



MATTHEW L. WINTON PLLC

State-wide legal services for
residential and commercial
condos and HOAs

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MATTHEW L. WINTON PLLC



Legal Service for Community

Purposes of the Community Association

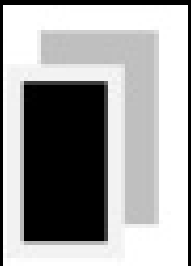
- Promote community
 - Manage common areas/elements
 - Administer governing document framework
 - Leadership and governance
 - NOT: Punish, take, enforce, or control
-

Terms, Definitions, Concepts - Overview

- Well drafted governing documents should have a definitions section and use the defined terms consistently throughout the Governing Documents (Covenants, Bylaws, etc)
 - Phased developments should use supplemental declarations
Make sure covenants are recorded for each phase/section!
 - Who is the Declarant?
 - Who controls DRB/ARC?
 - Who controls the HOA?
 - What Declarant rights to annex, remove, amend, transition?
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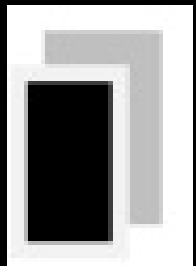
Documents - Overview

- Plat
- Declaration of Covenants
- Certificate of Incorporation
- Articles of Incorporation
- Bylaws
- Corporate Resolutions
- Rules & Regulations



Law – Overview

- The applicable law is published cases and statutes
 - 60 O.S. 501 et seq. – Condo Act
 - 60 O.S. 851 et seq. – HOA Act
 - 18 O.S. 865; 1001 – Corporation Act
- Minimal cases for condo, few more for HOA
- Where is it? Access the law at www.oscn.net



Taxation - Overview

- Federal Income Tax: IRC Section 528
Form 1120H
- State Income Tax: Form 990
- Local Taxes: Ad Valorem; Sales Tax
Loss of common area?
No sales tax exemption

Meetings - Practice

- Annual Meetings

Same time each year

Written agenda, notice given prior to meeting

Provide childcare and refreshments – advertise!

Use proxies to attain a quorum

- Board Meetings

Open Meeting Act does not apply automatically

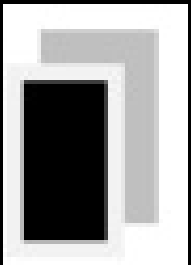
Should occur at least quarterly

- Meeting Tips

Prepare and follow an agenda

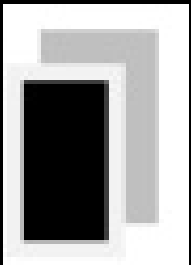
Limit the floor to minutes and recognized speakers

Hold hostile meetings in a church or elementary school



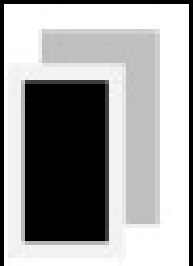
Meetings - Minutes & Resolution Practice

- Resolutions document decisions/acts of the association.
- Sometimes done when awarding contracts for common area maintenance, or for substantial corporate events, such as taking legal action or policy positions.
- Minutes and Resolutions are the written record of the corporation and should be kept together for future boards.
- Minutes are prima facie evidence in court
- See okhoa.blogspot.com for samples of a resolution, meeting agenda, and minutes.



Meetings – Quorum

- A quorum is “Such a number as must be present in order that business can be legally transacted.” RONR, p.334-340
- What does Articles or Bylaws provide for quorum?
- If incorporated, 18 O.S. 1060 provides for 1/3 of total membership, but may be less.
- For court-ordered election, the quorum is the number of members present regardless of actual quorum requirement.



Meetings – Proxies

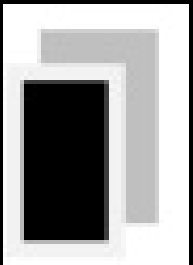
- 18 O.S. 1057.C & D

*Proxy must be signed or have signature “affixed” to writing
Electronic copies are acceptable*

- 18 O.S. 1060

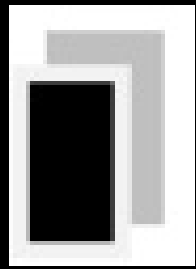
*UOP, proxy is valid for 3 years
What duration is advisable?*

- Limited proxy? Voting proxy?



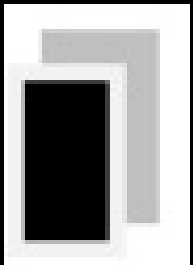
Meetings - Internet/Electronic Voting/Email

- Use the Internet to communicate
 - Governing documents*
 - Newsletters/events*
 - Contacts*
- Remember the “Newspaper Rule” when using email among board members
- Electronic voting is allowable by Oklahoma law; may require governing document amendments.



Meetings - FAQ

1. Does the Open Meeting Act apply to community associations?
2. Do members have a right to call special meetings?
3. Do members have a right to remove board members?
4. Can I vote electronically?
5. Can we act without meeting?
6. Class A members and Declarant Class B: What does it mean?

