



Strong Neighborhood Initiative

Building a REAL Community
Starts with Your Participation

Neighborhood Leader Workshop #1

March 14, 2019

HOA Legal Presentation

HOMEOWNERS ASSOCIATIONS

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FORMATION OF OWNERS ASSOCIATIONS

- ▶ In Oklahoma, after June 5, 1975, Homeowners Associations are authorized by statute. See Okla. Stat. tit. 60, § 852. They are called owners associations because they can be for other types of property than residential property.
- ▶ The purpose of an owners association is to: a) provide management, maintenance, preservation and control of common areas; and b) enforce all easements, covenants and restrictions imposed on the separately owned lots. See Okla. Stat. tit. 60, § 852(A)(1)(2).
- ▶ An owners association is formed by all owners of a tract of property signing an instrument and recording it in the county clerk's office. See Okla. Stat. tit. 60, § 852(B). Often the restrictive covenants applicable to the property provide for an owners' association. An owners association is currently commonly formed as a separate legal entity, like an LLC, but it does not have to be.
- ▶ Membership is transferred with the title to the separately owned properties. See Okla. Stat. tit. 60, § 854.
- ▶ Membership is not mandatory in all owners associations. Usually the restrictive covenants applicable to the property state whether membership is voluntary or mandatory.

ENFORCEMENT POWERS

- ▶ An owners association has the power of levy or assessment which it can use in connection with collecting dues or fees from its members. See Okla. Stat. tit. 60, § 852(C).
- ▶ An owners associations' levy may become a lien upon the separately owned properties within the association. This lien can be foreclosed just like a mortgage.
- ▶ In order to have a right to a lien, initial owners in an association must have been informed, in writing, at the time of joining the owners association of the owners' association restrictions and rules, and of the potential for financial liability. This rarely comes up because subsequent owners are deemed to have constructive knowledge due to the recorded covenants. See *Warwick Estates, Ass'n. , Inc. v. Anderson*, 1989 OK CIV APP 65. In addition, title companies are required to provide purchasers with the recorded covenants and restrictions. See Okla. Stat. tit. 60, § 857.
- ▶ Importantly, if an owners association has to foreclose, it can recover its attorneys' fees – but if it loses, the homeowner can recover his or her fees.


EXCLUSIVITY OF HOA ENFORCEMENT RIGHTS

- ▶ An owners association does not have the exclusive right to enforce the covenants or restrictions of the real estate development.
- ▶ Any homeowner in a development can sue any other homeowner to enforce any of the specified restrictions or covenants of the development. See Okla. Stat. tit. 60, § 856.
- ▶ In any such lawsuit, the prevailing party is entitled to recover its reasonable attorneys' fees as determined by the court.
- ▶ It is important to keep in mind, that not all disputes in a neighborhood involve the owner's association. For example if two neighbors have a fence that is built over the property line, that is generally not an issue for the HOA to get involved with.

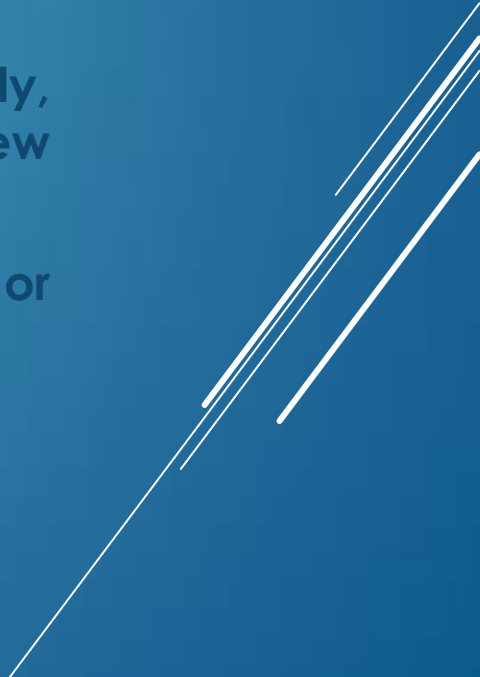
LIMITATIONS ON ENFORCEMENT

- ▶ Owners associations cannot enforce covenants that violate federal or state law.
- ▶ An example of this is the restrictions on ownership based on race which are contained in too many older covenants. These restrictions are illegal and may not be enforced.
- ▶ In Oklahoma, an owners association also cannot restrict a homeowner from displaying the flag of the United States so long as it is flown at a height of 20 feet or less.
- ▶ Other restrictions can become unenforceable if they have been abandoned. This is seen often with covenants related to shake shingles or outdoor storage sheds. What constitutes abandonment is a question of fact, dependent on the circumstances.


