

City of Cibolo HOA Knowledge Series



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Presenter



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OVERVIEW

- Governing Documents Intro
 - Including roles of owners, board members, committees
- Association Contracts Intro
- Standard of Care, Volunteer Immunity, and Insurability

Governing Documents

Intro



GOVERNING DOCUMENTS

Dedictory Instruments

- Plats
 - Turn raw acreage into lots, easements, reserves, streets, rights-of-way, etc.
- Articles of Incorporation or Certificate of Formation
 - Forms the HOA entity and defines the purpose of the entity
- Declaration of Covenants, Conditions and Restrictions
 - The deed restrictions, not “the Bylaws”
 - Supplements, annexations
 - Touch the dirt

GOVERNING DOCUMENTS

Dedictory Instruments, continued

- Bylaws
 - Corporate functions, not deed restrictions
- Rules, Regulations, Policies, Guidelines
 - Required by law: Document Retention, Document Production, Payment Plan, Management Certificate (filed with Texas Real Estate Commission), Enforcement and Fine Policy, Contract Bidding
 - Not Required But Recommended (not an exhaustive list): Collection Policy, Solar, Roofing Materials, Generators, Political Signs, Rainwater Harvesting, Flags, Xerascaping, Architectural Guidelines, Security Measures/Perimeter Fencing

GOVERNING DOCUMENTS

Declarations/Restrictive Covenants

- Purpose is to protect and preserve property values
- May state action permitted on a parcel of real property
- May state action prohibited on a parcel of real property
- Contain rights of enforcement

GOVERNING DOCUMENTS

Typical Functions of HOAs

- Maintain common areas, community signage, recreation centers, pools, parks, streets and gates
- Levy and collect assessments
- Enforce restrictions
- Adoption of rules and regulations, etc.
- Maintain policies of insurance
- Vendor contracts
- Operate architectural committee

GOVERNING DOCUMENTS

Funding of Community Associations

- Annual Assessments
 - Mandatory
 - Secured by lien
 - Foreclosable for non-payment
 - Judicial foreclosure
- Special Assessments
- Other Assessments
 - Working capital
 - Specific/Individual
 - Reserve funding

OWNERS

- Usually defined as any person who is a fee simple owner of a lot
- Membership rights per the Declaration and Bylaws
 - Every owner shall be a member of the association, i.e., mandatory
 - Membership shall be appurtenant to and may not be separated from ownership of any lot which is subject to assessment by the association

OWNERS

Restrictive Covenants

- Address architecture, landscaping, use, and conduct

Assessments

- Annual Assessments
- Special Assessments
- Specific Assessments

OWNERS

Voting rights of Members/Owners

- Election of directors
- Amendment of the Declaration
- Amendment of the Articles of Incorporation or Certificate of Formation
- Increase in Annual Assessments
- Special Assessments
- Other

OWNERS

- Read the Governing Documents
 - More than once
 - New documents may come through an amendment or adoption
- Attend board or member meetings
 - Not always an opportunity to vote, but participate nonetheless

OWNERS

In summary

- Owners owe financial obligations to the Community Association
- Owners have maintenance/compliance obligations with regard to their property
- Right to vote on certain key issues such as declaration terms and directors
- Read the governing documents, more than once

BOARD MEMBERS

- Makes decisions on behalf of the association as a non-profit corporation (with the exception of decisions made by the members/owners)
- General authority in the Texas Business Organizations Code and the governing documents regarding anything necessary and appropriate for administration of the affairs, duties, and rights of the entity per the governing documents

BOARD MEMBERS

- Prepare and adopt budgets
- Levy and collect assessments from owners to fund common expenses
- Operation, care, upkeep, and maintenance of the common areas
- Hiring personnel necessary to operate the association
- Making/amending rules and regulations, etc.
- Contracting for services, maintenance, or repairs
- Enforcing covenants, conditions, or restrictions affecting any property
- Engage experts for guidance on decision-making to protect HOA assets

COMMITTEE MEMBERS

- Creation of committees is typically supported by the Declaration (ACC), Bylaws (ACC and other committees), and the Business Organizations Code (committees generally)
- Appointed by the Board
- Purpose or scope of authority provides specific purpose of the committee
- Cannot act in place of or as a director