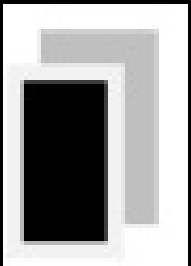


The dangers of a one sided story



Dispute Resolution – Non-judicial remedies

- Clear, up-front communication
- Room for honest disagreement
- Structuring discussion to remove conflict
- Structuring procedures to remove conflict
- Getting ready for difficult conversations
- Informal mediation
 - Going it alone*
 - Taking another with you*
- What do the covenants/bylaws say?
 - Hearing en banc*
 - Appeals*
- Formal mediation
- Binding arbitration











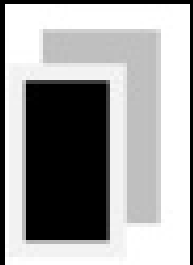
Dispute Resolution – Judicial Remedies

- Demand letter
- Penalties: no vote, no common area
- Monetary Fines
- Small Claims Court
 - Collections of assessments and fines
 - Amounts under \$10,000.00
 - Attorney's fees limited
- District Court
 - Collections under \$10,000 (CS court)
 - Collections over \$10,000 (CJ court)
 - Injunctions, damages
 - Declaratory actions (honest disagreement)

Operations – Books & Records

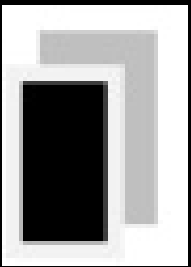
Books & Records: Rights to Access

- 18 O.S. 10 65 (if incorporated)
- 18 O.S. 10 69 – form of records
- 60 O.S. 521 (for condo)
- None for HOA
- What do Governing Documents provide?
- “Proper purpose”



Operations - Books and Records

- Consist of Financials, Governing Documents, Owner Files, Litigation/Enforcement Files, Minute Book/Organizational File
- Governing Documents may outline member rights to the books and records
- If incorporated, Oklahoma law grants access to members
- See okhoa.blogspot.com for an article on records access



Insurance Issues

- Builder's policy or HOA stand-alone?
- Insurance protects against casualties and liabilities
- Specialized insurance packages for community associations
- Director's & Officers Insurance
- Insurance must "fit" to Gov. Doc.
- Annual review of coverage
- Duty to defend certain claims

Operations - Board Duties

- Look for the “shall”
- Business judgment rule
- Duty of loyalty
- Duty against self-dealing
- Duty of inquiry: accounting
- Arbitrary and capricious
- Protect against embezzlement

Operations – Board Statutory Immunities

- 18 O.S. 865-867 – IRS form 1120H
- 18 O.S. 1027(E): A member of the board of directors, or a member of any committee designated by the board of directors, in the performance of the member's duties, shall be fully protected in relying in good faith upon the records of the corporation and upon information, opinions, reports, or statements presented to the corporation by any of the corporation's officers or employees, or committees of the board of directors, or by any other person as to matters the member reasonably believes are within the officer's, employee's, committee's or other person's competence and who have been selected with reasonable care by or on behalf of the corporation.

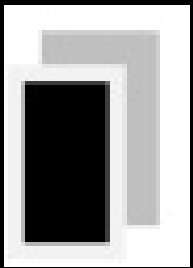
Operations - Common Mistakes in Common Interest Communities

- Over-eager/under-eager enforcement
- Failure to provide due process if required by the governing documents
- Failure to properly constitute the ARC
- Enforcing non-existent covenants
- Assuming court will be a panacea
- Failing to place a D&O insurance policy

Operations – Myths

Have you ever heard...

- “My neighbor’s fence doesn’t comply with the covenants, so I’ll sue the HOA.”
- “Plant more trees in the Common Area or else...”
- “The Board doesn’t enforce the covenants, so I’m not paying my assessments.”
- “I never received a copy of my covenants, so they don’t apply to me.”
- “You can file a lien, but you can’t foreclose.”



Assessments: Overview

- Four types: Annual, Special, and Specific/Individual, Reserve (See, CAIRF BPR for reserves)
- Procedure: Accounting system; Owner tracking; invoicing, title companies
- Collections: Communication; customer service; Liens; Judicial actions
- Costs and Attorneys Fees

Finance - Reserve Funding

- Capital improvements wear out, break, etc.
- Unless their replacement can be covered within the annual budget, the replacement would be a reserve item.
- Reserve Study
- Reserve assessments
- Special assessments
- Fairness

Assessments - Collections

- The correct account amount
- Consistent application of interest
- Late fees?
- Uniform invoicing and collections; title company contact
- Lien practice: Absent a Power of Attorney, your HOA manager does not have authority to sign liens.
- Make sure your manager, attorney, any third party collector understands and complies with FDCPA.

