



IN THIS ISSUE

Should Community Association Boards Meet After 6 p.m.?—2

5 Items to Consider as to Architectural Issues — 4



Should Lifeguards Be Provided at Community Association Pools? Things to (Bay)Watch Out For — 6



Upcoming Events — 8

It's that time again - CAI National Conference & Exposition

By Cherie Wilson

The Community Association Institute will host their annual conference in Washington, D.C., May 9 - 12. The national conference offers an opportunity for community managers to gain knowledge and perspective while meeting colleagues and industry leaders from across the country. It's easy for us to zone into factors affecting us in our own community, city, and even state; by attending the national conference, there is an opportunity to see the community association industry on a larger scale. With opportunities to share ideas, discuss common struggles, or learn new methods and strategies trending in community associations world-wide, this is an event you don't want to miss. The conference is also a time to celebrate successes within the industry, from a CAI chapter's growth and improvement to those receiving professional designations by completing educational courses.

We're often asked by fellow business partners and community managers if they should attend the CAI National Conference, and the answer is YES! RMWBH Law has a belief in community growth gained through education, knowing what is occurring across the country not just in our backyard, and finally we absolutely believe in celebrating the success of those making a difference in those communities. We hope to see you in D.C.!

Attending the conference? Let us know by emailing marketing@rmwbhlaw.com.

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.

Should Community Association Boards Meet after 6 p.m.?

By Marc Markel

Have you ever noticed that people don't like community associations, but they only seem to buy houses in deed restricted communities with a community association? Why is that the case when there are housing alternatives? The answer is simple. The purchase of a home is one of the largest, single purchases that someone will make in their lifetime and they want to protect the value of their investment. The best way to make sure that you don't wind up living next to Sandford & Son is to purchase a home in a neighborhood with an effective community association.

Now the words "effective community association" does not mean that they have one inspector for every 25 homes. What it means is a reasonable group of volunteers that have the best interest of the community in mind. It is a group of individuals who operate like a business and exercise good business judgment for the benefit of the entire community. So what does this have to do with meetings that occur after 6 p.m.?

It's hard to conduct business in a businesslike manner when folks are exhausted and not thinking clearly. Also what businesses operate after 6 p.m.? Retail stores, restaurants, and movie theatres are open after 6 p.m., but their employees didn't start working at 8 a.m. When you meet with your doctor, go to the bank, meet with an investment counselor, get your car serviced, or have a repairman come to your home, it almost always occurs during business hours and you will possibly need to take time off from work for this appointment to occur.

The community association has all the attributes of a business; it hires service providers, provides services, invests money, bills and collects money from its members, determines if members are compliant with the laws of the community, and much more. So, it's past time for the members of the board of directors to start operating like a business.

The first step toward operating like a business is having board meetings (when they are really necessary) during business hours. Many boards in the past said that having meetings at night was the only way to go because most everyone has a nine-to-five job. What that did was cause those who serve associations to work well beyond the typical work day. For management companies, what it meant was managers had to be in the office at opening bell to respond to issues from homeowners, supervising those who are maintaining the communities, and stay there until at 7 p.m. when the board meeting was set to begin. After working 11 hours, one can only imagine that your creativity and alertness has waned.

When you are responsible for the maintenance, preservation, and enhancement of property values as most boards of directors of community associations are, you don't want to make decisions when the only thing you are thinking about is nodding out. Patience levels, rational thought, and reasonableness seem to go out the window when there is controversy, you are exhausted, and maybe even hungry.



"I'd like you to work more than just 24/7."

Yes, community association boards are composed of volunteers and they are giving up a lot just by agreeing to serve. Should they be expected to leave their jobs during the daytime for a board meeting? The answer is yes, because of the jobs that they agreed to take on. However, as you will see, there are options for a meeting during the daytime that may not significantly interfere with their full-time jobs.



So what are the options? I represent community associations that have breakfast meetings, lunch meetings, and virtual meetings. These options are available and are more convenient for those who may need to take time off and/or adjust their schedules. Having business-like meetings when you are fresh and rested tend to be shorter and more effective. Your management team is not looking at their watch to see if they are going to be able to get home before their children are asleep or they totally run out of energy. If you need help setting up a virtual meeting, most management companies are equipped with the technology software that can help.

What about the complaints from homeowners who you are meeting with at a time when they can't participate because they have a nine-to-five job? These are the same folks who will take time out of their day to meet with others who only operate during business hours and it benefits all owners that we have volunteers.

Also, if there is a desire to have information sessions with the owners after hours, those can be scheduled quarterly or semi annually if there is a sufficient demand or need for such meetings.

Finally, there is one more reason why community association boards of directors will want to meet during business hours and that's cost. Management companies across the country are addressing the cost relating to meeting multiple ways. However, the two most popular options are a discount to associations with board meetings during the day, or a surcharge to associations who meet after 6 p.m.

