



U.S. GREEN BUILDING COUNCIL  
**IDAHO CHAPTER**

## **Greening Your CC&Rs: Strategies to Improve the Sustainability of Your Neighborhood**

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### **EXECUTIVE SUMMARY**

Between federal law, state law, municipal ordinances, and private contractual relationships, almost all aspects of our lives are affected by various layers of rules and restrictions. CC&Rs (short-hand for “covenants, conditions, and restrictions”) represent one of the many mechanisms people have developed to regulate the way we behave in a community setting. In general, CC&Rs are intended to contribute to a well integrated, high-quality development; preserve property values, desirability, and attractiveness; and provide for adequate maintenance of common areas and improvements.

Clearly, many people find this arrangement to be valuable and appealing – recent reports estimate that over 60 million Americans live in communities regulated by CC&R documents. Unfortunately, the disheartening reality is that many of the restrictions and requirements prevent the implementation of environmental best practices and actions that save water and energy, reduce toxic pollutant levels, and increase self-reliance. Problematic CC&R provisions include those that: (i) reduce freedom to create water efficient, non-toxic landscaping and engage in food production efforts; (ii) restrict energy efficiency measures and renewable energy production; and (iii) otherwise place vague or onerous conditions on activities conducted in private lots.

The Idaho and Montana Chapters of the U.S. Green Building Council, through contributions from the Bullitt Foundation and the support of various organizations that share a common vision, have crafted this document to give our members and community leaders the tools they need to make targeted shifts in our community management policies. This document will explain the role CC&Rs play in our communities; identify the types of provisions that provide obstacles to sustainability efforts; suggest language that can replace problematic provisions; and describe various strategies for reforming CC&Rs.

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## TABLE OF CONTENTS

I.	THE BIG PICTURE: HOW CC&RS ARE CREATED AND HOW THEY ARE ENFORCED.....	3
II.	PROBLEMS IN NEED OF SOLUTIONS: HOW CC&R LANGUAGE CAN INHIBIT SUSTAINABILITY EFFORTS .....	4
	A. Water efficient, non-toxic landscaping .....	4
	B. Gardening and food production.....	5
	C. Energy efficiency .....	5
	D. On-site renewable energy production .....	6
	E. Catch-all restrictions.....	6
III.	PREFERRED CC&R LANGUAGE TO FACILITATE SUSTAINABILITY.....	6
	A. Common area landscaping.....	7
	B. Individual lot landscaping.....	7
	C. Gardening and food production in common areas and individual lots .....	9
	D. Energy efficiency .....	11
	E. On-site renewable energy production .....	12
	F. Emphasis on sustainability in the Architectural Review Committee.....	12
IV.	REFORMING PROBLEMATIC CC&RS: TOOLS AND ACTION PLANS.....	13
	A. Interpret vague wording in your favor. ....	13
	B. Seek a variance for your particular request.....	13
	C. Amend your CC&Rs to change problematic provisions.....	13
	(1) Recognize important differences. ....	14
	(a) New neighborhoods v. established neighborhoods.....	14
	(b) Common areas v. individual lots .....	14
	(c) Shielded v. visible areas.....	14
	(2) Navigate the amendment process.....	15
	(a) Identify the provision(s) you want to change and draft the proposed new language.....	15
	(b) Seek support from the HOA board. ....	16
	(c) Build your coalition of neighbors to support the transition to sustainability. ....	17
	(d) Follow the CC&R procedures for scheduling the required meetings, setting the voting day/period, and distributing ballots.....	17
	(e) Celebrate success. ....	17
	D. If you are experiencing significant push back from the HOA Board, consider running for a position to change the dialogue internally.....	18
	E. For a broader impact, campaign for state legislation and local ordinances that prohibit sustainability-blocking CC&R provisions. ....	18
V.	CONCLUDING THOUGHTS.....	19

## I. THE BIG PICTURE: HOW CC&RS ARE CREATED AND HOW THEY ARE ENFORCED

The development of most CC&Rs follows a common path. A developer of subdivided land develops the land into individual units and establishes a set of covenants, conditions, and restrictions that will guide the use and occupancy of each individual unit and the common areas. The CC&Rs are recorded in the county records and revealed to purchasers in the title search process.

In the early stages of a subdivision, the developer is in control of maintenance and enforcement. After a certain number of lots have been sold, the developer transfers the management authority to a homeowners' association ("HOA"). HOAs are democratic structures where community residents can vote and be elected to the HOA Board of Directors, the entity that oversees the enforcement of the rules and tend to the general needs of the community.

