



www.RMWBHLaw.com
800.713.4625

AUSTIN

111 Congress Ave, Suite 1620
Austin, Texas 78701
512.279.7344

DALLAS

Mockingbird Station
5307 E. Mockingbird Ln, Suite 685
Dallas, Texas 75206
214.365.9290

FORT BEND

Sugar Land Town Square
2277 Plaza Drive, Suite 290
Sugar Land, Texas 77479
281.207.7697

HOUSTON

2800 Post Oak Blvd 57th Floor
Houston, Texas 77056
713.840.1666

SAN ANTONIO

4630 N. Loop 1604 W. Suite 311
San Antonio, Texas 78249
210.731.8858

The information contained in this newsletter is not legal advice, but rather general information for educational purpose, and will not establish an attorney-client relationship. Please consult with an attorney of your choosing before entering into ANY contract.



ROBERTS MARKEL WEINBERG BUTLER HAILEY

JUNE 2018 | COMMUNITY ASSOCIATION NEWSLETTER



The Texas Supreme Court Issues its Opinion regarding Short-Term Rentals

by Mia Lorick

On May 25, 2018, the Texas Supreme Court issued an Opinion in *Tarr v. Timberwood Park*. This case, which originated in San Antonio, was a lawsuit brought by a homeowner seeking a declaration from the court that his short-term rentals were not a violation of the Timberwood Park deed restrictions. The Association prevailed in the trial court and on appeal. However, the Texas Supreme Court reversed the decision and held that short-term rentals are not a violation of the residential-use restriction set forth in the restrictive covenants applicable to the subdivision.

In reaching its conclusion, the Court considered the specific language in the restrictive covenants. There was no specific language prohibiting any type of leasing; and, use of the property was limited to residential use. Additionally, while there was a single-family restriction, the Court determined that it was related to architectural style and not occupancy. The Court found that short-term rentals, in which occupants eat, sleep, drink, and watch TV, are not a violation of the residential-use restriction.

The Court noted that the result may be different with different restrictive covenants and so to determine if your association can prohibit or limit short-term rentals your association's documents should be reviewed by a qualified attorney.

More information and detail will be provided in our next edition of the RMWBH community association newsletter.

IN THIS ISSUE:

The Attorney Engagement Letter: 3 Questions You Should Ask Before Signing.....2

Three Things to Know About Executive Sessions4

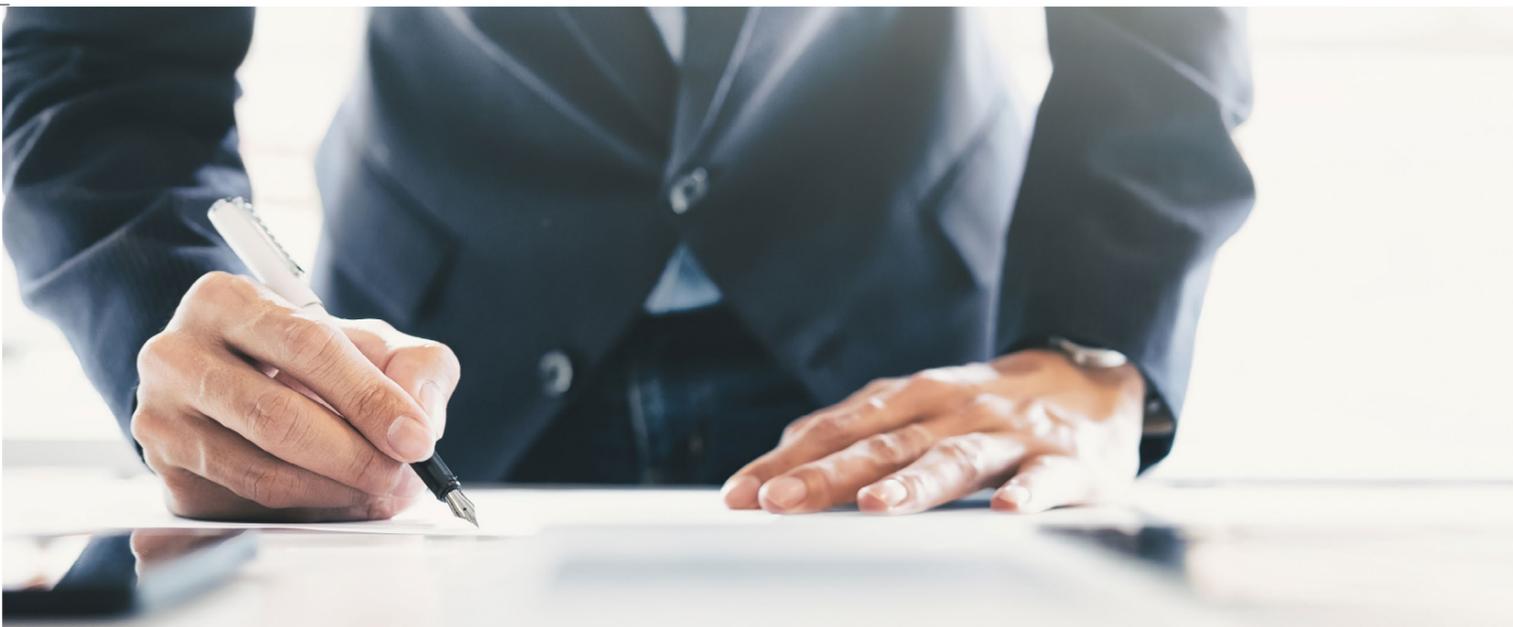
4 Things To Do To Get Your Association Ready For The Next Natural Disaster6

