

Hope for the Helpless: What to Do When Super-Majority Approval for a CC&R Amendment Seems Impossible

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Do your CC&Rs require approval of a super-majority (67% or 75%) of the membership to amend? Has the board worked tirelessly to obtain at least enough votes to even warrant counting the ballots, only to find that it did not receive the requisite approval? If this sounds familiar, there might be hope for you. Civil Code section 1356 (“Section 1356”) provides a way for associations to petition the court for approval of an amendment when it has failed to achieve the super-majority approval required by its CC&Rs. This is commonly referred to as a “1356 Petition.”

An association may file a 1356 Petition with the court when it has met certain criteria set forth in Section 1356. The association must have held a proper vote on the amendment (pursuant to the governing documents and applicable California law), and achieved approval of at least a majority of the homeowners (over 50%). The association must show that “[a] reasonably diligent effort was conducted to permit all eligible members to vote on the amendment.” (Civil Code section 1356(c)(3).) Such “efforts” can include providing notices to homeowners, extending the voting deadline, and even volunteering homeowners’ time to phone their neighbors or canvass the community for votes. If the association meets these requirements, you may file a 1356 Petition.

A 1356 Petition requires a large amount of documentation, including copies of all of the association’s current governing documents. The association’s attorneys will also need multiple other documents:

1. Any and all documentation that was sent to homeowners regarding the amendment or the vote on the amendment (letters, announcements, postings, newsletters, etc.). (Section 1356 requires production of “copies of any notice and solicitation materials utilized in the solicitation of owner approvals”).
2. A copy of the complete ballot packet that was sent to all homeowners for the vote on the amendment;
3. Any official report on the results of the vote, including any minutes from the meeting where the votes were tabulated;

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4. Statements from any board members or homeowners who made telephone calls or canvassed the community to solicit votes about what they did to encourage homeowners to vote (this is not specifically required – only a showing that the association made a diligent effort to get homeowners to vote is necessary – but statements from volunteers help to show the court the extent of community involvement);

5. A current membership list containing the mailing addresses for all association members. (This is used to prepare a “proof of service” to submit to the court showing that the association provided each member with notice of the petition).

From this documentation, the association’s attorneys will prepare a petition complying with the requirements of Section 1356. The petition will be a fairly substantial document, as the documentation mentioned above will be attached as exhibits. The petition will also contain the timeline of events leading to the vote on the amendment, as well as an explanation of the reason for the amendment.

Once the petition is prepared and verified by the board president, it is filed with the court, along with an ex parte application to obtain a hearing date. The ex parte hearing will be held within the week following the filing of the petition. (“Ex parte” refers to an expedited method of presenting a petition to the court.) At the ex parte hearing, the court will set a method for which the association is to provide notice of the hearing to all the homeowners. Section 1356 requires no less than fifteen days notice of the hearing to be provided to homeowners; however, it is best to request thirty days so that the notices can be mailed. The law requires 10 additional days notice for those members living outside the State of California. At the ex parte hearing the association should ask the court to allow a full copy of the petition to be made available at the association’s management office for homeowner review. As you can imagine, mailing a copy of the petition to each and every homeowner would be extremely costly due to the amount of documentation that needs to be attached. The court will usually set the hearing date for about six weeks out, to give the association time to prepare and send out the notices. It is good practice to confirm the accuracy of the mailing addresses and the ownership of the units or lots to avoid challenges based on lack of notice.

Once the hearing notices are sent out to the association members, a memorandum of points and authorities (legal brief) and supporting declarations will be filed with the court, along with a proof of service for the notice of hearing on the petition. There may also be letters or declarations of opposition that will be filed with the court by homeowners who are against the amendment. Because homeowners opposing the petition will usually be working without the aid of an attorney, opposition may be submitted to the court the day prior to the hearing, so the association has no time to respond. If that is the case, the court may continue the hearing for anywhere from two weeks to a month, depending on the court’s schedule, to allow the association time to prepare a responsive brief addressing specific homeowner objections to the amendment.

Opposed petitions can often be very contentious. Significant opposition can considerably increase the cost of the petition and the time it takes for the petition to be heard. The court may be very lenient on homeowners appearing without an attorney, which can result in the relaxation of typical court procedural requirements. However, even if there is opposition to the petition, the petitions are routinely granted if all the requirements of the statute have been sufficiently met.

If your association balloting on an amendment has failed to achieve super-majority approval, do not lose heart. If the association can satisfy the requirements of Section 1356, the court may approve the amendment without the need for another homeowners' vote. It may take more time and require the association to incur attorneys' fees, but if the proposed amendment lowers the approval requirement for future amendments to a simple majority, you may never have to file a 1356 Petition again!