The HOA Board of Directors has the authority to enforce the terms of the CC&Rs and collect assessments from homeowners to pay for common area management and other shared expenses. In the case of rule violations, HOA Boards can assess penalties and resort to the courts to enforce the provisions. In many cases, fellow homeowners also have the right to seek judicial enforcement of what is essentially a private contract between homeowners.<sup>1</sup>

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<sup>1</sup> Lawsuits involving CC&R enforcement often involve disputes over the meaning and scope of individual provisions. The Idaho Supreme Court has explained the legal framework as follows:

Idaho recognizes the validity of covenants that restrict the use of private property. When interpreting such covenants, the Court generally applies the rules of contract construction. However, because restrictive covenants are in derogation of the common law right to use land for all lawful purposes, the Court will not extend by implication any restriction not clearly expressed. Further, all doubts are to be resolved in favor of the free use of the land.

In applying the rules of contract construction, the court analyzes the document in two steps. Beginning with the plain language of the covenant, the first step is to determine whether or not there is an ambiguity. . . . [A] covenant is ambiguous when it is capable of more than one reasonable interpretation on a given issue. Ambiguity is a question of law subject to plenary review. To determine whether or not a covenant is ambiguous, the court must view the agreement as a whole.

The second step in contract or covenant construction depends on whether or not an ambiguity has been found. If the covenants are unambiguous, then the court must apply them as a matter of law. . . . Conversely, if there is an ambiguity in the covenants, then interpretation is a question of fact, and the Court must determine the intent of the parties at the time the instrument was drafted. To determine the drafters' intent, the Court looks to the language of the covenants, the existing circumstances at the time of the formulation of the covenants, and the conduct of the parties.

*Pinehaven Planning Board v. Brooks*, 138 Idaho 826, 829 (2003)(quotations and citations omitted). The Montana Supreme Court issued a similar holding in *Micklon v. Dudley*, 339 Montana 373, 376-77 (2007). If you are involved with disputes over CC&R enforcement, seek the advice of a licensed attorney.

Due to the private nature of CC&Rs, federal, state, and local governments tend to play a limited role in their development and enforcement. However, these entities have some direct and indirect impacts on subdivision regulation and CC&R content. For example, federal law prohibits certain types of discrimination in residential real estate transactions, regulates pollutants, and provides low income programming and disability access requirements. State law impacts HOA formation, governance, and financial issues, and some states are becoming more involved in energy and water issues (discussed below). Cities and counties focus on shaping growth patterns through comprehensive planning, zoning, and infrastructure management, and many municipal governments (including those in Idaho and Montana) instruct subdivision developers to include certain language or requirements in the CC&Rs.<sup>2</sup>

While great potential exists for local governments to use their planning authority to improve the sustainability of neighborhoods through CC&Rs, the public must demand action to create the political will to enact new ordinances. In the meantime, private parties can seek to work within or change their CC&Rs through the private contracting process. That process is what this document focuses on – what YOU can do in YOUR community.

## **II. PROBLEMS IN NEED OF SOLUTIONS: HOW CC&R LANGUAGE CAN INHIBIT SUSTAINABILITY EFFORTS**

Our members gather frequently to share ideas and experiences related to individual and collective actions that improve the quality of our built environment. Increasing levels of frustration have been expressed over the constraints inflicted by CC&Rs that tell you “no” when you are working towards a more sustainable livelihood, home, and neighborhood.

To assess the situation, we reviewed approximately 100 sets of currently applicable CC&Rs from neighborhoods across the states of Idaho and Montana. As suspected, many of the provisions present significant obstacles to sustainability. What follows is a review of the various types of problematic provisions.

### **A. Water efficient, non-toxic landscaping**

More people are realizing the value of replacing non-native, water intensive species of grass, trees and flowers with native and/or drought tolerant species that require less chemical inputs to thrive. Some seek to eliminate grass all together. CC&R provisions that can interfere with the ability to increase water efficiency and reduce landscape-related toxins – in one’s own yard and in the common areas – include:

- Strict mandates on the amount and location of sod or hydro-seeded grass
- Specifications of the number, size, and type of trees and bushes

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<sup>2</sup> Many subdivision ordinances condition approval of the subdivisions upon favorable review of the draft CC&Rs, and some require or recommend various substantive provisions. For example, Garden City, Idaho’s “Sustainable Development Provisions” establish a point system for new developments where two points are awarded to developments that allow solar collectors in the CC&Rs. *Garden City Code* § 8-4G-3.

