The HOA Citizen

HOA citizens are US citizens first!

July 2004
eNewsletter

Inside this issue:

The Other Phoenix Job

I read with great interest the Dana James article, "The Phoenix Job", in the May-June issue of On The Commons magazine. It covered incidents involving two Arizona HOAs, Lago Estancia in Gilbert and Entrada in Glendale in the second half of 2002 to 2003. It describes the unblemished role of two CAI member firms, Tri-City Property management and Rossmar & Graham, and two CAI member attorneys, Scott Carpenter of Hazelwood, Carpenter and Curtis Ekmark of Ekmark & Ekmark.

However, there is another side of the story regarding the incident at Lago Estancia based not only on public info, but on materials from Tri-City, Mr. Shaw of Hazelwood Carpenter, the president of the HOA, and correspondence from a homeowner, all dating from the October 2002 - January 2003.

In a Dec. 30, 2002 letter from Chip Wilder, signed as president of the HOA, to the homeowners (my emphasis) said:

"Our scheduled annual meeting was held October 17, 2002 ... At that meeting, in good faith, the decision was made not to honor his [Jason Hope's] proxies[149], and not to allow three owners from the same lot to be placed on the ballot.... Because six people left the meeting believing they held three seats on the board, there were ambiguities and an unclear election result from that meeting."

"Based on the advice from the Association's attorneys, Carpenter Hazelwood, PLC, a second annual meeting was held on November 14, 2002 ... At this meeting, an amendment to the Bylaws was voted on and approved, which prohibits more than one owner per lot from

(Continued on page 5)

AZ Governor responds to HOAs

In a brief statement to local Phoenix ABC affiliate KNXV-TV on June 9th, Arizona Governor Napolitano stated, "The laws must catch up to HOAs" because many citizens now live in homeowners associations. Homeowner advocates were surprised but delighted to hear the Governor take an affirmative stance on behalf of homeowners against rogue HOA boards.

The reporter added: The Governor says she expects to see bills every year in the legislature that will try to better define the relationship between property owners and HOAs.

STATE LEGISLATION IS MOVING IN RIGHT DIRECTION

By Barbara Epperson

The Arizona State Legislature took significant strides in the right direction for individual homeowners in the recently concluded 46th regular session. Faced with seventeen bills relating to Planned Community and homeowner concerns, they passed thirteen of them. Nine bills which directly relate to Homeowner Associations have been signed into law.

One of these bills, HB 2380, which deals with written disclosure at the time of closing on real estate property, may come back to haunt the buyer. This bill states that the buyer understands that he is giving up his homestead exemption and that he will abide by the CC&R's of his Home Owners Association.

Of the six bills indirectly related to HOA's, four bills were signed into law by Governor Napolitano. One of these bills, HB 2378, increases the homestead exemption from $100,000.00 to $150,000.00.

HOA REFORM

This is the first time in five years that any HOA legislation has been passed in the Arizona State Legislature. Although it has been a positive year for HOA reform, there are issues that still need to be addressed in next year's Legislature.

Restoration of the homestead exemption to residents living in planned communities stands out as one of the most important issues. A Homestead Exemption protects the property of an individual homeowner for up to $150,000 in case of a bankruptcy. Those persons living outside of planned communities already have this protection.

It is only fair that persons living within planned communities should be afforded the same protection of a homestead exemption. It has been argued that homeowners associations could go bankrupt should their members have this protection. However, there is no record that any HOA went bankrupt before this protection was taken away in 1996.

Special interest lobbies were successful in their efforts to remove language from HB2402 which would have stopped foreclosure on a homeowner's property because of unpaid assessments. They were also successful in having removed from this bill language stating that a property must be sold at its fair market value in case of a foreclosure. Foreclosure is big business in the United States; State Legislatures are beginning to pass legislation to stop this control.