Either way, the world of community associations boards needs to change and step up to the role of operating a business in a business environment during business hours when volunteers have the energy and patience to make good, sound decisions that benefit their communities.

Marc Markel 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.



5 Items to Consider as to Architectural Issues

By Sipra Boyd

A canary-yellow house, a ten-foot fence, and a driveway extension are just some of the various types of architectural issues that could mark a turning point in a community depending on how they are handled by the community association. Having a consistent and uniform architectural process is the key to ensuring the proper handling of issues related to architectural control to better protect property values.

1. Adopt architectural control guidelines

Although deed restrictions often provide a framework for the architecture of the dwellings in a community, many specific issues might not have been contemplated during the initial phase of the community or addressed in the restrictions. If the developer did not create architectural guidelines, the association should consider adopting guidelines to help direct owners about any desired exterior elevations, fence restrictions, color, and the overall topography of the properties in the community. Guidelines can incorporate a variety of topics including limitations on architectural modifications to existing residences. Obviously, the guidelines should not conflict with the restrictions, but may help clarify certain provisions in the restrictions. Work with the community association's legal counsel to create architectural control guidelines that compliment the restrictions.

2. Provide an application

Before constructing new improvements or making modifications to existing improvements, most deed restrictions require approval by the community association or its architectural control committee ("ACC"). The owner is required to submit an application that provides details about the proposed construction including materials, color, and a detailed drawing. Material and color samples are often required to be a part of the application process. The association or the ACC is then tasked with authority to review the application and related materials in order to determine compliance with the restrictions and architectural control guidelines. Owners are often either unaware of the requirements of the architectural control process or unwilling to submit the necessary

documentation. The architectural control guidelines can also provide owners with a copy of the application, including information about the requirements, as well as the architectural control procedures which should result in a more efficient process. Making the application easily accessible (i.e. community association's website) may also assist with compliance.

3. Promptly respond to applications

Deed restrictions typically contain an automatic approval provision providing that an application is deemed approved if the community association fails to approve or deny an application within thirty (30) days after submittal. Obviously, these types of provisions attempt to protect owners from unreasonable delays in the construction process. However, deemed approval provisions may hamstring the associations ability to regulate architecture if the process is not refined or handled properly. Once deemed, it is extremely difficult if not impossible to require the owner to comply with the restrictions. As a result, architecture in violation of the restrictions may lead to bigger problems involving waiver and abandonment of the restrictions. Again, the association must protect the restrictions by having proper procedures and processes in place to prevent deemed approvals.

Additionally, if the application lacks information regarding the proposed construction, the ACC should not wait until the end of the thirty-day period to request additional information. In fact, quickly deny the application and make the request for additional information as soon as possible to avoid allegations of unreasonable delays.

4. Determine if a variance should be given

Occasionally an owner submits an application that is not in conformity with the restrictions or guidelines. Only if the restrictions give the community association explicit authority to grant a variance should the association consider such a request. Generally, granting variances for these types of requests should be limited to situations in which a hardship exists due to the particular nature of the property. It is important to keep in mind that

granting numerous variances could also lead to allegations of waiver and abandonment of the restrictions. Therefore, variances should be seriously considered. Associations should consult with its legal counsel to determine if the authority to grant variances exist, whether a particular situation warrants a variance, and to document the variance correctly in the real property records.

5. Act quickly on violations

Once an application is approved or denied, the community association should pay attention to the property to prevent the beginning of unapproved construction or variations from approved construction. Unfortunately, the longer unapproved construction continues towards completion, a judge or jury may be less likely to require an owner to undo or even revise the construction. Chances for compliance are best at earlier stages of construction before money, labor, materials, and time become issues. It may become necessary for the association's attorney to become involved either by sending a cease and desist letter, or in the most egregious situations, by filing a temporary restraining order demanding that all construction cease immediately. Regardless, the association must be cognizant of any ongoing or new construction in the community by relying on its board members, owners, and management team during inspections.

For the architectural control process to be successful, it is extremely important for community associations to be engaged in the process from beginning to end. Adopting architectural control guidelines and having a systematic procedure to respond to applications provides a solid foundation for dealing with new or even reoccurring architectural issues. Additionally, promptly dealing with any issues throughout the application and approval process helps ensure that construction does not begin or progress to a point of no return. Some associations even use independent companies to review architectural

control applications requiring a non-refundable deposit to cover the review fees. Unfortunately, it takes just one architectural issue to potentially create problems with deviations from the restrictions, decreasing property values, as well as the expenditure of assessment income on legal expenses to pursue the property owner with litigation. Due to the potential negative impact on the community, it is vital for associations to work with their management teams and legal counsel to make certain that the architectural control process is implemented correctly and systematically from start to finish.