TAXATION OF OWNERS ASSOCIATIONS

- ▶ It is important to contact an accountant who can help you file the appropriate tax returns for your HOA.
 - ▶ Most HOA's are not tax exempt under the Internal Revenue Code and are required to pay taxes on their non-exempt income like interest, dividends or investment income earned on the savings they are holding.
 - ▶ Many HOA's report their income annually using Form 1120-H, although there are other options. Your accountant can advise as to the best option for your particular situation.
 - ▶ Your accountant can advise as to record keeping and accounting practices that will be appropriate for your specific tax situation.
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COMMON PROBLEMS

- ▶ Problems that arise within HOA's typically arise from:
 - ▶ A lack of transparency and/or planning, particularly with regard to financial matters.
 - ▶ Failing to communicate effectively with homeowners.
 - ▶ Delays and failures with regard to maintenance issues.
 - ▶ Not enforcing the rules and covenants consistently, particularly with regard to Architectural Review Committee matters.
 - ▶ Not following the mandates of the by-laws or operating agreement.
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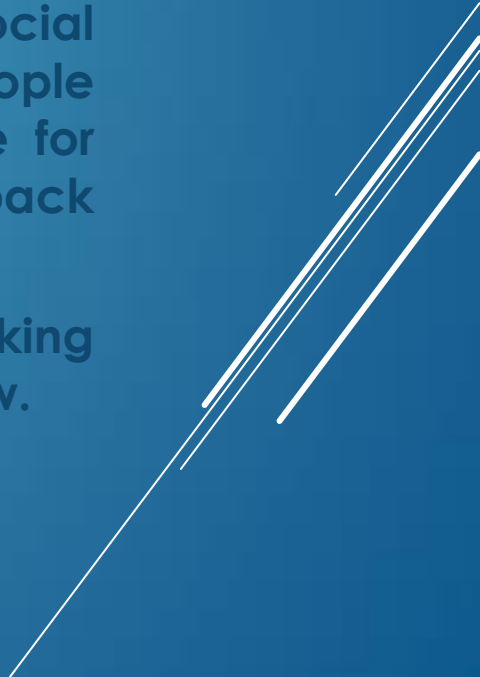
MAINTENANCE ISSUES

- ▶ Developments are different in their HOA requirements. For example, some have limited common areas to plant and mow, some have extensive recreational areas, some have streets and drainage facilities to maintain.
 - ▶ No matter how minor or extensive, failing to ensure that these tasks are timely completed is a sure way to create conflict.
 - ▶ Within the HOA, it is important to delegate responsibility for managing these tasks.
 - ▶ It is good to have periodic status or progress reports from each responsible parties to ensure that nothing is left unattended.
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FINANCIAL PLANNING AND REPORTING

- ▶ It is important to establish an annual operating budget and a reserve budget based on your history and needs.
- ▶ It is also important to keep detailed financial records throughout the year.
- ▶ If the bylaws or organizational documents of your HOA provide for disclosure of financial information, follow those rules.
- ▶ Whether there are defined rules on reporting, it does not hurt to be free with sharing financial information. Report at least annually on the budget and the previous year's finances.
- ▶ Sometimes simple explanations go a long way. For example, homeowners may be concerned about the amount of assessments and reserves held by their HOA. When it is explained that the HOA maintains the neighborhood pool and every so many years the pool has to be refinished and the pumps and equipment have to be replaced, that concern may be alleviated.

COMMUNICATION

- ▶ Communication about meetings, rule changes, and other developments is very important.
 - ▶ The legal notices for such things that is required by the organizational documents is a minimum, but better communication achieves better results.
 - ▶ Try creating a Facebook page or otherwise utilizing social media to provide an additional way to notify people about meetings, rules, and other topics appropriate for public discussion. It is also a good way to get feedback on issues in the neighborhood.
 - ▶ Do not hand deliver notices to homeowners by sticking them in their mailboxes. This is a violation of federal law.
 - ▶ Do not discuss enforcement actions in a public forum.
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CONSISTENTLY FOLLOWING THE RULES

- ▶ It is important to establish bylaws or governing organizational documents if they do not already exist.
- ▶ It is also important to carefully and consistently follow the rules and guidelines that are set out in the organizational documents.
- ▶ Failing to follow the correct protocols (notices, timing, percent of votes required, etc.) can invalidate actions that the HOA governance has taken. This can lead to additional legal problems.
- ▶ Architectural rules and review committees can present difficult problems. It is important to remember that ARC's are supposed to ensure compliance with the standards provided to them and do not exist to impose their subjective tastes on the rest of the homeowners.
- ▶ Politics are inevitable, but all homeowners must be treated the same to help avoid expensive disputes. This consistency needs to extend over time. If a garden flag was allowed for the Smiths last spring, this year, unless there has been a formal rule change, the Jones must be allowed to put up their garden flag.
- ▶ Exceptions may be necessary depending on the circumstances; however, exceptions should be rare and should be documented thoroughly.

UNIQUE ISSUES OR PROBLEMS

- ▶ Each development and HOA presents unique considerations. Sometimes, you have to know when to call in help, be it an engineer, a surveyor, a lawyer or an accountant.
- ▶ Each homeowner is also unique and an HOA cannot make everyone happy all the time. Sometimes disputes are unavoidable.
- ▶ If you have followed the organizational documents and applied the rules fairly and consistently, you will have gone a long way to making any problem easier to resolve.
- ▶ If it looks like a dispute is inevitable, get legal advice sooner rather than later. Sometimes steps can be taken before any lawsuit that improves your position.
- ▶ Up and coming issues that are not currently settled or often addressed include Airbnb type arrangements and aging issues.

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Thank You!