- Required sprinkler systems and usage requirements
- Prohibitions against “non-living” materials such as rock structures or rain barrels
- Giving “veto” power over landscaping plans to a committee with broad discretion

## **B. Gardening and food production**

More people are pursuing urban farming and gardening for reasons associated with personal satisfaction and economic benefits. Growing our own food improves the self-sufficiency of our community, gives us control over the chemical inputs, and provides opportunities to create memories with our loved ones. While CC&R provisions that outright ban gardening are rare, several provisions can inhibit some aspects of home food production:

- Restrictions on the location, size and appearance of “outbuildings” or other structures, which could prohibit greenhouses and chicken coops
- Categorical prohibitions against keeping or raising farm and production animals, including poultry, goats, rabbits, bees, etc.
- Restrictions on structures like raised plant beds
- Restrictions on keeping and storing tree clippings, plant waste, and compost piles
- Requirements that garden equipment be stored out of site
- Limits on commercial use of property
- Restrictions on fencing, trellising, or wall construction
- Mandates on specific size, style and color of roofing material that effectively ban rooftop gardening

## **C. Energy efficiency**

Many energy efficiency measures are taken during the construction phase or focus on the interior of the house, so CC&Rs often do not have a lot of influence. However, some provisions have a direct negative impact on energy efficiency (and these effects are in addition to the energy impacts of policies that prevent water efficiency):

- Mandates that outside lights be on from dusk to dawn or sunset to sunrise every day
- Bans on exterior clothes lines and similar equipment

## D. On-site renewable energy production

Not all types of renewable energy production are available on the home-scale or appropriate in all locations. Yet for those locations with high potential, various CC&R provisions can get in the way:

- Categorical prohibitions against exterior “energy production devices” such as solar panels and small-scale wind generators
- Onerous approval conditions for exterior energy production devices
- Mandates on specific size, style and color of roofing materials

## E. Catch-all restrictions

In addition to explicit restrictions, CC&Rs usually have an additional “catch-all” prohibition against creating “unsanitary, unsightly, or offensive conditions” and creating “nuisances”. The meaning of these terms vary from person to person, and what may look like a wise, beautiful desert landscape and home vegetable garden can look “ugly” or “weird” to someone else. In these situations, homeowners may not know what they can and cannot do, and may only realize that they are violating the rules (i.e. offending a neighbor) after work has already begun.

## III. PREFERRED CC&R LANGUAGE TO FACILITATE SUSTAINABILITY

The above sections described various provisions in CC&Rs that operate as barriers to sustainability. When pursuing changes to your CC&Rs, it is important to keep in mind that establishing clear standards and maintaining a certain level of control over community character is a legitimate goal for an HOA. Studies have shown that people actually like the concept, but find dissatisfaction in restrictions that seem to make no sense (at least to them). Thus, the goals for amendment should be to honor and respect the functionality of HOAs and CC&Rs while allowing individuals to improve the sustainability of their livelihoods, households, and communities.

Proposing amendments is your chance to change the negative tone of the CC&Rs. Eliminate problematic restrictions and/or craft provisions that explicitly allow certain actions and provide flexibility to adapt to evolutions in technology, regulatory requirements, and community needs. For example, instead of banning greenhouses, chicken coops, solar arrays, and clotheslines (or, alternatively, frightening those who prefer the status quo by removing *all* oversight), the CC&Rs could provide a menu of acceptable designs that will ensure the attractiveness and relative consistency many people desire. Some advocates for CC&R reform think that this positive approach improves the overall tone of the community, increases respect for the “institution”, and allows individual expression.

To help guide these important changes, the following sections provide suggested CC&R provisions that can take the place of the types of problematic provisions discussed above. The intention behind these suggestions is to help homeowners, HOA board members, and developers as they pursue reformation of the CC&Rs. The suggested language is *italicized*

and provides various levels of “freedom” or “force” that can be suited to various community needs. Some content is placed in [brackets] to indicate options for modifying the provision.

The spectrum of options provided by these suggestions should be modified as appropriate for each individual community. If any legal advice is needed to navigate this process, a licensed attorney should be contacted.

### **A. Common area landscaping**

HOAs charge fees to maintain the common areas, so any actions that can lead to cost savings should be of great interest to homeowners. Specific language on landscaping is included in the “Individual lot landscaping” section below, but the following provisions can be used to guide HOA maintenance activities from a broader perspective.