COMMITTEE MEMBERS

Practical benefits of committees

- Assist the board and management with key operations of the community
- Connection to the membership allows for greater transparency
- “Training ground” for future board members
- Board decisions less likely to be challenged
- Great way to “check the pulse” of the community
 - Example - amendment to the Declaration
- Fosters and builds community spirit

MANAGEMENT

Generally speaking, role of management is to serve the board as the representatives of the corporate entity and implement board decisions (partial listing)

- Functions both behind the scenes and on the front lines
- Makes recommendations to the board based on management expertise

MANAGEMENT

- Custodian of books and records
- Seeks and obtains bids for vendor services (maintenance, landscaping, accounting, legal, etc.)
- Properly pre-screens vendors, service providers, contractors, etc. (insurance, reputation, pricing, etc.)
- Facilitates collection of assessments both internally and when escalated to legal counsel
- Facilitates compliance enforcement both internally and when escalated to legal counsel
- Insurance claim management

MANAGEMENT

- Notice of meetings (board and member meetings)
- Presiding over the annual meeting, coordination of the election or any member vote
- Maintains the accounting, budgeting, and financial accounts of the entity
- Social event implementation
- Facilitates communication with the members
- Fosters improvement of the community experience of the owners

Questions?



Association Contracts 101



GOALS

- Understanding the desired outcome by the association
- Conveying that message to all vendors
- Preparing a request for proposal (“RFP”)
- Working with your professional team
- Evaluating responses to RFPs
- Negotiating and Executing the agreement
- Evaluating the work product of the vendor

VENDOR

The term “Vendor” for this presentation means:

- Any service provider, such as
 - Landscaper
 - Plumber
 - Painter
 - Gate maintenance
 - Pool maintenance
- Professional Team
 - Attorney
 - CPA
 - Banker
 - Insurance Broker

UNDERSTANDING THE DESIRED OUTCOME

What is it that the Association really wants?

- Results
- Cost
- Quality
- Specific specifications
- Specific timeframes
- Strong insurance and indemnity

CONVEYING THE MESSAGE TO VENDORS

How is the Association's message conveyed?

- Please send a bid for landscaping
- Please send a bid for insurance that is needed
- Please send a bid for legal services

STATUTORY REQUIREMENTS

Section 209.0052 TPC

- Amends Section 209.0052 TPC
- Requires POA to solicit bids or proposals using a bid process established by POA if it chooses to contract for services that will cost more than \$50,000
- *Applies to single family*
- *Does not apply to Developer-controlled associations*

PREPARING A BID REQUEST

The Elements

- Scope
- Specifications
- Expectations
- Standards
- Quantifiable results
- Payment terms
- Default
- References

Key Contract Terms

- Term
- Automatic renewals
- Default, notice of default, cure period, cure, default (on repeat)
- Methods of notice
- Notice of termination
 - Balancing ease of getting out of a bad contract with appreciation of the “break even” experience of the vendor

Key Contract Terms

Types of insurance

- General liability
- Worker's compensation
- Motor vehicle
- Umbrella
- Employers liability
- Pollution
- Cyber crime/Fidelity
- Etc.

When a claim occurs whose insurance pays first

Key Contract Terms

Indemnification/Hold Harmless

- Who is accepting the risk relating to performance
- Are you paying the vendor for this risk
- Is contractual indemnification funded by insurance
- If not, what assets secure payment of indemnity
- Is there a duty to defend
- Hold harmless provisions
- Who is supervising the work

NEGOTIATING AND EXECUTING THE CONTRACT

Use of Master Service Agreement

- Association's form contract for its use with Vendors
- Sets forth the requirements that often stall or terminate the process
 - Insurance
 - Indemnity
 - Default
 - Right of termination
 - Etc.
- Vendor bids are based upon a set contract document
- Avoids confusion regarding comparing bids

EVALUATING THE WORK PRODUCT

Like any other relationship — periodic reviews are a good idea

- Discuss performance issues
- Room for improvement
- Modification of scope of agreement
 - Be sure it is bid with detail
 - Effect on existing agreement
- Effects on renewal
- When is it time to rebid?

Questions?





GOALS

- What is Standard of Care?
- How to perform duties without having any personal liability
- What risks are associated with volunteering?

