2014 WVHOA Newsletter

APRIL 2014

WEST VALLEY HOMEOWNER ASSOCIATIONS

April's Luncheon Meeting: Amending Governing Documents

The next meeting of the West Valley Homeowner Associations will be April 2 - Amending Governing Documents: Tips and Pitfalls. Attorney Adrianne Speas will be providing guidance on how to get through the amendment process.

We'll be meeting on April 2 at 11:45 a.m. in the Hopi Room, Chaparral Center in Sun City Grand, 19781 N. Remington Drive in Surprise. Cost for the luncheon is $10. Lunch will be served from 11:45 to noon and the program will start promptly at noon.

Please make your reservations by contacting Colleen Lombard at calombard@cox.net or 602-795-2363. Reservations must be received by 3:00 p.m. on Friday, March 28.

Payment for the luncheon may be made by cash or check (personal or business check) at the door only. We are not able to accept "pre-payment" for the luncheon meetings.

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Benefits of Attending WVHOA Meetings

As part of your membership in WVHOA, you receive the WVHOA Newsletter. While this contains information regarding homeowners associations, you still derive additional benefits by attending the meetings. For example, our speakers usually provide detailed handouts pertaining to our meeting topics. Also, you get to meet other association board members and discuss and share ideas.

We hope to see you on April 2!

Meetings are held in the Hopi Room of the Chaparral Center, 19781 N. Remington Drive in Sun City Grand. Sun City Grand is located on the west side of Grand Avenue, about five miles past the Bell Road intersection. Turn west onto Sunrise and take it to the second intersection, which is Remington. The Chaparral Center is located about .2 of a mile on the right side of Remington Drive adjacent to the Sonoran Plaza.

NATIONAL HOA CASE LAW UPDATE

WVHOA Vice President, Curtis Ekmark, was the guest speaker. He provided a review of HOA cases throughout the country that had been decided over the past year.

He explained that in the past, it was very rare for a case to not settle, go to trial court, not settle in trial court, and then go all the way to the court of appeals. In the past year, 77 HOA cases throughout the country went to the court of appeals. In his own practice, Mr. Ekmark has seen an outbreak of litigation with HOAs over the past three years.

In the first case, from Mississippi, an HOA's CC&Rs allowed the leasing of the property if four conditions were met. The HOA passed a board resolution that no longer allowed leasing, and the HOA was ultimately sued by an owner. The court ruled against the HOA by stating that an HOA cannot pass resolutions that are in conflict with the CC&Rs.

Colorado is similar to Arizona in that it has state statutes governing HOAs, such as the Planned Community Act, Condominium Act and the Nonprofit Corporation Act. In Colorado, an HOA amended its documents. It was a condominium and the Condominium Act was silent regarding the procedure. However, the Nonprofit Corporation Act set forth requirements. The HOA proceeded with the amendment stating that it was a condominium and the Condominium Act did not set forth requirements. The HOA was sued and the court ruled against it stating that the HOA had to refer to and comply with both the Condominium Act and the Nonprofit Corporation Act.

Similarly, in Illinois, the court ruled against an HOA who responded to a records request within 30 days, per the Condominium Act. Evidently, in Chicago, there is a city ordinance that states that records requests must be responded to within three days. The court stated that the HOA had to comply with both the city ordinance and the Condominium Act. Since the city ordinance was more restrictive, the HOA should have responded to the records request within three days.

An HOA in Georgia was sued because it passed a non-uniform amendment. The original plan for the HOA was that only the people who lived around the lake in the community could use the lake. Other people in the community wanted the HOA to amend the documents to state that everybody could use the lake. The court ruled against the HOA and struck down the amendment stating that it had to be a uniform amendment – the HOA cannot pass an amendment that favors one group at the expense of another.

In Florida, the HOA was still developer-controlled. The CC&Rs stated that funds had to be put in reserves, but the developer wanted those funds to go back to it. So, the developer used the amendment provision in the CC&Rs to amend them to state that funds went back to the developer and that it did not have to fund the reserves. The developer was sued and the court ruled against the developer stating that amendments to the CC&Rs have to be reasonable. Arizona had a similar case regarding reasonable amendments: Greenland Villas.

A troubling case came out of Illinois in which the trial court ruled that if a homeowner is unhappy with the HOA due to lack of maintenance of the common areas, the owner can withhold payment of assessments. The case was appealed, and the court of appeals also ruled in favor of the homeowner. The case is now being appealed to the Illinois Supreme Court.

Mr. Ekmark pointed out that this emphasizes the importance of HOAs properly maintaining the common areas.

A case in Ohio emphasized the point that if an HOA is going to require an owner to follow the governing documents, the HOA should follow them as well. An upstairs unit's balcony was leaking and damaged the downstairs unit. The balcony was fixed, but the downstairs unit owner continued to complain about the damage. He ultimately met with the board and was told that the balcony was fixed and the HOA could do nothing more. The owner sued the HOA, and the court ruled against the HOA because it did not follow the requirements in the governing documents that stated that the owner must be given the opportunity to address the HOA during a formal hearing. Since a formal hearing was not held by the HOA, it lost.

