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SCOTTSDALE COUNCIL OF HOMEOWNERS ASSOCIATIONS
SCOHA NEWSLETTER

IN OUR 40th YEAR

NOVEMBER 2014

Litigation Issues Affecting HOAs

Attorney Curtis Ekmark will be SCOHA's speaker at the luncheon meeting on November 18. He will focus on litigation issues facing all associations, as well as potential legislation that will be addressed by state legislators this coming session. Finally, he'll answer your HOA-specific questions.

Mr. Ekmark earned his undergraduate degree from Marquette University and received an academic scholarship to attend Pepperdine University School of Law. While at Pepperdine, he was a member of the Law Review and the Phi Delta Phi legal honors fraternity. He was named the Terry Giles Scholar and the Odell McConnell Scholar before graduating with honors. Upon graduation from law school, Mr. Ekmark accepted a judicial clerkship with Justice Roland B. Day on the Wisconsin Supreme Court.

In addition to serving as President on SCOHA's Board of Directors, Mr. Ekmark practices in the area of community association law, with an emphasis on litigation. He frequently lectures on association issues and has won several significant cases in this area.

We look forward to seeing you on November 18. Please make your reservations by e-mailing jeanne@ekmarklaw.com or calling Nancy Fagan at 480-945-7098. The deadline for reservations is noon on Friday, November 14.

SCOHA ANNOUNCEMENTS

UPCOMING MEETINGS:

Jan. 27 Annual Meetings
Feb. 24 Annual Legal Update

SCOHA's WEB SITE:

Don't forget to check our web site!

SCOHA's web site address is www.scottsdalehoa.com.

You can enter the member section by typing hoamember for the password.

**SCOHA
DATA TO
REMEMBER:**

**Tuesday,
Nov.
18th
11:45 a.m.**

**Lakeview Room
McCormick Ranch Golf
Club
7505 McCormick Pkwy**

**\$15.00
Reservations
Required**

**Call Nancy Fagan at
480-945-7098 by
Friday, Nov. 14**

480-922-9292

jeanne@ekmarklaw.com • www.scottsdalehoa.com

Architectural Review Process

Summary of the October 28, 2014 Meeting

Attorney Lynn Krupnik was SCOHA's guest speaker.

What types of modifications does the association govern? Ms. Krupnik indicates that you should review your governing documents because they may limit the association's authority to govern modifications, such as: structural vs. non-structural; internal vs. external; and some alterations may be exempted.

To determine how an architectural review committee should be structured, use the following questions:

- Is a committee required?
- Is there a required number of committee members?
- Do the committee members need to be association members or board members?
- Can the board opt to function as the committee? (For planned communities, the chairperson of the committee must be a board member.)

The association needs to ensure that the committee follows any meeting requirements, such as whether it is required to meet at certain intervals, if there is a timeframe for approval/denial of submissions that may dictate the meeting schedule and that all regularly-scheduled committee meetings must be open to the association members.

It's important to determine whether the committee is simply advisory or if it has the authority to make the decision. If the committee is advisory, it must determine the process/timeframe for advising the board.

The committee should strive to be uniform in applying its approval and review. Determine if there are specific factors that the committee should consider, such as aesthetics, harmony with existing improvements and impact on neighboring properties.

In addition to the governing document requirements, the committee must act reasonably.

What does it mean to act "reasonably?" The committee must:

- Act in the best interest of the association as a whole.
- Set aside personal opinions or motivations.
- Act in compliance with the governing documents and applicable law.
- Treat similarly-situated individuals similarly.

Determine if your association has or can adopt architectural guidelines. If an association is considering adopting guidelines, it needs to consider specific parameters:

- The guidelines must be in compliance with current laws and governing documents.
- The decisions must be in line with the guidelines.
- The guidelines should be reviewed and revised periodically and communicated to all homeowners.

In some cases, the committee may have to consider retaining an architectural consultant, especially in situations in which the application is outside the committee's area of understanding, such as a home addition, a separate structure or a rebuild. The committee could benefit from hiring a consultant because relying on expert advice can help protect the association from liability. In the best case scenario, an architectural consultant's fee could be passed along to the owner IF the declaration explicitly provides that this is the case. The committee can take steps to mitigate a potential challenge to this cost by requiring the owner to pay the fee upon submission of the application, add language to the application requiring the owner's acknowledgement, and if the fee is not referenced in the guidelines, the association should attempt to amend the guidelines. The fee can only encompass the exact cost actually incurred.