- Require the HOA to take actions to reduce water needs and chemical inputs on common areas.
  - *The HOA Board shall implement community-scale water conservation and chemical reduction projects in the common areas. The HOA Board shall minimize the use of irrigation water and the need for chemical inputs by emphasizing native species in all common area landscape plans.*
    - *Species selection shall be based on recommendations from the State Native Plant Society or similar organization.*
    - *The HOA Board shall place educational signage in appropriate locations to emphasize the benefits of the selected species on the local ecosystem.*
    - *The HOA Board shall use currently available best practices for non-chemical fertilization and weed and pest management [as provided by State Agency or Local Organic Nursery].*
- Allow homeowners to participate in the appearance of the common areas.
  - *The HOA Board encourages residents to take an active interest in the appearance and water efficiency efforts on the grounds. Accordingly, owners may plant any of the following shrubs and plants in the following common areas:*
    - [list of native or xeric species, or reference to third-party list].
    - [list or map of common areas (i.e. open space, road borders) where resident planting is permissible]

### **B. Individual lot landscaping**

Limitations or requirements on the types, sizes, and amounts of grass, flowers, trees, and bushes that can or must be planted and maintained provides consistency of appearance, but they leave homeowners with very little opportunity to reduce water consumption, express their individuality, or provide natural habitat for native birds, insects, and small mammals.

- Create general policies that encourage water efficient and native landscaping.
  - *Homeowners are encouraged to design, build, and maintain landscaping in such a way as to cause the minimum possible disruption to the surrounding natural environment.*
  - *To encourage the efficient use of water and reduce the need for chemical inputs, homeowners are encouraged to landscape with native or drought-tolerant species, including but not limited to [those plants listed by the State Native Plant Society] [the following types of native or drought-tolerant species]:[list]*
  - *Non-living materials, including but not limited to rock and rock structures, are permitted as features of a water-efficient landscape.*
- If the community desires a grass requirement, only require the minimum amount needed to accommodate the need for consistency and provide options for native or drought-tolerant species.
  - *To ensure a consistent appearance in the community, Homeowners shall provide for at least two feet of grass along the edge of sidewalks and driveways.*
  - *In fulfilling the area requirements for grass, homeowners are encouraged to plant species that are native to this region or drought-tolerant, including but not limited to [species of grass listed by the State Native Plant Society] [the following types of grass]:[list].*
- Allow cisterns, rain barrels, and other water collection devices to the extent allowed by applicable law.
  - *Owners may use cisterns, rain barrels, and other water collection devices to store and hold rainwater [provided that no such devices are visible from the street.]*
  - *Roofs and other structures may be designed to collect rainwater with drainage to cisterns, rain barrels, and other water collection devices.*
- Establish guidelines for fertilization and weed and pest management that reduce chemical inputs and related pollution.
  - *Homeowners shall use currently available best practices for non-chemical fertilization and weed and pest management [as provided by State Agency or Local Organic Nursery].*
  - *Homeowners shall strive to maintain their landscapes in a water-wise, organic manner without the use of non-natural herbicides, pesticides, or fertilizers. The following practices are encouraged: [see standards for Community Garden Committee, above].*
  - *Organic fertilizers and weed and pest management products and techniques are recommended.*

- Consider requiring compliance (or aspirational compliance) with organic certification programs and strictly limiting chemical inputs.
  - *All landscaping and gardening shall be designed and maintained to [strive to] meet or exceed the standards set by the USDA's National Organic Program for organic procedures and processing [, provided that actual certification is not required].*
  - *Use of potentially hazardous or toxic substances for fertilizers, herbicides, or pesticides is prohibited in landscaped areas of the Property.*
- Enable awareness of treated areas.
  - *All areas treated with chemical and potentially toxic herbicides, pesticides, and fertilizers must be posted 48 hours in advance of the application, with signage remaining a minimum of 48 hours following the application, depending on the re-entry time specified on the pesticide label or MSDS sheet.*

### **C. Gardening and food production in common areas and individual lots**

Gardening and food production can be done on the individual and community scale. At a minimum, each family should be allowed to produce their own food in a reasonable location. In some neighborhoods, community gardens in common areas could allow individual landowners to share resources.

- Designate certain portions of common areas for community gardens and specify how such gardens should be managed.
  - *The following areas have been designated for community garden development: [list of designated areas].*
  - *Any homeowner who desires to share in the development and maintenance of the Community Garden must join the Community Garden Committee. The responsibilities of the Community Garden Committee include: (i) developing the appropriate method of dividing land among Committee members and/or garden species; (ii) the roles and responsibilities of each Committee member; (iii) the appropriate method of determining how the harvest is to be divided among the Committee members; (iv) the appropriate fee, if any, for participation in the Community Garden Committee. All decisions of the Community Garden Committee are subject to review by the HOA Board.*
  - *The Community Garden Committee shall strive to maintain the Community Gardens in a water-wise, organic manner without the use of non-natural herbicides, pesticides, or fertilizers. The following practices are encouraged:*
    - *Sizing the garden appropriately to meet the needs of the community without creating waste.*