Sipra Boyd is a shareholder in the firm's Real Estate section as a leader of the Community Association Team. She represents single-family residential, condominium, and commercial community associations throughout Texas and her practice focuses on all aspects of Community Association Law. Sipra graduated from South Texas College of Law in 2000.



Should Lifeguards Be Provided at Community Association Pools? Things to (Bay)Watch Out For

By Eric Tonsul

Recently, I made a very uninformed, poor decision and decided to watch the movie Baywatch. I would not be surprised if even David Hasselhoff thought the movie was cringe worthy (now that is saying something). While enduring my self-imposed suffering, I was reminded of the movie Back to the Future. More specifically, I was wishing I had a DeLorean that would take me back in time to get those two hours of my life back. Poor movie-watching choices notwithstanding, summer is right around the corner and association pools will be overflowing with energized kids looking to beat the summer heat. A question I often get asked by clients is whether a community association should or should not provide lifeguards at the pool.

Pursuant to Texas law, a lifeguard and second responder are required to be provided at Class A pools during competitive events and at all Class B pools. A lifeguard and second responder are required at Class C pools that have a diving board or a slide that is not locked or chained to prevent use [25 Texas Administrative Code §265.199(g)(9)].

Per §265.182(99) of the Texas Administrative Code:

Class A Pool - Any pool used, with or without a fee, for accredited competitive aquatic events such as Federation Internationale De Natation Amateur (FINA), United States Swimming, United States Diving, National Collegiate Athletic Association (NCAA), National Federation of State High School Associations (NFSHSA), events. A Class A pool may also be used for recreation.

Class B Pool - Any pool used for public recreation and open to the general public with or without a fee.

Class C Pool - Any pool operated for and in conjunction with:

(i) lodging such as hotels, motels, apartments, condominiums, or mobile home parks;

(ii) property owner associations, private organizations, or clubs; or

(iii) a school, college or university while being operated for academic or continuing education classes. The use of such a pool would be open to occupants, members or students, etc., and their guests but not open to the general public.



Most community association pools will be considered Class C pools. Consequently, if an association's pool does not have a diving board or slide, then lifeguards and second responders are not required per Texas law. If a community association's pool does have a diving board or a slide that is not locked or chained to prevent use, then lifeguards are required per Texas law.

Even if the community association did not have a legal duty to provide lifeguards at the pool, Boards should strongly consider that lifeguards are utilized. If lifeguards are not present during pool hours, the risk of liability for someone being injured or harmed increases significantly. There is no way for a community association to completely protect itself from litigation; instead, alternatives should be explored to provide the greatest protection possible for an association. Commonly, community associations are apprehensive to utilize lifeguards based on the cost. However, boards of directors need to exercise good business judgment and that involves shifting of risk whenever possible. A community association should consider that utilization of lifeguards as a precautionary measure and spending a reasonable amount up front to avoid a potentially substantial adverse judgment in the future. The use of lifeguards on the front end can save a world of sunburn on the back end.

While a community association can hire lifeguards directly to reduce the risk of a potential accident at the community pool, an association may find itself defending allegations that it is liable for the alleged

negligence of its employees. If an injury were to take place at the community pool while a direct hire lifeguard was on duty, an association would have to rely upon its own liability insurance to pay for the costs of defense as well as any indemnity that would have to be paid by settlement or trial verdict. Thus, even though having lifeguards is recommended, the community association should not hire lifeguards directly.

It is recommended that a community association contract with a lifeguard service provider to utilize lifeguards at the community pool. Many pool maintenance companies provide lifeguard services and liability should be shifted to the lifeguard service provider through contractual indemnity provisions backed by adequate insurance. Maintaining lifeguards through a lifeguard service provider is the preferred course of action for a community association assuming that the appropriate contractual indemnity provisions and insurance are in place. It is recommended that any contract with a lifeguard service provider be reviewed by an attorney so that any and all costs related to alleged liabilities of the lifeguards can be shifted to the lifeguard service provider. By doing so, this will allow the Board to spend its valuable time focusing on the more important things in life...like scouring the internet to find out if anyone has finally invented a plutonium-fueled, flux-capacitor enabled DeLorean.

Eric Tonsul is a shareholder in the firm's Real Estate section as a leader of the Community Association Team. His practice includes representation of land developers, community associations, condominium associations and other common interest communities. Eric graduated from South Texas College of Law in 2000.



Upcoming Events

A Toast to Education: Sex Offenders- What Can Be Done?

May 16, 2018 | 4:00 p.m.- 6:00 p.m.

RMWBH Training Room

4630 N Loop 1604 West, Ste. 311

San Antonio, Texas 78249

[Register Here](#)

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, Ste. 311

San Antonio, Texas 78249

[Register Here](#)

LOCATIONS

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



ROBERTS MARKEL WEINBERG BUTLER HAILEY PC

www.RMWBHLAW.com

800.713.4625

© 2018 Roberts Markel Weinberg Butler Hailey PC