Upcoming Events9



Mia Lorick

Mia is an associate with the firm's Litigation and Appellate sections. Her practice focuses on general civil and complex commercial litigation as well as professional liability and labor and employment. Mia graduated from University of Houston Law Center.



The Attorney Engagement Letter: 3 Questions You Should Ask Before Signing

By Marc Markel

Before engaging an attorney, be sure you really understand how much you are going to be charged and for what. This is even more the case as a community association engages counsel. Often times a community manager or board of directors will seek a proposal for legal services without providing a request for proposal. What this often yields is an apples to oranges comparison of fees.

1. What are the fees and what is included in the scope of legal services?

When a community association or manager is seeking to determine the fees that will be charged by a law firm; questions should be asked. Will the law firm be charging an hourly fee when answering questions of a homeowner who calls after receiving a collection letter? Will the association be charged a fee monthly just because it has an open file at the attorney's office? Does the law firm have a flat fee schedule and if they do, what is included in the fee? If the flat fee does not include postage, copying and other fees-- is it really a flat fee?

As well, the hourly rate that attorneys charge can be misleading by itself. An attorney that charges \$400 or more per hour may be more cost-efficient than an attorney charging less than \$200 per hour. How is this possible? An attorney who has a great wealth of knowledge may be able to answer your questions on the phone or a quick email where

another attorney may have to "research" the issues and get back with you. In that event the attorney with the higher hourly rate is actually a lower overall cost to the association.

2. When are legal fees due?

In most cases, fees are due within 30 days of presentment of an invoice; however, that is not always the case. In fact, not all attorneys provide monthly invoices. Monthly invoices are the only way to have a true and accurate prediction of the financial position of the community association and its obligation to counsel. There are some attorneys who will wait until the collection matter is concluded and you are left with an invoice that might be somewhat of a surprise.