- *Maintenance of species diversity, elimination of monocultures, and proper spacing and rotation of plant species to reduce the buildup or effect of pest organisms*
  - *Utilizing plant species and varieties with natural resistance to diseases and pests*
  - *Use of groundcover, cover crops, and mulching for weed reduction, water retention, winter production and root zone improvement*
  - *Hand weeding, trimming, mulching, and debris removal*
  - *Proper timing and use of water and fertilization to eliminate scarcity and waste; utilization of drip irrigation systems.*
  - *If it is determined that pesticides, herbicides, or fertilizers are needed, the following criteria shall be used in determining the appropriate strategy: (i) least disruptive to natural controls; (ii) least hazardous to human health; (iii) least toxic to non-target organisms; (iv) protective of wildlife and the native habitat; (v) least damaging to rivers, streams and the natural environment; (vi) most likely to produce a permanent reduction in the environment's ability to support target pests; (vii) cost effectiveness in relation to resource constraints in the short and long term; (viii) consideration of cultural, biological and mechanical solutions; and (ix) evaluation of prior treatments and successes of those approaches.*
- Enable homeowners to grow food in their yards, or in certain portions of their yards.
  - *Homeowners are permitted to use all portions of their property [including rooftops] [excluding the front yard visible from the street] for food production. No restrictions shall be placed on the types of species a homeowner is entitled to plant.*
  - *If a homeowner chooses to have a garden, such garden shall be properly cared for and maintained. All gardens shall be properly prepared for winter to prevent unsightly appearance and enhance productivity for following seasons.*
- Encourage water-wise, organic methods in personal gardening.
  - See standards for “Community Gardens” above.
- Enable homeowners to directly engage in the local food economy.
  - *Homeowners are permitted to engage in commercial activity related to food cultivation, including but not limited to the purchase and sale of plants and produce, provided that such activities take place at reasonable hours and do not cause unreasonable traffic in the Property.*
- Allow greenhouses, perhaps limited to certain areas of the property and/or subject to specific architectural standards.

- *Homeowners are permitted to construct greenhouses to assist with food production [in areas of the lot not visible from the street], [subject to the following architectural standards]:*
- Architectural standards for greenhouses can include:
  - Dimensional requirements
  - Listing of appropriate materials
  - Mandatory code compliance and industry standards for strength and HVAC
  - Requirements to use only for growing food or living plant materials
  - Limitations for personal use only (or requirements to obtain express authorization to use commercially)
- Allow compost bins and yard waste piles in appropriate locations.
  - *Disposal of food and yard waste and other compostable materials in composting bins and yard waste piles is encouraged [in areas of the lot not visible from the street], provided that homeowners use best practices to maintain such bins and piles in a manner that prevents odors and does not encourage pests.*
- Allow farm or production animals to the extent allowed by applicable city or county code.
  - *Homeowners are permitted to raise farm or production animals to the extent allowed by the City, provided that such animals are kept in clean and healthy conditions [and located in an area of the lot not visible from the streets].*
  - *No farm or production animals may be bred or maintained for commercial purposes without prior written approval from the HOA Board, provided that such approval shall not be unreasonably withheld.*

#### **D. Energy efficiency**

Most energy efficiency measures are internal or integrated into the building design during the home construction phase, so CC&R language tends to be minimally intrusive on a homeowner's freedom. Clotheslines tend to be the most regulated activity, although other areas could benefit from more flexibility.

- Provide flexibility for lighting.
  - *The use of occupancy or motion sensors for outdoor lighting is encouraged to enhance safety while minimizing energy use.*
  - *Homeowners are encouraged to reduce energy consumption by using energy efficient outdoor lighting and activating lights between sunset and sunrise only [if used at all].*

- Remove mandates on outdoor lighting schedules.
- Encourage efficient HVAC techniques.
  - *Passive and neutral techniques for ventilation and cooling are encouraged.*
- Eliminate prohibitions on clotheslines, or craft only those restrictions necessary to address modesty concerns.
  - *Outdoor drying of laundry is permitted [so long as clotheslines and related structures are not visible from the street] [provided that laundry is brought inside as soon as possible after drying].*
  - *Homeowners using outdoor clotheslines are encouraged to use the retractable models.*

### **E. On-site renewable energy production**

- Allow the HOA Board of Directors to establish community energy generation.
  - *The HOA Board of Directors is authorized to designate a portion of the Common Area for renewable energy generation, negotiate net metering and/or purchase and sale agreements with the appropriate utility company, and otherwise determine the appropriate use of generated energy.*
- Reduce or eliminate restrictions on homeowner use of renewable generation devices.
  - *Rooftop renewable energy collectors or generators may be used [so long as the structures are integrated into the overall roof design and compliment or blend in with the roofing materials].*
  - *Homeowners are permitted to use the Lot to generate renewable energy, [subject to environmental best practices and applicable laws and regulations].*
- Provide guidance through the Architectural Review Committee.
  - *Homeowners shall submit proposals for renewable energy generators to the Architectural Review Committee, including a scaled plan that shows design, location, elevations and accessory equipment. The Architectural Review Committee shall not deny applications unless the proposal fails to meet industry standards.*

