

General Hierarchy of Authority for Governing Documents

The general hierarchy of authority for governing documents is a loose one because not all documents address all issues involved in operating a community association.

For operating a community association, the general hierarchy of authority among governing documents consists of:

- Recorded map, plat, or plan (to show the precise location of units, lots, and/or common area)
- Declaration, CC&Rs, master deed, proprietary lease, or occupancy agreement (Note that the master deed, proprietary lease, and occupancy agreement apply only to cooperatives.)
- Articles of incorporation (if incorporated)*
- Bylaws
- Board resolutions

** The bylaws and board resolutions must be consistent with the articles of incorporation. Generally, the declaration would control if there is a conflict with any of the other documents. Resolving such a conflict will depend on the specific facts and legal issues involved.*

Each of these documents is discussed in some detail in the pages that follow.

The higher a document's place in the hierarchy, the greater its legal weight in a court of law. Documents lower in the hierarchy cannot conflict with or change the terms of those above them. Whenever there is a conflict, the higher document will prevail.

Recorded Map, Plat, or Plan

Some form of map is an essential document for a condominium or a planned community. A map or plat or plan is recorded in the County Recorder's office before any lots or units shown on it are sold. The purpose is to show the precise location of each lot or unit, as well as the common areas. The format and content will differ according to local requirements.

A map or plat or plan may help define an owner's or a community's title to property.

On an operational level, the map can help clarify:

- Who is responsible for maintaining a particular piece of property
- Whether a property improvement is properly located

Some states require cooperatives to submit a legal description of the land involved and an architectural drawing.

Declaration, CC&Rs, or Master Deed

An understanding of the declaration, Covenants, Conditions, & Restrictions (CC&Rs), or master deed requires an understanding of the rights of ownership. The terms CC&Rs and declaration are sometimes used interchangeably.

Under Anglo-American common law, the ownership of land has been characterized as a "bundle" of rights. In the absence of any restrictions, the landowner traditionally has the full bundle of rights regarding the use of the property. (For example—right to lease the property, build on it, mortgage it, and occupy it.)

When people buy a parcel of real estate, the bundle of rights is defined in the deed to the property, as it is in the previous deeds for the same parcel. All deeds should be recorded in the land records. These documents are sometimes called the "chain of title."

The provisions in deeds which define or limit the rights of ownership are often called deed **covenants** or deed **restrictions**. The legal community speaks of these covenants or restrictions as "running with the land." That is, they attach and apply to the land, no matter who owns it in the future.

Instead of inserting all of the same covenants and restrictions into each individual deed in a community development, the developer draws up a Declaration of Covenants, Conditions, and Restrictions—or something with a similar name. The developer records this declaration in the County Recorder's office before any of the real estate is transferred to any other owner.

This means that the declaration is in the chain of title for each piece of real estate. Its terms are binding on the real estate itself, as well as on its original and succeeding purchasers. As a result, the declaration defines the bundle of rights of each owner in the community association.

More than any other single document, the declaration brings the condominium or the planned community into existence because it spells out the essential elements of ownership. The condominium or planned community comes into existence when the declaration is filed in the office of the local recorder of deeds or registrar of titles. For condominiums, it is called the **declaration** (of condominium) or the **master deed**. For planned communities, it is called the **declaration of—covenants, conditions, and restrictions**, or **CC&Rs**.

The declaration, CC&Rs, or master deed generally:

- Defines the portions of the development owned by the individual owners and those owned by the community association—if any
- Creates interlocking relationships binding all the owners to one another and to the community association for the purposes of maintaining, governing, and funding the development
- Establishes protective standards, restrictions, and obligations in areas ranging from architectural control to prohibitions on various activities in order to promote harmonious living
- Creates the administrative framework for the operation and management of the community association—although many of the specific administrative details are spelled out in the bylaws
- Provides the mechanism for financial support of the community association through assessments
- Provides for a transition of control of the community association from the developer to the owners

Proprietary Lease or Occupancy Agreement

As we said earlier, a **proprietary lease** or **occupancy agreement** in a cooperative defines the member or stockholder's rights and obligations in relation to the living unit. (In a cooperative, this document serves generally the same purpose as the declaration, CC&Rs, or master deed in other community associations.)

