SUMMERFIELD HOMEOWNERS ASSOCIATION
Answers to Homeowner Legal Questions
prepared by Epsten Grinnell & Howell
5/29/08

FINANCIAL.

1. Is it true that the Board can raise our dues above the 3% and/or levy a special assessment without a vote of the community, even though our governing documents state that they must?

Yes. California Civil Code Section 1366(b) provides that notwithstanding more restrictive limitations placed on the board by the governing documents, the Board of Directors may not impose a regular assessment that is more than 20% greater than the regular assessment for the association's preceding fiscal year or impose special assessments which in the aggregate exceed 5% for the budgeted gross expenses of the association for the fiscal year without the approval of owners, constituting a quorum, casting the majority of the votes at a meeting for election of the association.

2. What liabilities do individual homeowners have with regard to the community pool and common area? I know we have insurance, but what if it is not enough?

California Civil Code Section 1365.9 was intended by the Legislature to offer civil liability protection to owners of the separate interest in the common interest development that have common areas owned in tenancy-in-common if the association carries a certain level of prescribed insurance that covers a cause of action and tort. It further provides that any cause of action in torts against any owner of a separate interest arising solely by reason of an ownership interest as a tenant-in-common in the common area of a common interest development shall be brought only against the association and not against the individual owners of the separate interest, if both of these insurance requirements are met: (1) the association maintain and have in effect for this cause action, one or more policies of insurance which include coverage for general liability of the association, and (2) the coverage is at least three million dollars ($3 million) if the common interest development consists of more than one hundred separate interest.

3. What obligation do HOA's have to fund reserves?

California Civil Code Section 1366(a) provides that the (a) association shall levy regular and special assessments sufficient to performance obligations under the governing documents. Additionally, Civil Code Section 1365.5(b)(5) provides that the board must adopt a reserve funding plan to meet the association's obligation for the repair and replacement of all major components. The plan must include a schedule of a date and amount of any change in regular or special assessments that would be needed to sufficiently fund the reserves. Finally, Civil Code Section 1365(b) provides that funding plans must be adopted in open meetings and distributed to all owners. However, at present, there is no statutorily mandated minimum amount of reserve funding in California.

ARCHITECTURAL POLICY ENFORCEMENT.

1. Does the HOA, including the Architectural Committee, have the legal right to enforce any policy approved by the HOA board? Can homeowners be forced to pay for violations of HOA policies, including court costs necessary to assist compliance?

Article XI of the Association's Bylaws provides that the Association shall appoint the Architectural Committee as provided in the Declaration. Article V of the Association's November 15, 1972 Declaration of Covenants, Conditions and Restrictions ("Declaration") provides that no building, fence, wall or other structure shall be commenced, erected or maintained, nor shall any exterior additions to or change in paint, or alteration be needed until the plans and specifications showing the nature, kind, shape, height, materials, color and location have been submitted to and approved in writing as to the harmony of the external design and location in relation to surrounding structures and topography by the Board of Directors of the Association, or by an Architectural Committee composed of three (3) or more representatives appointed by the Board.

California Civil Code Section 1354(a) provides that the covenants and restrictions in the Declaration shall be enforceable, equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interest in the development. Unless the Declaration states otherwise, these servitudes may be enforceable by any owner of a separate interest or by the association, or by both. Additionally, Section 1354(b) provides that the governing documents other than the Declaration may be enforced by the association against the owner of the separate interest or by an owner of a separate interest against the association. Finally, Section 1354(c) provides that in an action to enforce the governing documents, the prevailing party shall be awarded reasonable attorneys fees and costs.

2. Can an HOA place a lien against a homeowner for violations?

California Civil Code Sections 1367 and 1367.1 permit the Association to place a lien on an owner's separate interest property when a regular or special assessment is past due. Civil Code Section 1363(g)(h) permits an association to impose a monetary penalty on any association member for violation of the governing documents or rules of the association. However, Civil Code Section 1367(c) provides that a monetary penalty imposed by the association as a disciplinary measure for failure of a member to comply with the governing instruments, except for the late payments, may not be characterized nor treated in the governing instruments as an assessment which may become a lien against the members of subdivision interest enforceable by the sale of the interest. Accordingly, if an owner does pay a fine, the Association may <u>not</u> lien his or her property.

GOVERNING DOCUMENTS.

