

October 4, 2024

HOA Issues and Questions

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Nature of the Relationships Municipality and the Builder

Builder and Municipality

- The CCRs specify the terms and conditions of the development of the property
- The municipality requires the builder to be qualified and have sound business practices
- There are consequences for not meeting the terms outlined in the contract

Builder and Association

- The builder files the articles of incorporation with the state, which is essentially a contract with the state
- The purpose of the association is to continue the contract the builder made with the municipality
- The builder does not require the association to be qualified or have sound business practices
- There are no consequences from either the builder or the municipality for not following the terms outlined in the CCRs

Municipality and Builder Questions

- 1) What makes this a “private contract” that is able to take away the civil rights of the homeowners? I have a “private contract” with my dentist, but my dentist is not able to strip me of my civil rights.
- 2) If the purpose of the association is to enforce the contract between the builder and the municipality, then why isn't the one who files the articles of incorporation responsible for the conduct of the association?
- 3) If the municipality authorizes the establishment of these “special neighborhoods” and they want to financially benefit from them, then what allows the association to have more authority than they do? Who works for who?

Nature of the Relationships Builder and Association

Builder

- When a builder contracts with a company for its own work, it typically requires the contractor to have a verified work history and sound business practices
- When a builder hires an employee, it is for the purpose of carrying out its own work and typically provides some kind of supervision and accountability for the work performed
- There are consequences for not doing the work appropriately

Association

- The builder files the articles of incorporation with the state, which is essentially a contract with the state. The purpose of the association is to continue the contract the builder made with the municipality
- The builder does not require the association to be qualified or have sound business practices, nor does it provide supervision for how it conducts its business
- There are no consequences from either the builder or the municipality for not following the terms outlined in the CCRs

Builder and Association Questions

1) There is an urban myth/soundbite that is often repeated – “we were told..” or “we knew what we were getting into,” but who told us that associations were not required to have sound business practices and when?

- Realtors know the law (per their licensing requirements) yet their advertising typically only talks about snow plowing and lawn mowing.
- First time homebuyers classes talk about budgeting and credit scores, but they don't teach what questions to ask about the soundness of a HOA.
- Minnesota Attorney General's website says to “read the bylaws”, but doesn't talk about how there are no standards for the content of bylaws or that is what is construed as “bylaws” doesn't have to be current, complete or truthful.

2) If the purpose of the association is to enforce the CCRs, then why isn't the builder providing and ensuring sound business practices are in place for doing that before they walk away?

3) If the builder and the municipality don't want to take any responsibility for the neighborhoods they create and not hold them accountable for their conduct, then why are homeowners stuck with their rules – are they not able to come up with a better/different business model that doesn't facilitate so much harm to homeowners?

Nature of the Relationships Association and Management Companies

Association

- Associations, by law, are not required to have sound business practices
- The purpose of the association is to enforce the CCRs – the contract between the builder and the municipality, not to represent the homeowners
- There are no competency or accountability standards for serving on a board of directors
- There is no formalized contract between the homeowner and the association, let alone one that says in plain language that by moving in, homeowners agree to give up their civil rights to people who are not required to know how to run a business

Management Companies

- Management companies, by law, are not required to have sound business practices
- Management companies, by law, are not required to be licensed, unless a property manager is going to lease, rent, list, procure prospects or negotiate, assist, or offer to perform any of those acts, he or she will need a broker's license
- There is no competency or accountability standards for qualifying as a management company for a HOA
- Management companies typically have a formalized contract with the association, but most often the contract is written for the benefit of the management company and not for the benefit of the homeowners or the association
- Minnesota law says management companies are supposed to be “neutral third parties”, but they often don’t function that way, and there are no consequences for them for not doing so

Association and Management Questions

- 1) Most CCRs state that board members need to be voted into office, but why are homeowners voting for a board that doesn't represent the homeowners? Why isn't whoever filed the articles of incorporation responsible for the board of directors?
- 2) How does it make good business sense for a builder to establish a company and then not ensure the people running have standards in place for running it?
- 3) What is the nature of the relationship of the association and the management company to the builder and municipality, if the purpose of the association is to enforce the CCRs? Wouldn't they, in the very least, be a contractor of the one who filed the articles of incorporation? So, why are homeowners paying for the management company instead of whoever filed the articles of incorporation?