Regarding an architectural review fee, which is different from any architectural consultant fee, the analysis is similar to that of the consultant fee. The fee must be reasonable and there are limitations in the law with respect to solar panel submissions.

When responding to architectural submissions, review the governing documents first to determine if they set forth a required timeframe for a response. If a timeframe requirement is present, the committee must actually respond with a decision within such a timeframe. It cannot just issue a response stating it needs more time to make the decision. Sending the response by certified mail is a good way to track when the response was sent and received. E-mail is also an acceptable method to send the response because it provides documentation of the date and time sent, but check the governing documents to determine if they require a specific method of delivery. If the committee cannot respond to the submission within the timeframe required, it's better to send something to the owner denying the submission but explaining that the committee would reconsider if the owner provided certain information by a certain date.

Ms. Krupnik emphasized the importance of reviewing the governing documents to determine if the committee has a "deemed approval" clause or a "deemed disapproval" clause. It's important to be aware of such clauses as the association may subject itself to liability if it misses a deadline.

Typically, an association cannot refuse to review a submission from an owner who is not in good standing. The association is limited to the remedies set forth in the declaration. Unless the declaration specifically provides this remedy for architectural submittals, it cannot refuse to review the submission.

There may be instances in which a board/committee member may have to recuse himself/herself. This is recommend in clear conflict of interest situations. It should also be considered in situations with appearances of impropriety. The recusal should be announced at the meeting and reflected in the minutes.

Check the declaration and the architectural guidelines for imposing approval expiration dates or construction deadlines. Approval letters should clearly set forth expiration dates and/or deadlines. It's a good idea to also include a commencement date for construction.

Ms. Krupnik outlined several red flags and considerations for architectural submittals:

- Solar panels
- Antennas/satellite dishes
- Requests for reasonable modifications
- Flagpoles

Review the governing documents to also determine if the owner has a right to appeal the committee's decision. If the documents do give the right to appeal, determine what the deadline would be, if any documents are required to be submitted with the appeal, the entity that the appeal must be submitted to and the timeframe for the appeal to be addressed.

For new builds or construction deposits, there are special requirements that pertain to these types of construction if the association is a planned community. If it is a planned community, special requirements apply to situations that entail:

- New construction of the main residential structure, *and*
- Governing documents that permit the association to charge a security deposit; *and*
- The association requires the member to pay the security deposit to secure completion of the project.

For approval and disapproval letters, there are only three types: Approval, denial and denial with stipulations. Do not use "conditional approval" language. Attach the approved or disapproved plans to the letters. Avoid verbal discussions regarding the approval or denial. The denial letter must set forth a reasonable basis for the denial.



Dear SCOHA Members:

It is crucial that all SCOHA members contribute to a legislative action fund in order to protect associations from harmful legislation. We anticipate a difficult challenge again this year at the Arizona legislature and will have no chance of protecting associations and the people who live in them unless we hire a lobbyist. We cannot, however, hire a quality lobbyist without the financial assistance of our membership.

During the past few years, we have seen things change for the worse down at the legislature. Over the years, the legislature has passed new laws pertaining to community associations. We expect similar battles this year.

The bottom line is that we need a lobbyist in order to make sure that any new laws regarding associations are good for associations and the people who live in them. We cannot hire a good lobbyist without a substantial financial commitment from our members. To that end, we are asking that every association make the best possible donation that it can. At a minimum, we are asking for \$1.00 per home from every association. Please make your check payable to SCOHA and mail it to 6720 N. Scottsdale Road, Suite 261, Scottsdale, Arizona 85253.

This is certainly a worthwhile investment when you think of the risks associated with harmful legislation. It is a small price to pay in order to ensure that we have laws that will make our communities better rather than worse.

Thank you for your consideration with respect to this important issue. As always, please do not hesitate to contact me with any questions.

Sincerely,

Curtis S. Ekmark

Curtis S. Ekmark

President