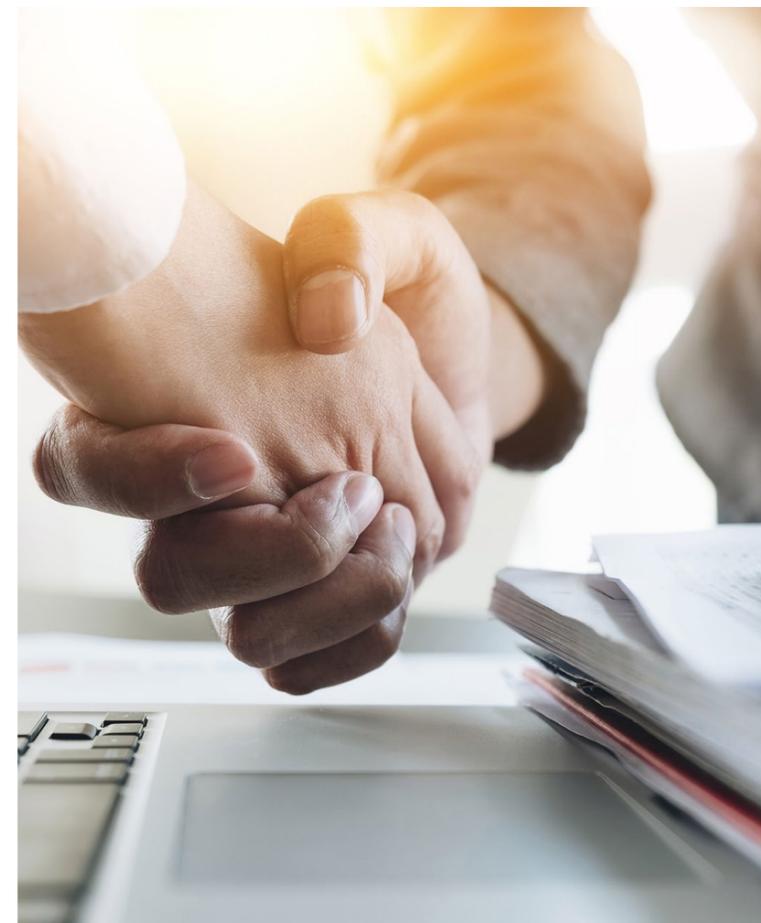
Monthly invoices are the only way to have a true and accurate prediction of the financial position of the community association and its obligation to counsel.

3. Who will precisely work on the case and which practice areas do they specialize in?

You should determine what the skill set is of the attorneys that you are hiring. Are they really good at collections, but not at

providing legal opinions? If the association needs a litigator for a deed restriction matter, does the law firm have attorneys with the necessary skills to obtain the relief the community association is entitled to? Community associations are complex corporate entities and they can be challenged with contract negotiation, dispute resolution, complex insurance issues, employment disputes, claims from H.U.D. relating to a fair housing dispute, interpretation of governing documents that are often ambiguous and many other types of issues. When determining what law firm to hire, you should determine if it's one that will be able to assist with a broad range of services or are they more focused on one or more issues.

So when considering counsel, be sure that the engagement letter sets forth not only the rates, but what the law firm can do if requested by the association, advises the association of what is included in flat rates and also advises the association of miscellaneous charges that may not have been anticipated.



Marc Markel

Marc is an equity shareholder with the firm's Real Estate section and is a leader of the Community Association Team. He has actively defended community associations and their volunteers in litigation and frequently assists developers through their due diligence process and creation of community process. His representation of developers, builders and associations involves litigation avoidance techniques in which he conducts a thorough risk analysis program. Marc is Board Certified in Residential and Commercial Real Estate by the Texas Board of Legal Specialization and is a Charter Fellow of the College of Community Association Lawyers. Marc graduated from South Texas College of Law in 1979.



3 Things to Know About Executive Sessions

By Clint Brown

Ahhhh the executive session. A time for board members to be candid and discuss anything they like and take any action they wish to take...right? Unfortunately, this simple statement, which is not correct, may be viewed as accurate among many community association boards. Here are some important tips to remember when conducting executive sessions to ensure you are in compliance with the law.

1. An executive session is NOT a separate meeting.

I see this many times when reviewing previous board meeting notices and agendas. The executive meeting starts at [X] time and the open board meeting starts at [Y] time. This is not accurate! The executive session is NOT a separate meeting; rather it is part of and within the board meeting. In order to have an executive session, you must first call the board meeting to order, establish quorum and then adjourn into executive session. Whether you have your executive session at the beginning of the board meeting or at the end, remember it falls within the board meeting itself and you must adjourn out of the executive session before either continuing with board business or adjourning the board meeting in total. Finally, if you have your executive session at the beginning of the meeting and are concerned that owners will show up at the beginning of the board meeting, you can simply make it clear on the notice and agenda that the board is immediately adjourning into executive session and will have the open portion of the board meeting at [Y] time.