More Remains to be Done

So, while the 46th regular session of the state legislature moved us in the right direction, there are major concerns still needing to be addressed. After listening to many concerned voices, it looks as though it is time for:

(Continued on page 3)

... state legislation

(Continued from page 2)

1) A bill of rights for individual homeowners.

2) Recognition that the association should be mainly concerned with the management of assets held in common, but should not impinge on the normal rights of private property ownership.

3) The myth that Homeowner Associations protect property values needs to be shattered, because they simply have very little to do with this. Outside economic and social forces have much more effect on property values. Associations have very little to do with protecting property values, yet they have everything to do with controlling property rights.

4) CC&R's which are non-negotiable adhesion contracts, are accepted and legally binding when the new homeowner purchases a property. The original CC&R's are written mostly for the protection of the developer. To say that a homeowner must be bound by a non-negotiable contract that may be more than 100 pages in length and full of legal jargon that only a lawyer can understand is insanely inappropriate.

When the original developer withdraws and turns over the management of the HOA to a Board of Directors elected by the homeowners, the original CC&R's, should be replaced. New CC&R's should be designed and voted upon by the homeowners. CC&R's which will be understandable and reflect the wishes of the HOA about what type of community they want and how it is to be governed.

5) Most county and state ordinances require associations to control common areas. However, most CC&R's are written for developers and are aimed at not only controlling common areas, but private areas as well which is not required by law.

6) Litigation history of a planned community should be readily available to a buyer.

7) Homeowners within associations should have the same homestead exemption protection already enjoyed by those living outside of planned communities.

"The myth that Homeowner Associations protect property values needs to be shattered."

Challenging Year

For me, this politically active year has been a challenging and enlightening experience. I look forward to continuing to work with the state legislature in future sessions. Please let me know what your concerns are so that we can make further progress together.

Barbara Epperson is an elected representative of the Arizona Silver Haired Legislature. She can be contacted by email at

benefits the commonality but harms the individual

A frequent contributor, Fred Pilot writes,

“Despite recent court rulings holding HOA CC&Rs to be "contracts," I don't expect we'll see courts apply a strict contractual analysis to their validity based on standards such as mutuality and unconscionability. While courts have held CC&Rs to be organically contracts, when push comes to shove they interpret their operation like local government ordinances, affording them a presumption of reasonableness and thus placing a high burden on those who would challenge them as we saw in this week's California Supreme Court ruling in *Villa De Las Palmas HOA v. Terifaj*.”

Ah yes, Nahrstedt, cited in the Terifaj case, where public policy, overriding benefits to members and covenants running with the land all meet.

In Nahrstedt v. Lakeside Village Condominium Association (1994) 8 Cal.4th 361 (Nahrstedt), we construed subdivision (a) of section 1354 and held that covenants and restrictions in the declaration are enforceable “unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit.”

This opinion uses the contractual - legal arguments of the Davis-Striling act and contractual provision called a binding covenant running with the land.

"When a declaration is silent on whether it may be amended, section 1355(b) provides that it may be amended at any time. ... Plainly read, any amendment duly adopted under this subdivision is effective against all homeowners, irrespective of when the owner acquired title to the separate interest or whether the homeowner voted for the amendment."

"To allow a declaration to be amended but limit its applicability to subsequent purchasers would make little sense. A requirement for upholding covenants and restrictions in common interest developments is that they be uniformly applied and burden or benefit all interests evenly."

"**We further observed that anyone who buys a unit in a common interest development with knowledge of its owners association’s discretionary power accepts ‘the risk that the power may be used in a way that benefits the commonality but harms the individual**.’”

And the opinion goes on and on and on. Why can they do this? Why can they pass the equivalent of ex post facto laws? **Because they are not public entities!** What, cities and towns don't face this same problem with grandfather clauses? But they have to live with it, don't they?

... the other phoenix job

(Continued from page 1)

serving on the Board of Directors concurrently".