Small Claims Collections

- \$10,000 jurisdictional amount
- Affidavit; Alias Affidavit
- Service of Process
- Trial within 45 days approx.
- Default/Attorney's fees limited
- Service of judgment
- Collection of the judgment

HOA/Condo Foreclosures

- Valid lien?
- Bankruptcy?
- Petition and Summons
- Entry of Appearance
- Answer/Cross-claims
- Timing
- Will the HOA see any \$\$???

Bankruptcy

- Is owner re-affirming?
- Pre-petition dues
- Post-petition dues
- Automatic stay – Civil Penalties
- Collections during pendency
- Make sure your HOA, your manager, and attorney understand the U.S. Bankruptcy Code
- Do not accept bad legal advice from non-attorneys!

Particular Lien Issues – Who Signs?

- Hypothetical – H&W own a Lot together and are selling the Lot. Can H sign the deed at closing on behalf of W?
 - Hypothetical – LLC engages attorney to provide various real estate related legal services. Can attorney sign a mortgage on behalf of LLC?
 - If the answer to both hypotheticals is “No,” can an agent sign a condo or HOA lien on behalf of a condo or HOA?
 - Consider if management contract includes “debt collection” services
 - Consider too whether the applicable covenants require liens to be signed by a specific condo or HOA officer.
-

Agent-signing of Condo/HOA Liens

1. **16 O.S. §3.** Allows for an attorney-in-fact to sign instruments affecting real estate.
 2. **16 O.S. §20.** Requires a power of attorney to be recorded along with a conveyance or any instrument affecting property, including releases.
 3. **16 O.S. §79.** Provides significant penalties for slander of title, including costs, attorney's fees, and treble damages.
 4. **16 O.S. §85.** Provides significant penalties for filing false affidavits, which may apply to false liens. Penalties include actual damages, costs, attorney's fees, and punitive damages.
 5. **TES 6.7.** Title Examination Standard 6.7 provides that conveyances of record for 5 years without a recorded power of attorney are effective to vest title, but the standard does not speak to other interests in property.
 6. **TES 12.3.** "Cures" a managing agent signing defect, so any lien that was improperly signed and filed by a managing agent would be "cured" 5 years after recording for defect, but not for other infirmities such as violation of FDCPA, Bankruptcy Code, and slander of title.
 7. **TES 12.5.** Speaks to corporations issuing powers of attorney for agents to sign instruments affecting property; 5 year curative language, which again would cure recording defects but not other infirmities such as violation of FDCPA, Bankruptcy Code, and slander of title.
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Lien Issues – Re-filing and Statute of Limitations.

- 12 O.S. 95(A)(1) – 5 years on a written contract
 - 12 O.S. 95(A)(2) – 3 years on unwritten contract or statutory liability
 - Is the SoL three or five years? FPOA v. Fredrickson says it's one or the other!
 - Debt is aged 5 years - Filing/re-filing a lien does not extend SoL
 - Tolling the SoL:
 - Getting any payment towards the debt
 - Settlement agreement
 - Filing suit
-

Another Lien Issue – What Debt May be Secured? FDCPA Considerations

- What debt may the condo/HOA lien secure? Regular assessments, special assessments, reserve assessments, transfer fees, interest, costs, attorney's fees?
 - The ubiquitous "\$25 late fee"
 - Covenant-based monetary penalties v. Rule-based monetary penalties
 - 60 O.S. 852(C): No lien may be placed or mortgage foreclosed unless the homeowner was informed in writing upon joining the owners association of the existence and content of the owners association restrictions and rules, and of the potential for financial liability to the individual owner by joining said owners association.
 - FDCPA: No demand for fake debt (Late fees, SoL, made-up admin charges)
-

More Lien Issues: Bankruptcy


- Bankruptcy - 11 USCA §101 et seq. The purpose of bankruptcy is to give a debtor a “fresh start,” which is why the Code provides for an automatic stay of collections activities at the filing of a bankruptcy petition. Code provides significant punishments for creditors who violate a debtor’s bankruptcy rights. Sending demand letters, filing liens, and otherwise attempting to collect pre-petition debt in a bankruptcy violates the Code.
 - The condo/HOA lien is a contractual and statutory lien – it is non-dischargeable. HOA/Condo lien reduced to judgment is still non-dischargeable
 - Questionable whether enforcement action may be taken on non-dischargeable debt despite Stay – better safe than sorry approach.
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Oklahoma Sex Offender Act/Restrictions

- 57 O.S. 590: unlawful for a registered sex offender to reside, either temporarily or permanently, within 2000 feet of a playground or park.
- 57 O.S. 590.1: unlawful for more than one registered sex offender to reside in one dwelling.
- Covenant restrictions for occupancy of registered sex offender – Panther Valley case

Leasing Restrictions

- Must be in recorded covenants
 - Short term/home-share restrictions; OKC ordinance
 - Initial owner-occupancy restrictions
 - Percentage leasing restrictions
 - Administration issues depending on form of restriction
 - Enforcement methods and issues
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LEGAL SERVICE FOR COMMUNITY

Offices in Oklahoma City & Tulsa

Representing clients with HOA and condo issues
across the State of Oklahoma.