### **F. Emphasis on sustainability in the Architectural Review Committee**

- As many projects begin and end with approval from an Architectural Review Committee, consider providing general guidance that instructs favorable treatment for activities that enhance sustainability.
  - *New products and technologies which support the concept of sustainability will be given special consideration for approval.*

- *Building materials should reflect a low environmental impact. Favorable consideration shall be given to the selection of materials that are: (i) made of recycled materials, can be recycled, and/or are produced without waste of energy or resources; and (ii) do not produce significant off gassing or otherwise contribute to poor air quality.*
- If any references to a third-party verification system are made (like LEED), make sure you reference the proper version (i.e. LEED-ND or LEED for Homes) and draft the language to allow for updates (i.e. “LEED for Homes Version 1.0, or the latest applicable version”).

#### **IV. REFORMING PROBLEMATIC CC&RS: TOOLS AND ACTION PLANS**

Many people mistakenly assume that they are “stuck” with the CC&Rs currently in force. Fortunately, many options exist for working within your existing framework or, as discussed in the previous section, crafting new language to replace existing rules that act as roadblocks to sustainability.

##### **A. Interpret vague wording in your favor.**

Many CC&Rs use vague language to create subjective standards that can be interpreted in many ways. For example, if your rules only allow “appropriate”, “complimentary”, or “attractive” uses and prohibit “nuisances”, do the best you can to demonstrate that your ideas are within the scope of allowed uses. Practice the power of persuasion and explain why your xeriscaping plan will be appropriate for your neighborhood, complementary with existing uses, and attractive. People often fear what they do not know, so try your best to assuage their fears with photographs or other means of demonstration.

##### **B. Seek a variance for your particular request.**

Many CC&Rs have a provision that allows a homeowner to seek a “variance”, which is basically an exception, from a generally applicable rule. The most common language in the variance provision allows the HOA board or architectural committee to consider “circumstances such as topography, natural obstructions, aesthetics, environmental considerations or hardship.” If the homeowner can show that one of these reasons justifies a variance, the otherwise-prohibited activity can occur.

You might persuade your HOA Board or Architectural Review Committee that “environmental considerations” justify the installation of an organic garden, xeriscaping, or outdoor clothesline. Again, persuasion is important here and the factual circumstances in your neighborhood will determine whether the variance is granted.

##### **C. Amend your CC&Rs to change problematic provisions.**

If there is no feasible way to achieve your sustainability goals within the limits of your existing CC&Rs, the next step is to try to amend them. This section will discuss the various issues involved with the amendment process and provide ideas for success. In general,

emphasizing cost savings and enhanced freedom of choice is positive, but be aware that many people in HOA-governed communities enjoy the consistency of appearance brought by the rules. Thus, you will need to find a balance to persuade your neighbors to embrace the changes needed to enhance sustainability.

## **(1) Recognize important differences.**

### **(a) New neighborhoods v. established neighborhoods**

As discussed above, CC&Rs are first established by the developer, usually before any lots are sold. Most CC&Rs have a two-phase amendment provision. In the first phase, the developer has the exclusive right, power, and authority to amend the CC&Rs at any time and in their sole discretion, up until a certain number of lots are sold. When the requisite number of lots have been sold, the second-phase amendment provisions require consent from a specified percentage of owners to amend the CC&Rs.

Thus, in new developments, only the developer needs to be convinced. If your community has new developments that are still in the construction phase, identifying the developer and approaching them about these sustainability principles could bring about quick change.

### **(b) Common areas v. individual lots**

Homeowners pay fees to maintain the common areas and are likely to value anything that can reduce the use of water and chemical inputs and save money. Before presenting proposals to change rules about outdoor lighting, xeriscaping, and toxic pesticide/fertilizer/herbicide use in the common areas (such as landscaping and play areas), do some research and find out how much money the HOA spends on electricity, irrigation and maintenance. Your proposal can point to the long-term benefits of reduced costs as well as the health benefits of reducing or eliminating chemical exposure for children.

For individual lots, the idea of personal choice is likely to resonate with many homeowners. Emphasize the need for homeowners to have the freedom to make the best decisions for their family's health, economic situation, and environmental priorities. Remember that the freedom of choice will need to balance the desire for a sense of uniformity, and this balance will vary depending on your community's preferences.