FirstService Residential

Examples of why lack of oversight is detrimental to homeowners

- 1) They have appointed all of our board members.
- 2) They are the sole signers on a bank account with \$1.8 million in it and the bank is in Iowa.
- 3) Our master plan insurance policy has us, as homeowners, paying for employee theft coverage to cover the possibility of theft by FSR employees, as the association doesn't have employees. When I asked about the conflict of interest this creates for us, FSR supported the insurance company's attempt to get a restraining order on me to get me to stop asking questions.
- 4) When I approached the board about changing management companies, FSR responded with a letter from an attorney telling me that I am not allowed to talk to the board. If I want to communicate with them, I am to send a snail mail to FSR's Bloomington office and FSR will decide whether or not the board sees it. My dues paid for the attorney who sent the letter.
- 5) FSR recently started charging us a \$3 surcharge to make our payments through Clickpay. It's an online service that we have used for the last several years. Clickpay says it is there because the management company wants it. FSR is blaming Clickpay, and Visa says surcharges are against their policies. I asked FSR to remove the charge, and they refuse to do it.
- 6) FSR is listed as the president of our association on the business registration with the Secretary of State's office.

Nature of the Relationships Association and Homeowner

Association

- Has full power and authority to make decisions without the knowledge or approval of the homeowners
- Doesn't need a legally justifiable reason for issuing an assessment on a property
- Can retaliate
- Isn't legally required to be truthful with the homeowners

Homeowner

- Gives up civil rights when purchasing into a HOA
- Has no or very limited legal defense against toxic business practices
- Choices are to either tolerate toxic business practices or sell and move

Association and Homeowner Questions

- 1) If the association gets to make decisions about my home without my authorization or knowledge, doesn't that make them a landlord?
- 2) If the nature of the association is to function as a landlord, then why don't we have the same or similar protections that renters have?
- 3) If the purpose of the association is to enforce the CCRs established by the builder and the municipality, then why isn't the builder paying for the management company instead of making the homeowners do it?

Nonprofit Organizations

- 1) Minnesota law allows anyone to incorporate a nonprofit organization “for any legal purpose”, but it is only those with a purpose to be a public charity that are regulated or have any oversight to them.
- 2) Board of directors of a public charity can be held legally liable for their conduct, but there are no consequences for a board of an HOA who uses the association for their own financial benefit.
- 3) Public charities are required to have an audited financial statement when income is above \$750,000. There are no accounting or reporting requirements for HOAs at any income level.

Business Registrations

Secretary of State

1) Minnesota law says businesses are supposed to file an annual renewal with the Secretary of State's office, but there are no consequences if the association doesn't do that.

2) The Secretary of State will show the status of the organization on their website, but is not required to notify anyone when/if it doesn't happen.

3) Virginia requires this on their annual business registrations:

Annual Reports are filings made by domestic and foreign corporations listing the current directors, officers, and principal office address of the business. **The purpose of the Annual Report is to verify that your information is up to date.**

All corporations must file an Annual Report beginning the year after incorporation or registration with the Clerk's Office verifying the information is correct or indicating any changes, additions, or deletions.

The Clerk's Office sends the Annual Report to your Registered Agent two months prior to your due date.

Business Registrations Involuntary Dissolutions

A Minnesota corporation will be administratively dissolved for failure to file its annual registration for two consecutive years. The revisions also provide, however, that a corporation dissolved may file a registration, pay a \$25 fee and be reinstated to good standing retroactive to the date of dissolution. There is no time limit on such reinstatement. Reinstatement validates contracts and other acts during the period of dissolution and makes the corporation liable for them.

Involuntary dissolution generally involves a failure on the part of the company to comply with state law. A typical example of this is a failure to reregister the company with the Secretary of State as required under MN Statute §302A.821.

There needs to be a distinction/qualification made to this because the consequences for dissolution are different for homeowners than they are for a services company, for example.

I have identified more than 150 HOAs that have had an involuntary dissolution. It goes to how they operate the business and the competency of those running it.

Involuntary Dissolution

Texas

- No time limit; however, only considered to have continued in existence without interruption if entity is reinstated within 36 months.
- Both Texas-formed and out of state entities registered with the Texas Secretary of State (SOS) must satisfy all state tax filing requirements before they can reinstate, terminate, merge or convert a business. These requirements are detailed below. Note the filing due dates to avoid late penalties.

Virginia

- There is a 5-year period during which an inactive entity can reinstate. After 5 years, the Office of the Clerk does not have the authority to reinstate an inactive business entity.
- There are a few reasons that the SCC may terminate or cancel your business. Examples of these reasons are:
 - You did not pay registration fees;
 - If you are a corporation, you did not file an annual report;
 - Your registered agent resigned, and you did not file a statement of change appointing a new registered agent.

Involuntary Dissolutions

Questions

- 1) What happens to the homeowners when the association is no longer a valid business?
- 2) Renters have the ability to be put into a receivership of some sort while the building issues are being sorted out – why can't that be available for homeowners?
- 3) If it is determined that reinstatement is not a viable option, who gets to make that decision and how do homeowners get to participate in that decision?