BUSINESS ORGANIZATIONS CODE

- §22.221 – General Standards for Directors
 - Directors are not liable for actions taken as a director if:
 - The Actions were taken in good faith
 - With ordinary care
 - In a manner the director reasonably believes to be in the best interest of the corporation

BUSINESS ORGANIZATIONS CODE

- §22.235 – Officer Liability
 - An officer is not liable to the corporation or any other person for an action taken or omission made by the officer in the person's capacity so long as the officer's conduct was exercised:
 - In good faith;
 - With ordinary care; and
 - In a manner the officer reasonably believes to be in the best interest of the corporation

BUSINESS ORGANIZATIONS CODE

- Establishing good faith
 - A volunteer may rely on information, opinions, reports, or statements prepared or presented by:
 - Community manager
 - Legal counsel
 - Certified Public Accountant
 - Investment banker
 - Landscape architect
 - Engineer
 - Person the governing person believes to possess professional expertise
 - Committee of the governing authority which the governing person is not a member
 - A volunteer may not rely on above information if he/she has knowledge that makes reliance unwarranted

STANDARD OF CARE

- §22.223 – Not a Trustee
 - Director is not considered to have the duties of a trustee with respect to the corporation or with respect to property held or administered by the corporation
 - Not a fiduciary
 - Public declaration of fiduciary duty

CHARITABLE IMMUNITY AND LIABILITY ACT OF 1987

- **§84.003 – Definitions**

- Homeowners associations are included in the definition of “charitable organization” (must be HOA per IRS code §528(c) and file a 1020H)
- Volunteer is a person acting in their course and scope who does not receive compensation in excess of reimbursement for expenses
 - Includes directors, officers, etc.
- Good faith is honest, conscientious pursuit of activities and purpose that the organization is organized and operated to provide

CHARITABLE IMMUNITY AND LIABILITY ACT OF 1987

- §84.004 – Volunteer Liability
 - (a) Volunteer serving as a director, officer, etc. is immune from civil liability for acts/omissions resulting in death, damage, or injury if the volunteer was acting in the course and scope of his duties or functions as an officer, director, etc. within the organization
 - (e) Immunity does not apply to liability of organization, however, there are potentially some caps in place

CHARITABLE IMMUNITY AND LIABILITY ACT OF 1987

- §84.007 – Applicability
 - (a) Does not apply to an act that is intentional, willfully or wantonly negligent or done with conscious indifference or reckless disregard for the safety of others
 - (b) Does not modify the duties or liabilities of a director or officer to the organization or its members and shareholders
 - (c) Does not apply if the organization was formed substantially to limit its liability under this chapter

CHARITABLE IMMUNITY AND LIABILITY ACT OF 1987

- **§84.007 – Applicability**
 - (g) Sections 84.005 and 84.006 do not apply to any charitable organization that does not have liability insurance coverage in effect on any act or omission to which this chapter applies
 - Coverage shall apply to the acts or omission of the organization and its employees and volunteers in the amount of:
 - At least \$500,000 for each person
 - At least \$1,000,000 for each single occurrence for death or bodily injury
 - At least \$100,000 for each single occurrence for injury to or destruction of property

VOLUNTEER PROTECTION ACT OF 1997

- The Federal Act

- Establishes a uniform minimum level of protection provided to volunteers, nonprofit organizations and governmental entities in lawsuits based on the activities of volunteer
- Preempts state laws that provide less protection to organizations and entities for the acts of volunteers

VOLUNTEER PROTECTION ACT OF 1997

- § 4 – Limitation on Liability for Volunteers
 - (a) No volunteer of a nonprofit organization or governmental entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity if:
 - The volunteer was acting within the scope of the volunteers' responsibilities at the time of the act or omission and
 - The harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer

VOLUNTEER PROTECTION ACT OF 1997

- § 4(f) – Exceptions to Limitation on Liability
 - Inapplicable to misconduct that:
 - Constitutes a crime of violence or an act of terrorism
 - Constitutes a hate crime
 - Involves a sexual offence
 - Violates State or Federal civil rights law
 - Where defendant was under intoxication of alcohol or drugs

STANDARD OF CARE & INSURANCE

- Behavior outside the standard of care may lead to loss of coverage
 - Unilateral actions or actions by less than a majority
 - “Rogue” director or committee members
 - Action/decision contrary to advice of the expert
- Exclusion from coverage may equal self-funded defense
- Use experts to maintain coverage
- Ultimately protects your personal assets
- Value of experts in communications with members
 - The “why” of your decision

Questions?



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