The readers of the CAI article, which does refer to the vote to amend the bylaws, need to ask why was the advice given to the original board by Hazelwood, Carpenter to amend the bylaws which was taken, presumably prior to the new election since Mr. Hopes is reported to have had 100 proxies of some 200+ voters. The meeting was called and run by an illegally constituted board. This is the only interpretation that can be given for the vote on an amendment at the second annual meeting, and that the HOA attorney was not acting in the best interest of the HOA, but of the old board.

Further, in the December 30, 2002 letter to homeowners from Augustus Shaw of Hazelwood, Carpenter, the homeowners are told,

"We do not represent Tri-City Property Management ... Our sole responsibility is to represent the best interests of the members of the Association ... Tri-City ... is the only entity authorized by the board to act on behalf of the association".

Why was this statement by the HOA attorney necessary? Unless, of course, there were concerns about a conflict of interest between Tri-City and the HOA attorney. Was it the fact that Tri-City shows a Phyllis and a Doris Carpenter as President and Secretary? This letter from Shaw also makes it clear that Tri-City is the management firm and homeowners are to ignore any Orion Management correspondence, Jason Hopes' firm. Homeowners are urged to call Tri-City and not the president or a board member.

A question arises as to who was in control of the HOA? It appears that the CAI member management firm and attorney were. In mid-January, prior to the January 22nd article in The Arizona Republic by Walsh, a homeowner wrote,

"The board never sent anything about this court decision [referring to a reported, but unseen East Valley Tribune article] nor the fact that the association now has to elect about 5 more board members"

"Members of Lago Estancia are continually directed to direct all correspondence etc. to Dawn ... of the Management Company ... the board decided to direct all information ... to her. My opinion is that she is really in charge of it all. A few neighbors complained about this. Is this the way this is supposed to run?"

"This should not happen in a democratic society. I personally find this appalling".

And, after the January 21st board meeting. the homeowner again wrote,

(Continued on page 6)

"This is the only interpretation that can be given for the vote on an amendment ... that the HOA attorney was not acting in the best interest of the HOA"

... the other Phoenix job

(Continued from page 5)

"Several of them already knew about 'Carpenters' owning Tri-City. There were several angry at the meeting last week .... They said S. Carpenter and Dawn Stone of Tri-City just took over and controlled every question and answer-mostly cutting off all questions in mid-air. One neighbor went to Tri-City this Monday(1-27) and Dawn Stoner [Tri-City manager] never would answer the question as to ownership other than 'a lot of people have asked that same question' and 'no S. Carpenter has no personal interest in Tri-City' She did say that the books had been currently sent to the auditor."

And yet, Scott Carpenter doesn't address these concerns when quoted in January 22nd and 23rd articles:

'"There is no evidence of thievery,' said Scott Carpenter, the association's attorney" (Arizona Republic).

"But Lago Estancia association attorney Scott Carpenter said the deal was the least painful solution to what would have been a long and costly fight. 'This settlement was not about what was right or what was wrong, it was about how to get this behind us,' Carpenter said. The association maintains fraud in Hope's actions, Carpenter said, but taking him to court would likely have cost $75,000 or more. By settling, the association expects to spend $20,000 in legal fees" (EV Tribune).

What was at stake here? The homeowners? The old board? Tri-City versus Orion Management? Lago Estancia was sitting on over $160,000 in cash at the end of 2002 and a 2003 budget showed another excess of some $130,000 over expenditures. Budgeted revenues amounted to some $323,000 before a $36,000 reserve setoff. The cash position of Lago Estancia, as reported to the Arizona Corporation Commission was:

2000:	$146,104	2001:	$147,900
2002:	$162,000	2003:	$143,240

Tri-City was aware of these figures through 2002. Why was it necessary to raise homeowner dues, as stated in a November 25 letter from Tri-City, $18 per lot per year, amounting to a mere $13,000 increase that is part of the budgeted $130,000 cash position? No reason for the increase was given except to say that the governing documents allow the board, not the homeowners, to do so. Why the increase, one must ask? While Arizona law does not prohibit the accumulation of cash for planned communities, it does require excess cash in condo associations to be returned to the owners.