1. Our governing documents that are 30+ years old and we have been told that some rules/policies might no longer be current because of new legislation. What are the implications of not taking action to modify the HOA laws?

Our records indicate that the Association's Declaration was recorded on or about December 15, 1972, and that various subsequent amendments were recorded after that time, the most recent in or about 1977. Accordingly, the Association's governing documents are at least 30 years old. While the Declaration and its subsequent amendments are legally binding, enforceable documents, they are somewhat misleading in that portions of these documents have been superseded by California law. A good example of that is that an Association's ability to impose regular and special assessments without a vote of the membership under Civil Code Section 1366(b) that was discussed above. Not spending a significant period of time to review the Association's governing documents at length, we will not be able to provide you with other provisions that have been superseded by California law. However, typically the Legislature adopts several new pieces of legislation each year that impacts homeowners associations, or are likely any provisions of the Association's governing documents that will need to be amended to bring them into compliance with current California law.

2. What is the process to update the HOA laws?

We believe this question is intended to ask what is the process to update the Association's governing documents, and we will answer it accordingly. The process to amend the Association's Declaration is set forth in Article VII, Section 3 of the Declaration. It provides that an affirmative vote by seventy-five percent (75%) of Owners is required to amend the Declaration. Similarly, Article XIII, Section 1 of the Association's Bylaws provides that the Bylaws may be amended by a vote of a majority of a quorum of members.

3. Do we really need a membership approval to modify our HOA laws, if legislation dictates something other than we currently have?

As above, we believe that this question is asking whether member approval is required to amend the Association's governing documents to incorporate new legislation if this legislation supersedes existing provisions in those governing documents? As noted with the assessment collection increase above, while there may be new legislation that supersedes portions of the Association's governing documents, a homeowner typically reviews his or her governing documents, not the California Civil Code to determine what his or her duties and obligations are to their homeowners association. Therefore, to avoid confusion like with the assessment collection issue, we recommend that the association consider amending its governing documents to incorporate the more than 30 years of legislation that has been enacted since the Association's governing documents were last amended.

4. We have a lot of rentals in our neighborhood, is there any legal way to limit the number of rentals?

Restrictions on rentals are generally characterized as "restraints on alienation." California Civil Code Section 711 provides that "unreasonable restraints on alienation are void." As such, the issue is always whether a particular restriction, including a restriction on rentals, is unreasonable, or reasonable; if unreasonable, the restriction if void. Otherwise, it is valid.

The specific issue of whether a homeowners association has the right to adopt rental restrictions which interfere with an owner's existing right to rent property within the community has not recently been addressed by California courts. However, a rental restriction was upheld by the Florida Supreme Court in a 2002 case entitled *Woodside Village HOA v. Jahren.* However, a Florida decision is not binding in California.

Generally speaking, owner adopted Declaration amendments are presumed reasonable and may be enforced against owners who purchased their properties before the Declaration was amended. (*Nahrstedt v. Lakeside Village Condominium Assn.*). In the 1994 *Nahrstedt* case, California Supreme Court held that a restriction will be upheld unless unreasonable in that it violates public policy, it bears no rational relationship to the preservation of the affected land, or the burden of the restriction is so disproportioned to the benefit that it should not be enforced. In order to determine whether a particular restraint is unreasonable, a court will balance the degree the restraint on one hand versus the "justification" for the restraint on the other hand.

In our opinion, a properly adopted rental restriction should be entitled to a presumption of reasonableness under the *Nahrsted* case, putting the burden on the complaining party to prove the restriction is unreasonable. To do so, the owner must prove that the restriction is wholly arbitrary, imposes a burden on the use of land that far outweighs the benefit and/or the restriction violate public policy. The validity of the rental restriction should be measured by a benefit or burden as to the entire community, not on the basis of its effect on a single homeowner. However, we cannot predict how a California court would hold on this issue.

5. Is there any legislation in the planning process that could impact our HOA laws? Should we look at updating other parts that are not currently "unlawful," but could become so in the near future?

Once again, as noted above, this question appears to be referring to the Association's governing documents, not the "law," and we have answered it accordingly. As noted above, the Legislature typically enacts several pieces of legislation that impacts homeowners associations each year. However, it is very difficult to predict which legislation will be enacted by the Legislature in any given year, much less in the future years. Accordingly, we do not recommend that the Association amend its governing documents in anticipation of possible future legislation.