2. There are only limited topics that can be discussed during executive sessions.

Many board members wish to discuss a variety of topics and make decisions during executive session simply because they can be more candid with one another in voicing their opinions. While I understand the reasoning, it is not allowed for both single family and condominium associations.

In single family associations, the only actions that can be considered during executive session are the following:

- 1) Personnel;
- 2) Pending or threatened litigation;
- 3) Contract negotiations;
- 4) Enforcement actions;
- 5) Confidential communications with the property owners' association's attorney;
- 6) Matters involving the invasion of privacy of individual owners; or
- 7) Matters that are to remain confidential by request of the affected parties and agreement of the board.

For condominium associations, the list is similar and only allows the following topics to be considered during executive session:

- 1) Personnel;
- 2) Pending litigation;
- 3) Contract negotiations;
- 4) Enforcement actions
- 5) Matters involving the invasion of privacy of individual unit owners; or
- 6) Matters that are to remain confidential by request of the affected parties and agreement of the board.

Finally, please keep in mind the board can only consider these actions but should generally not vote. If the board wishes to

vote on an action during executive session, please consult with the community association's legal counsel to determine what actions you can or cannot take during executive session.

3. General and NOT specific summaries should be made for actions considered and/or taken during executive session.

First and foremost, the executive session should not have its own set of meeting minutes. As discussed in Number 1, it is a session that is part of the board meeting, it is not its own meeting and should thus not have its own minutes.

In the single family association context, any action taken or considered during executive session should be summarized orally after the executive session and during the open portion of the board meeting. This summary should also be placed in the board meeting minutes. Please keep in mind that summary means just that; do not mention owner names, addresses or deed restriction violation history. But, what do you do if the executive session is at the end of the board meeting? Some boards simply adjourn back into open session and summarize to an empty room, which is okay. Another option I provide to boards is to summarize the executive session from the previous board meeting at the beginning of the next board meeting. For example, if you have an April executive session, the April board meeting minutes will reflect the summary BUT you orally summarize the April executive session at the beginning of the May board meeting.

If the board wishes to vote on an action during executive session, please consult with the community association's legal counsel to determine what actions you can or cannot take during executive session.

In the condominium association context, before you adjourn into executive session, the law requires that you orally announce the general nature of any business to be considered. So, if you have your executive session at the beginning of the board meeting, a general statement of the items to be discussed should be recited, regardless of whether any owners are present. Again, please keep in mind that general means just that; do not mention owner names, addresses or deed restriction violation history. Additionally, although not technically required, I also recommend placing such general statement in the board meeting minutes.

Finally, please keep in mind that board member workshops are not considered board meetings and do not have to be noticed if the board is not taking any formal action. Further information regarding workshops will be discussed in a later article.

If you follow these tips, you should start seeing more successful executive sessions and board meetings overall!



Clint Brown

Clint is a shareholder in the firm's Real Estate section as a leader of the Community Association Team. His practice includes Bankruptcy Law, Construction Law, Residential and Commercial Real Estate, Corporate Law, and Community Association Law. Clint is the Common Interest Community editor for the State Bar of Texas REPTL Section Law Reporter. Clint graduated cum laude from South Texas College of Law in 2009.



4 Things To Do To Get Your Association Ready For The Next Natural Disaster

By Jeffery Lucas

Soldiers and first responders prepare and train so that they are not paralyzed by the chaos of the situations they encounter but carry out the actions necessary to survive. Similarly, planning and preparedness can help your community survive when a natural disaster hits. A board should not over-analyze the possibilities before putting a plan in place. As General George S. Patton noted, “A good plan...now, is better than a perfect plan next week.” Get a plan in place; it can be improved on over time.

As we consider 4 areas of focus pertaining to disaster readiness for community associations, the initial action item for every association should be a thorough review of the governing documents to identify the association’s obligation and authority to take action vis-à-vis a natural disaster. Determining whether the board assumes an elevated level of risk and exposure to litigation if it adopts a disaster response plan or conversely, whether risk increases if the board fails to consider and adopt a plan for responding to disasters or emergencies within the community, is a critical threshold issue. Though it is somewhat outside the scope of this article, it should be noted that the obligations and approaches to disaster response will necessarily be different in a single-family association versus a condominium. For the balance of this article it will be predetermined that the the community association has the right to adopt and implement a disaster plan.