### **(c) Shielded v. visible areas**

Many people value consistency in appearance and that is why they choose to live in HOA-governed communities. Others do not like the idea that their neighbor can have total freedom to turn their yards into urban wildlife sanctuaries or farms, and the idea of seeing a neighbor's laundry from the kitchen window distresses many people. Finding out what matters the most to the people in your neighborhood is an important part of the amendment process. Talk to your neighbors, show them pictures of the types of changes you are envisioning, and gather input before you make your proposal. If people oppose the

changes, it is better to find out why and try to change their minds or adapt the proposed amendment to their needs before the issue is put on the ballot. For example, some people despise the idea of raised garden beds in the visible portion of the front and side yard, but they have no problem with such structures in the backyard. You do not want your proposal to fail because you neglected a tweak that would have appeased opponents.

That said, consider whether you are hearing from the “vocal minority” and whether they represent the community viewpoint as a whole. You are unlikely to get 100% support for any proposed amendment, so try to craft an amendment that works for your community without letting a few naysayers douse your motivation. Seek out as much input as you can and build a coalition of supporters. You will need to determine whether your proposal is “wrong” or whether you are simply going to have to live with some “no” votes.

## **(2) Navigate the amendment process.**

While the following guidance is presented in a linear, step-by-step framework, note that in reality the process is likely to be iterative. You will gather input, propose some changes, gain some support, identify some opposition, and update your proposal in response. Depending on the level of interest and opposition in your community, you may go through this process many times. Be flexible, stay positive, and believe in your goals.

### **(a) Identify the provision(s) you want to change and draft the proposed new language.**

In the previous section, we proposed suggested clauses that can be used to replace the problematic language in your neighborhood’s CC&Rs. Make sure you identify what you would like to be able to do and ensure that the new proposed language is sufficiently inclusive and conforms to the “tone” and vocabulary of your existing document.

You may want to start small and make a proposal for one change. Or, if you think your community is ready for it, consider a package of amendments. This package could address all of the sustainability weaknesses in your CC&Rs.

One way to present a proposed amendment is to list the “old” provision next to the proposed “new” provision. This works when direct replacements make sense. For example:

Existing Section 10.1 states, “Outdoor clotheslines are prohibited.”
New Section 10.1 shall state, “Outdoor drying of laundry is permitted provided that laundry is brought inside as soon as possible after drying is complete.”
Existing Section 13.8 states . . .
New Section 13.8 shall state . . .

Another way would be to list all of the “old” sections that will be deleted followed by a list of all the new sections to be added. For example,

The following existing sections shall be deleted: 10.1; 13.8; . . .

The following new sections shall be adopted:

10.1. Outdoor drying of laundry is permitted provided that laundry is brought inside as soon as possible after drying is complete.

13.8. . . .

You could also present an overarching “Sustainability Guidance” section. This new section could list all of the new provisions along with a provision that states, “All other provisions in this document that contradict the provisions in this Sustainability Guidance Section are void and unenforceable.”

Grouping all the proposed changes into a comprehensive package has its pros and its cons. If there is widespread support, the “full package” is more convenient and educational (in the sense that it shows many different ways to enhance sustainability in one presentation). However, if one of the provisions is more controversial than the others, people may vote “no” on the whole package when they really only oppose one change. If you present the “whole package” but allow people a yes-or-no vote on each new section, you may cause confusion and taint the results. You will need to consider the best way to approach the amendments given the input you receive and the usual means of voting in your community.

**(b) Seek support from the HOA board.**

If you are on the HOA Board, you have an easier avenue to propose amendments to CC&Rs through that role because you know the other board members and perhaps are more familiar with the history and ethos of your community. If you are a coalition of homeowners, ask to be put on the agenda at an HOA Board meeting to present your ideas. Before you do this, though, consider vetting your ideas with individual members of the Board or other influential members of the community. They will be able to provide feedback that will be useful to your presentation to the full Board.

It is important to the overall effort to have the HOA Board support your proposal because they are the people who are familiar with the legal requirements for amending the CC&Rs and have the easiest access to community-wide means of communication. Plus, if you are changing the rules about how common areas are managed, you do not want the Board resisting (or refusing) adoption and implementation. Preferably, the Board will agree that your ideas have merit, provide useful suggestions to improve the quality of the amendments, and help facilitate the process. If the unfortunate situation occurs whether the HOA Board tells you “no”, you may find yourself having to decide whether to challenge the Board’s decision or give up. Hopefully you do not give up!