The proprietary lease or occupancy agreement:

- Identifies the premises that the stockholder is permitted to occupy exclusively
 - Defines the term of the lease and the rent (sometimes called maintenance) that is payable by the stockholder
 - Establishes the powers and obligations of the cooperative's board of directors, including assessment rights
 - Defines the events which would result in the termination of the proprietary lease
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Articles of Incorporation

Incorporation may or may not be a legal requirement for a community association. It is essential for cooperatives because they are based on the corporation concept. The articles of incorporation usually spell out the essential elements of ownership for a cooperative because it is a corporation. The cooperative comes into existence when its articles of incorporation are recorded or filed.

The governing bodies of planned communities are almost always set up as not-for-profit non-stock corporations. Condominium associations often are incorporated, depending upon the requirements of the applicable state law. In some cases, condominium associations do not have to be incorporated, because they exist under the authority of a state condominium statute.

A community association's corporate structure is established when a developer sets up the association. The developer files articles of incorporation—sometimes called a corporate charter—with the appropriate state corporation agency. Different states have different names for this agency.

The articles of incorporation:

- Bring the corporation into existence
- Define its basic purposes and powers
- Indicate whether stock will be issued
- Indicate whether there will be a board of directors—and if so, identify the initial board

There are a number of benefits to incorporating a community association. Incorporation:

- May help to limit the liability of individual owners for acts of the community association
- Entitles the community association to the rights granted to all corporations under state law—this could be useful in areas such as obtaining financing, obtaining insurance, or bringing suit against another party
- May make it easier to deal with other parties, such as utility companies or vendors

Bylaws

Bylaws are formally adopted governing regulations for the administration and management of a community association. Planned communities, condominiums, and cooperatives all have bylaws. Sometimes bylaws are developed as part of the declaration. At other times, they are adopted as soon as a corporation is established.

Bylaws address such topics as:

- Requirements for membership in the community association
- Requirements for membership meetings
- Voting rights of member owners
- Procedures for electing the board of directors; qualification of directors
- Procedures for the board of directors to elect officers (In some associations, the association members elect the officers.)
- General powers and duties of the board
- Provision for indemnification of officers and directors—except in cases of gross negligence or willful misconduct

To indemnify and hold harmless means:

- ☐ To exempt an individual or entity from responsibility for claims made against the organization and
- ☐ To reimburse the individual or entity for damages or expenses incurred as a result of such claims

Resolutions

Rules and regulations for all three types of community associations are also established by means of board resolutions. A **resolution** is a motion that follows a set format and is formally adopted by the board of directors. Resolutions may enact rules and regulations or formalize other types of board decisions.

There are four types of resolutions for a common interest community:

1. **Policy Resolutions:** These are resolutions that affect owners' rights and obligations. (For example—rules for the use of common areas and recreational facilities, architectural guidelines, and enforcement procedures.)
2. **Administrative Resolutions:** These are resolutions that address the internal operations of the community association. (For example—operating procedures, collection procedures, and where board meetings will be held.)

3. **Special Resolutions:** These are resolutions stating board decisions that apply a policy or rule to an individual situation. (For example—a decision about an alleged rule violation or authorization of a lawsuit.)

4. **General Resolutions:** These are resolutions which involve routine events. (For example—adoption of the annual budget or approval of a contract.)

The power of the board to enact rules and regulations is generally defined in the declaration and/or the bylaws. Sometimes, the board's right to enact rules is limited by the requirement that the members approve the rules.

Resolutions should be kept in a **Book of Resolutions**. This is an orderly, indexed record of the resolutions adopted by the board. In some communities, it includes the resolutions adopted by the architectural guidelines committee as approved by the board.

If your community association doesn't already do so, consider creating a Book of Resolutions by dividing a three-ring binder into sections by type of resolution. Enter resolutions under their designated category in the order of their adoption. This system makes the use and updating of a Book of Resolutions as simple as possible.

If someone in your office is handy with computer software, you could create a chronological list of numbered resolutions with a topical index.

Note: A resolution cannot conflict with or override requirements in a statute or document higher in the hierarchy of governing documents.

Public Offering Statement

Because it is often accompanied by copies of the governing documents, some people think of the public offering statement itself as a governing document. However, this is a misconception; the public offering statement is *not* a governing document. Instead, it is simply a disclosure statement that provides information on the community association to prospective buyers. It is also mandated by state statute.