An association’s disaster plan does not have to be overly complex or restrictive, but it must contain sufficient information so that current board members can quickly digest and understand their roles in disasters that impact the association. When developing a plan to handle natural

disasters, a board of directors should consider the two main functions of a plan: 1) creating an effective response to the disaster while it is happening; and, 2) restoring the affected area to pre-disaster conditions as permitted by the community association’s governing documents. The following are four areas of focus to consider to ensure that a plan properly fulfills those two functions.

1. Consult with Your Membership

If constructing a disaster plan is a right or duty under the dedicatory instruments, and if the board has thoughtfully decided that it can and should take on that responsibility, before putting a pen to paper, the association should determine what the membership expects as a response during, and after the disaster has occurred. Either by a discussion in an open meeting, solicited comments or with a brief survey, find out what the members envisage as a reasonable and effective response, when disaster strikes. In addition to giving the membership some ownership in the plan’s design, the process itself may uncover subject matter experts, skill sets and resources within the membership, of which the board was unaware, and which can be called upon in the case of an emergency. Again, bear in mind that the obligations of a condominium association will be different that a single-family association.

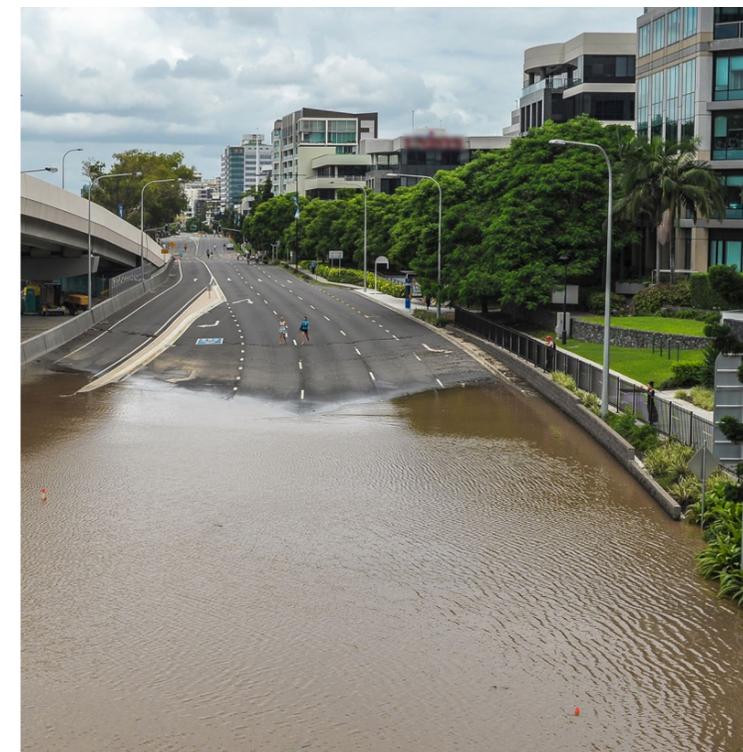
2. Insurance, Insurance, Insurance...

If the association hasn’t reviewed its insurance policies recently, the cost to repair or replace the association’s property has likely gone up. If that is the case, the association should determine whether it needs to increase its policy limits, after having an insurance appraisal

conducted. The association will also want to make sure it has the right type of coverage, like replacement coverage, so that it will be compensated for the full cost of replacing the association’s property, not the depreciated value. And don’t forget, the association needs to ensure that a board member or the manager has copies of the policies for when it’s time to rely on them. As well it is also time to determine what if any assets are not insured for casualty losses.

During Hurricane Harvey, in some very nice neighborhoods that flooded, only 20 percent of the homeowners had flood insurance.