Although the next case in Colorado demonstrates that HOAs are trying to get creative with resolutions of issues, Mr. Ekmark stated that this can backfire on an HOA. The HOA determined that it needed to institute a special assessment of over $69,000 per unit. The owners rejected the special assessment. The HOA gave the owners two options for payment of the special assessment: Pay it today in one lump sum or get a line of credit from the bank and the owners would pay the HOA back. Quite a few owners opted for the line of credit option. However, one owner filed bankruptcy. The HOA went to the bankruptcy court and stated that it was a creditor. The court ruled against the HOA because the line of credit was not considered an assessment lien, so it doesn't survive the bankruptcy and the line of credit gets wiped out. The HOA lost the ability to be paid pack the money on that line of credit for that owner.

In another Illinois case, the HOA purchased a speed gun and was monitoring speeding on its streets. One driver was pulled over and was fined for driving nine miles over the speed limit. The HOA was sued because the driver claimed that the HOA was not the police and had no authority to pull people over and fine them for speeding. The HOA lost but the case was appealed. At the Illinois Supreme Court level, the HOA won. The court stated that the HOA could make rules governing its own streets because they were private property. Because the driver being fined was a member of the HOA, he had to abide by those rules and the HOA had the authority to fine him for not abiding by the rules.

In Kentucky, an owner insisted that the HOA had a duty to maintain the windows in the units and demanded that the HOA replace her windows. The HOA stated it did not have the duty to maintain the windows and denied the request. The owner replaced her windows at a cost of $78,000 and then sued the HOA. At the trial court, the HOA lost and the court awarded the owner $250,000 in damages. The case was appealed, and the court of appeals ruled that the HOA did not have a duty to maintain and/or replace the windows, and so the HOA won at the appeal level and did not have to pay any damages.

Maine and Maryland had similar cases involving neighbor-to-neighbor issues with second-hand smoke invading one neighbor's yard from the other neighbor. The neighbor complaining of the smoke stated that it was a nuisance and that the HOA needed to get involved because of the nuisance provision in the CC&Rs. The HOA did not get involved and the complaining owner sued the HOA. In one state, the HOA won, but in the other, the HOA lost. Mr. Ekmark explained that this demonstrates the importance of carefully analyzing the documents to see if there is a violation and if the HOA is required to take action.

A case in California emphasized the importance of buying good Directors & Officers insurance and not going for the cheapest policy. The board passed a parking resolution, and an owner sued the HOA claiming the resolution was invalid. The HOA turned the claim over to its insurance carrier, but the carrier would not cover the HOA because the D&O coverage was for money damages claims only. Since this matter did not involve money damages, the carrier denied the claim and the HOA was not covered. The HOA sued the insurance carrier, it was appealed, and the court of appeals ruled against the HOA.

A similar case in Florida involved an HOA who consulted with an insurance broker about the type of insurance coverage to obtain. Based on the broker's advice, the HOA purchased the insurance. However, it was discovered that the coverage did not match the requirements of the documents. The HOA sued the broker, but the court ruled against the HOA stating that the broker doesn't have the obligation to ensure the coverage matches the documents; the HOA has that obligation and it did not purchase coverage that matched the documents.

In another case from Florida, an HOA was sued because it sold docks located in the common area to a neighboring community. The court ruled against the HOA because the HOA could not sell its common area without obtaining 100% approval of the owners. Arizona has a similar case: McKeever v. Lyle.

Another Illinois case involved a woman who got hurt while swimming in the HOA pool. The HOA won at the trial court level which ruled that the HOA was not responsible. The woman appealed it, and the court of appeals reversed the decision. The HOA knew about a defect in the pool before the woman got hurt, and so the HOA had an obligation to correct the defect. Therefore, the HOA was responsible for her injuries.

An HOA in Texas suffered damage from a hurricane. It hired a national risk control company who confirmed the damage and entered into a contract with the HOA to work with the insurance company to obtain the funds necessary to repair the damage. After a period of time, the HOA was not satisfied with the risk control company and it fired the company. Eventually, the HOA's law firm was able to recover $10 million from the insurance company for the damage. The fired risk control company made a claim against the HOA demanding 10% of that recovery per the contract. The HOA stated that the claim was invalid because the company was fired. The matter ended up in court, and the court ruled against the HOA because the contract clearly stated that the risk control company was entitled to 10% of the recovered funds, no matter where it came from, even if it was no longer working for the HOA. Mr. Ekmark emphasized that this clearly demonstrates the necessity of reviewing all contracts before signing.

In New Mexico, an HOA's documents did not prohibit rentals but they did prohibit commercial use of a unit. An owner was renting out his unit for short-term rentals. The HOA claimed that this was a commercial purpose and sued the owner. The court ruled against the HOA stating that the short-term rentals were being rented to people who were living in the unit and they were not using the unit for a commercial purpose.