modifications to selected provisions. We think you will find our fees both affordable and appropriate to the services you will receive. The scope of our work is clearly explained up front, and the costs laid out for you, so that there will be no surprises down the road.

SERVICE:

At G3MH, you will find *attorneys* (not just paralegals) ready and willing to meet with you face-to-face whenever needed. G3MH is a full-service law firm, which means that we can offer additional guidance in landlord/tenant issues, title transfer and vesting, trust and estate matters, easements, tenancies-in-common, property taxes, and other condominium-related matters. No other firm in San Francisco offers the staffing and resources to meet your needs in every aspect of condominium amendments, and beyond.

About the Authors:

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Partner **David R. Gellman** has extensive experience in condominium subdivisions, tenancy-in-common (TIC) formation, landlord/tenant (rent control), real estate litigation, commercial leasing, like-kind exchanges, and estate planning. His companion article, "Managing Small Condominium HOAs" can be found on the firm's website at www.g3mh.com. Mr. Gellman is an accredited instructor with the California Department of Real Estate, and frequently conducts co-ownership workshops for attorneys, real estate agents, and prospective home buyers. Mr. Gellman can be contacted via email at DGellman@g3mh.com, or by phone at 415/673-5600 ext. 229.

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