The association should also consider reminding and encouraging its members to acquire and maintain insurance coverage to protect their assets. During Hurricane Harvey, in some very nice neighborhoods that flooded, only 20 percent of the homeowners had flood insurance. The association should remind its homeowners to make sure they have adequate coverage and coverage for every reasonably possible disaster. Do this in a manner that helps them understand that damaged and destroyed homes that remain unrepaired for an extended time after a disaster, negatively affect the entire association. Owners should be made aware of the insurance requirements in the governing documents and should consult their insurance professional before making any changes.



Jeffery Lucas

Jeff is an Associate in the firm’s Real Estate section as a member of the Community Association team. His practice focuses on representing community associations, collection litigation, deed restriction enforcement, commercial dispute litigation, mortgage lending/financial litigation and bankruptcy. Jeff graduated from South Texas College of law in 1993.

3. Effectively Facilitate Disaster Response and Restoration Through the Plan

A quick and competent response focuses primarily on providing assistance to affected members as quickly as possible. Most especially for single-family associations, the board should suggest and encourage a volunteer system as an integral part of its approach to disaster relief (e.g. block captains). A disaster plan should define broadly the type and scope of response that will be engaged in by the board and the association's other volunteer members, as the event is occurring and in the hours immediately following the event. In a disaster, the list of needs will always be longer than what an association can or should meet. The amount of support and for how long this initial support would continue is a decision on the part of the association's board of directors and could vary, depending on the type of incident and the purposes set forth in the association's formative documents.

Correspondingly, restoration of the affected area comprises a reestablishment of a state of normalcy as quickly and smoothly as possible. An association will, again, want to define and list the resources and services it can provide after the event has occurred to assist the area's recovery, with the association's primary focus being the common areas and only secondarily and to a much more limited extent, assistance, if at all, to member properties. When the community association contemplates its future needs in the event of a natural disaster, it might consider predetermining qualified vendors to assist with restoration and clean up and be sure that they are on a preferred list of customers if possible. If this is not the case please do not hire "Chuck with a Truck" and keep to the sound business practices that you have been in times of calm. Rushing to hire an unqualified contractor will cost more in the long run than being patient and working with the reputable contractors that you have used in the past.

An important component of an association's plan for its part in coordinating a disaster response and the restoration of the community is communication. It is hard to underestimate the value of timely dissemination of information to homeowners who are being affected by a disaster. Clearly, some disasters make communications quite difficult. Nevertheless, social media and cell phone apps have provided associations with tools for communicating, at times, without interruption during and after disaster events. How the association plans to communicate with its members should be part of every emergency plan, including the forwarding of messages from governmental sources and the provision of information concerning governmental sources of assistance to the members.

4. Adopt the Plan, Inform the Membership and Train the Participants

Once the plan has been drafted, reviewed and finalized, the board of directors should formally adopt the plan. Once the plan is adopted, implement formal training in the execution of the plan at the board level. There are numerous companies and consultants with expertise to assist in developing and administering realistic and effective disaster training and exercises. Finally, the board needs to communicate the disaster plan to the association's members so that they know what to expect from the board in response to any disaster within the community.

It is incumbent on the board of directors to protect the assets of the association. The board of directors can either be a hero or a zero, depending on the actions taken before, during and after a natural disaster. With a written plan in place, a board that understands its role in the plan and regular review and training of the plan, an association can reasonably anticipate effective disaster preparedness to result. As every Boy Scout will tell you, "be prepared."



UPCOMING EVENTS:

CAI San Antonio - Speed Networking at TopGolf

June 12, 2018 | 4:00 p.m. – 7:00 p.m.

5539 North Loop #1604 West
San Antonio, TX 78249
Free Entry for Community Managers
Must Register online
<http://www.caia.org/>

Law Luncheon: You've Been Sued

June 20, 2018 | 11:30 a.m. – 1:00 p.m.

RMWBH Training Room
4630 N Loop 1604 West, Suite 311
San Antonio, TX 78249

[Register Here »](#)

A Toast to Education: Contentious Meetings- Tips to Diffuse

July 18, 2018 | 4:00 p.m. – 6:00 p.m.

RMWBH Training Room
4630 N Loop 1604 West, Suite 311
San Antonio, TX 78249

*Appetizers and drinks will be provided

[Register Here »](#)