It's understandable that these issues were not reported by the media be-

(Continued on page 7)

... the other Phoenix job

(Continued from page 6)

cause in that time period CAI controlled the media and the legitimate grievances by homeowner rights advocates were still viewed with suspicion. Regardless of any allegations against Mr. Hopes at that time period, there are a number of questions raised as to the conduct of Hazelwood, Carpenter and Tri-City Property Management that go unreported in this article, some 18 months later.

Further attesting to the spin in favor of HOAs, only pro-HOA quotes from homeowners are included in these articles, including an Arizona Republic comment on a pending HOA bill, HB2307, that sought to clamp down on the severe HOA foreclosure practices that benefit the HOA attorneys.

And still, why were the civil cases settled (Entrada) and dismissed (Lago Estancia) if there was indeed wrong doing by Mr. Hopes alone? The alleged fraud in the Lago Estancia HOA was never even filed. In response to a police charge that Hope was hiding some $120,000 in Entrada money and commingling it with a personal account, according to an Arizona Republic article, Hopes' lawyer filed a 36 page statement accounting of all the monies.

Why was the criminal case, relating to Entrada alone, dismissed for probable cause in July 2003, and why did the police make that statement of "a continuing investigation" in view of all these court decisions? All these questions go unanswered in this CAI article.

Why do the authorities not act on claims of fraud, embezzlement and misuse of funds by homeowners against HOA boards and unlicensed management firms? Are these just the ramblings of a disgruntled minority? No, the answer lies in the lack of access to records that are continually denied to homeowners in spite of state laws to the contrary. It is widely reported that homeowner calls and requests go unanswered and ignored or the homeowner is told that the HOA records do not exist. Additional obstacles are the result of the requirements in these laws that allow for a denial of the homeowner request, such as, in part, "for a reasonable purpose", "contemplated litigation". etc.

"Why do the authorities not act on claims of fraud, embezzlement and misuse of funds by homeowners against HOA boards and unlicensed management firms? "

In these two incidents, which were really over disputed control of the HOAs, the incumbents, their attorneys and management firms all had access to such detailed information and could claim some sort of evidence of wrong doing that is denied to the homeowner because of laws that protect the incumbent HOA boards. Yet, in spite of this access to the records, nothing has come of these allegations.

The winds of change are blowing stronger and stronger. As the media reaches out in a fair presentation of the facts, the public and the policy makers will react to give back control of the associations to the homeowners and to remove the self-serving interests of the "hired hands" in making decisions for the association.

Why can't an HOA be an unincorporated town?

Just what, legally, is an unincorporated town as compared to an incorporated town? What legal standing does it have? Can an HOA simply declare itself as an unincorporated town? What rules does an unincorporated town follow, in the sense of being answerable to the county or state government?

These are important questions relating to an HOA acting like a government or being a de facto government.

My initial research starts with the laws of Nevada, where I easily found a concise body of laws **regulating unincorporated towns** (Arizona statutes don't seem to address this topic in an easy manner). So, what are a few things contained in the Nevada statutes?

Chapter 629, Unincorporated Towns, NRS 629.0 -629.652.

Not regulated? Well here are some of the major "articles" --

Town Board form of Government (elections, petitions to form, etc),

Citizen Advisory Council (created by board of county supervisors),

Officers and Employees,

Finances,

Taxes Ordinances,

Town Code, Suits against,

Public Health and Morals.

Now,

1) why couldn't this model be used for HOAs?

2) why didn't the towns, cities and counties (state law in general) mandate this form of government of HOAs, even within incorporated boundaries?

Don't you think life would be much more pleasant and easier for all? Don't you think that after the developer leaves this is the democratic form of government that should be mandated?

More government? No, that layer of government exists now, but without accountability to the US Constitution that protects all our rights.

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