**(c) Build your coalition of neighbors to support the transition to sustainability.**

As discussed above, it is important to gather as much input and support at the front end of the process as possible. Once you have your proposal (and hopefully the support of the HOA Board), it is time to start reaching out to the rest of the neighbors. Work to ensure that all homeowners receive a copy of the proposed amendment by using mail, email, common-area bulletin boards, and direct contact (but respect people's disdain for spam and obey any CC&R provisions regarding HOA use of mass mailings).

Consider creating various ways to interact to share your reasoning for the proposal and gather feedback. Form a "sustainability committee" that hosts BBQs, dinner parties, and other types of group gatherings. Having a committee distribute the tasks makes them more manageable and communicates a message that "people want this." Group gatherings allow you and your neighbors to meet new people, share ideas, and learn what will work in your community. You should not expect everyone to agree with you right away, and because CC&Rs require 2/3 or 3/4 of the homeowners to vote in favor of an amendment, you may need to gather input and form compromises for many months.

**(d) Follow the CC&R procedures for scheduling the required meetings, setting the voting day/period, and distributing ballots.**

All CC&Rs have specific rules and procedures for amendments. Many allow the HOA Board to first adopt a resolution approving the amendment from their perspective and then to submit the resolution to the homeowners for final approval. This is another reason why HOA Board support is important – chances are higher that homeowners will approve a change already vetted and approved by the HOA Board. In addition, having the HOA Board take the lead on procedural compliance may be more efficient. Some CC&Rs have provisions that allow homeowners to propose an amendment directly. Some CC&Rs require a meeting of the homeowners where voting will take place, while others establish a voting period where homeowners can mail in their ballots.

It is critical that the required procedures be followed exactly if the amendment is to be valid and enforceable. Consult a licensed attorney if you need help interpreting the CC&Rs and following the requirements.

**(e) Celebrate success.**

Hopefully, your sincerity, hard work, and persuasive skills will result in an approval of your changes and a community-wide embracing of sustainability efforts. Please share your success stories with the USGBC and local news outlets. The more people experience the positive changes, the more likely such efforts will be replicated.

**D. If you are experiencing significant push back from the HOA Board, consider running for a position to change the dialogue internally.**

Be the change you want to see. If the lack of concern for sustainability in your community stems from an individual or small group of HOA Board members, a leadership change may be in order. Review your CC&Rs for terms and election times and procedures and consider throwing your name in the hat. As an HOA Board Member, you will have a more direct route to understanding why certain CC&Rs are in place and a podium to present your ideas for pursuing sustainability. If you are considering this option, make sure that you understand that a board position carries with it many responsibilities, not just the opportunity to advocate for amendments of your choosing.

**E. For a broader impact, campaign for state legislation and local ordinances that prohibit sustainability-blocking CC&R provisions.**

Some municipal and state governments have enacted (or attempted to enact) ordinances and statutes that prohibit CC&Rs from banning or unduly restricting certain sustainability measures. Essentially, these government actions have declared that public policy supports sustainability and, therefore, rules that inhibit sustainability violate public policy. Others encourage voluntary adoption of sustainability measures. Some of the types of laws and ordinances that have been enacted around the country<sup>3</sup> include the following:

- No governing association of a planned community may prohibit the installation or use of a renewable energy generating device, but such association may implement reasonable rules regarding the placement of renewable energy generating devices, so long as those rules do not prevent the installation, impair the functioning of the device, or restrict its use or adversely affect the cost or efficiency of the device.
- Any CC&R provision that effectively prohibits the installation or use of a renewable energy generating device is void and unenforceable.
- Any CC&R provision that prohibits outdoor laundry drying is void and unenforceable.
- Architectural guidelines in common interest developments shall not include conditions that could have the effect of prohibiting the use of xeriscaping.

Depending on the politics of your region, this legislative option could present a viable opportunity to infuse principles of sustainability into your HOA. However, it is important to recognize that if you find it difficult to convince the requisite number of homeowners to vote in favor of a rule change, convincing the requisite number of city council members, county commissioners or legislators will also be formidable. In states that emphasize low

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<sup>3</sup> Such laws and ordinances were implemented or attempted in at least Arizona, California, Colorado, Florida, Hawaii, Maine, Maryland, North Carolina, New Mexico, Oregon, Utah, Vermont, and Virginia.

regulation of private property rights, such laws are less likely to gain political traction if viewed as infringing on individual autonomy and freedom to contract.

## **V. CONCLUDING THOUGHTS**

The USGBC seeks to transform the built environment and make green buildings available to everyone within a generation. Unfortunately, many of our members live in communities where the neighborhood rules present obstacles to these efforts. We hope that this document provides a foundation for understanding the problematic rules, creating alternatives, and implementing desired change through the appropriate measures.

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