

How to Amend the Governance Documents.

This article will discuss the general way to amend the Governance documents for the BCLOA. As explained in the first article, the governance documents involve two statutes and three core documents originally prepared in 1991 by the real estate developer of Bear Creek. The first statute is the Colorado Revised Nonprofit Act (CRNCA), pursuant to which the BCLOA Articles of Incorporation (Aol) and the BCLOA Bylaws were passed. Both of these corporate documents refer to the Declaration of Covenants, which is now subject to part, but not all of the Colorado Common Interest Ownership Act (CCIOA).

In general terms, the BCLOA Aol and Declaration of Covenants are self- controlling, which means that the statutes do not supersede or replace an express provision of the BCLOA documents. However, the CCIOA, as well as other Colorado laws, contain provisions that declare certain HOA covenants void as a matter of public policy (meaning they are unenforceable). These include covenants that restrict the use of xeriscaping or satellite dishes, the display of the U.S. flag, and, most recently, fire prevention activities like the removal of live trees. For example, a portion of a tree removal limitation in the current Declaration of Covenants may no longer be enforceable as long as live trees are being removed to comply with a written defense plan issued by a governmental entity. See CCOIA §38-33.3-106.5.

Amending the BCLOA Bylaws: It is relatively easy to amend the Bylaws. Under Article XIII, Section 1 of the Bylaws, once a quorum is established, only a majority of those members *present at or represented by a proxy* at the annual meeting, or a special meeting called by the Directors of the BCLOA, must vote to approve a Bylaw change. Under Article III, Section 4, a quorum is only 10% of the members eligible to vote. This means it takes only 14 members to constitute a quorum; and if only 14 attend the meeting and send a proxy, it takes only 8 votes to amend the BCLOA Bylaws. The Bylaws need to be updated to conform to provisions of the CRNCA and address certain deficiencies, like the failure to handle a tie vote when board members are elected, as was the case in 2015. This will be the subject of a future article.

Amending the Declaration of Covenants: While the Aol and the Bylaws are documents that control the BCLOA as a nonprofit corporation, the BCLOA Declaration of Covenants govern the BCLOA as a “common interest community” (HOA) under the CCIOA. Unless a provision of the Declaration of Covenants is declared void as a matter of public policy by the Colorado Legislature or the courts, the Declaration controls over any conflicting provision of the BCLOA Aol or Bylaws. Because the BCLOA was created before the COIA became effective, not all of the CCOIA applies to the BCLOA. Section 38-33.3-117(1) sets forth the sections that do apply, and currently the Board of the BCLOA believes it is in compliance with all of those sections.

While the Declaration of Covenants has special quorum provisions for use in voting on special assessments, those quorum provisions do not apply to any of the other sections of the Declaration of Covenants. Article IX, Section 3 of the Declaration of Covenants addresses the amendment of the Declaration and states: **“This Declaration may be amended during any period by a majority vote of the owners of the Lots.”** But what does this mean? Does it apply to a majority of the quorum (as in the Bylaws), or a majority of all owners eligible to vote, whether or not they actually cast a vote? Because the Declaration does not have a general quorum provision, or a special provision that applies to

amendments, one could, in good faith, take the position that the quorum provision of the Bylaws applies (a majority of 10% of the members present), or that the CCIOA provisions control. The CCIOA is silent on the issue, neither expressly prohibiting nor allowing a quorum requirement in The Declaration of Covenants.

However, Section 38-33.3-217 of the CCIOA only allows for an amendment to the Declaration by “an affirmative vote or agreement” of 50% of the members up to 67% percent of the members.” (Any requirement greater than 67% is void as a matter of public policy). The BCLOA Bylaws do not mention an “affirmative vote,” but use the phrase “majority vote. “ However, both the statute and the Declaration require a “vote,” which in its simplistic meaning requires the affirmative act of a voting.

The two statutes that govern the BCLOA also require a person to vote. The AoI speaks of owners holding the right to vote (Articles III). The Bylaws speak only of voting or being entitled to cast a vote (Article III, §§2, 3, 4 and 5; Article IV, §§3 and 5; Article V, §2, and Article VIII). The Declaration also speaks of voting (Article V, §2; Article 6, §§4 and 5; Article and Article X, §3).

When members of the BCLOA do not attend the annual meeting to vote in person or they fail to vote by proxy, it can be difficult to meet the requirement that a “majority vote of the members must approve an amendment.” The BCLOA Board has been struggling with the issue raised by the wording of Article IX, Section 3, of the Declaration. In 2015, an attempt to add a quorum provision failed. Had the provision passed the 2015-2016 Board agreed to acquire a legal opinion. Even though the amendment failed, a current member of the Board requested a legal opinion, and though not formal, the firm stated that under C.R.S. 38-33.3-217(1), the *minimum requirement*, under Colorado law to amend a declaration is an affirmative vote of at least fifty percent of the members.

Eighty-four percent of those who returned a ballot or cast a vote in person *voted to approve the 2015 amendment to the Declaration*, but the amendment did not receive the requisite 69 votes (50% of the 137 lot owners eligible to vote) and it failed by only 8 votes. Twelve people who made the effort to vote cast a “no” vote. *Sixty-two members did not vote at all.*

Past and present members of the Board believe democracy is based on the fundamental principle that those who chose not to vote have agreed to abide by the decision of those who take the time and effort to vote. Someone who takes the time to consider a proposed amendment and then casts a “no” vote, has at least participated in the democratic process. The Board recognizes that it must not only provide the members with better information about the governance documents and changes that need to be made to them, it also needs to work harder to “get-out-the-vote.”

We encourage all of the BCLOA members to educate themselves, to discuss any proposed changes to the Bylaws and the Declaration, and to work with the Board to get out the vote, whether they agree with the proposed amendment or not.