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Annual Meeting Minutes Addendum

Andrew Mowery <andrew.p.mowery@gmail.com> Wed, Nov 14, 2018 at 12:53 PM
To: Buck Hammond <buck.hammond@gmail.com>
Cc: Keith Knight <send.keith@gmail.com>

Buck & Keith,

At last night's meeting, Heather Phillips asked a question which was addressed by both Walker and Irve regarding the supremacy of Board decisions on matters for which the ACC has authority. Her question was specifically in regards to whether or not the Owners have a right to vote upon issues in which the ACC has made a determination that has subsequently been reviewed by the Board.

While I respect the concern raised at the last Board meeting regarding speaking about legal matters, this question was raised in an open meeting regarding the more general question of policy and procedures in enforcement of the CCRs or any rules adopted by the Board.

In addition, I've reviewed the applicable Colorado State Law, and in particular CRS § 38-33.3-308 (2016) as it relates to transparency. I do not believe we have acted in good faith in regards to this law by attempting to restrict Board members from using email for deliberations regarding the appropriate procedure we will use in addressing enforcement of CCRs and Rules. And, since state law supersedes our CCRs, it is, in my opinion, my good faith duty to document for future Board members the consideration of such issues.

However, I am limiting my comments, for the time being, to a report to the President and Vice President of our Executive Board for consideration prior to extending the same communication to the board, and perhaps the Owners who I believe have a right to know and understand their role and responsibilities in enforcement of the CCRs, and more specifically, to any enforcement activities by the Architectural Control Committee.

Since this may be lengthy in order to treat this subject fairly, I will divide this into sections with **BOLD CAPITALIZED HEADINGS** for each topic**.**

A. TRANSPARENCY

1. According to CRS § 38-33.3-308 (2016)(2)(a):

> "***All regular and special meetings of the association's executive board, or any committee thereof, shall be open to attendance by all members of the association or their representatives.*** Agendas for meetings of the executive board shall be made reasonably available for examination by all members of the association or their representatives."

a. At this time, ***we are not in compliance with this statute***, in my opinion. As the sole member of the Communication Committee, and in response to the feedback at our annual meeting on November 13, 2018, it is clear that the Owners are frustrated with being unable to know what has occurred at our meetings. We do not give the Owners advance notice of the time, date, or location of our meetings, and we have not, to my knowledge, allowed Owners to attend the Board meetings.

b. We have discussed the issue of whether or not deliberations at Board meetings are privileged information that is not owed to the Owners, and it would appear that outside of legitimate Executive Sessions, the Owners are allowed to

know which individuals have spoken, raised points and issues, and even taken sides while debating any topic - whether a vote is or is not taken. We are literally required by statute to have open and transparent Board meetings.

2. According to CRS § 38-33.3-308 (2016)(2)(b)(I):

> "The association is encouraged to provide all notices and agendas required by this article in electronic form, by posting on a website or otherwise, in addition to printed form. ***If such electronic means are available, the association <u>shall provide notice of all regular and special meetings of unit owners by electronic mail</u> to all unit owners who so request and who furnish the association with their electronic mail addresses. Electronic notice of a special meeting shall be given as soon as possible but at least twenty-four hours before the meeting."***

a. At this time, ***<u>we are not in compliance with this statute</u>***, in my opinion. While we "shall provide notice" is conditioned by the "who so request" phrase, it is clear from our Annual Meeting on November 13, 2018 that a significant number of Owners are, in fact, making such a request, even if no such formal request has been made in writing.

b. It is my opinion that the most transparent approach would be to simply make an email announcement of each Board meeting, and to similarly post this as an "Event" on the website, similar to how our Annual Meeting is announced. While this may not be possible to do with the printed notice that is in the Newsletter, Glen's point about not reaching some members by email is not necessarily a requirement of the statute, but a consideration for identifying and notifying any persons who simply do not use email should be made.

3. According to CRS § 38-33.3-308 (2016)(2.5)(a):

"Notwithstanding any provision in the declaration, bylaws, or other documents to the contrary, ***all meetings of the association and board of directors are open to every unit owner of the association, or to any person designated by a unit owner in writing as the unit owner's representative."***

I think this portion of the statute simply underlines the importance of ensuring that all Board meetings are "open" to the Board. But, more importantly, it addresses the issue of documentation of deliberations, for which no Board member should expect entitlement to any expectation of privacy or secrecy. We are literally required to be fully transparent, in oral or written deliberations, to the Owners by statute. Any effort to hide or make secret such deliberations, with the narrow exceptions described in CRS § 38-33.3-308 (2016)(4), are ***<u>actually in violation of this statute</u>***, which supersedes our CCRs and Rules.

4. Given that the statutes regarding what constitutes Owner's rights to know about deliberations, it is similarly inappropriate to limit deliberations that are outside of meetings to verbal discussions, again, with due respect to Paragraph 4 for applicable legitimate Executive Session issues that pertain, in particular, to issues that may invoke attorney-client privilege in legal matters. We have recently portrayed ALL matters of deliberation as though they should not be documented in email, which is in contrary to the spirit of the statute. Clearly, the statute envisions transparency that requires our deliberations to be conducted in public, and when done outside of a meeting, to be documented for the benefit of Owner's and future Board member examination and consideration.

It is my opinion that we need to reconsider the policy which may or not be fully understood by all Board members in specific relation to this nuance.

FORM OF GOVERNMENT

1. In response to Heather Phillips question regarding whether or not the Owners had a right to review and/or vote upon the enforcement of a CCR or rule upon another owner, two of our Board members spoke at the November 13, 2018 meeting (per my recollection, which I would like noted in the meeting minutes) in response to her question.

> a. I recall Irve Denenberg stating to her that "I don't think so"
> b. I recall Walker Flanary stating that we are a "Republic", and that the Board has final decision-making authority on all enforcement of CCRs and Rules.

2. Walker opined about how our self-governance mimics the form of the US Government, which elects "representatives" who then vote upon various issues. In his statement, he essentially portrays that election has a form of waiver of Owner rights to question and/or overrule any decision made by the Board. He further suggested that the only form of recourse for any disagreement with any specific decision or even pattern of decisions to be the election of new Board Members who may vote differently at some distant point in the future.

3. Unfortunately, the metaphor is incomplete and imperfect, in my opinion. The US Government was formed with a system of checks and balances on power and authority, with 3 co-equal branches of government that are capable of oversight and/or reversal of actions made by the others.

Walker's metaphor as applied to Heather's question implies that the Board as a form of supreme authority that serves as the final judgement on any matter. And, in our US Government, elected officials have no such supreme authority. In fact, both the Executive Branch has the authority of veto power over their decisions, and the Judicial Branch has authority by review of decisions regarding compliance with the underlying governing document, The Constitution of the USA.

So, a search for how the metaphor does actually apply reveals that there are, in fact, parallels in our self-governance. We have CCRs and Rules, which are, in effect our local "constitution". And, within those documents are defined the checks and balances on the power and authority vested in the Board of Directors. As it turns out, ***the Owners do, in fact, have the power to overturn and overrule the Board with a simple majority vote***.

4. Since it is not clear whether Walker or Irve were giving their personal points of view, or the view of the Board, and since it appears that both are not correct in their portrayal of our "form of government" and the ultimate authority of the Board, I believe it is necessary to amend the meeting minutes to document a dissenting opinion. If it is to my personal dissent, or an official statement rebuking the claims made by Walker or Irve, the point is that it is very important that we document that our form of government is not a direct parallel of the US Government, nor does it give the Board supreme authority. In fact, the Owners have the last say on any ACC decision, and also have the ability to remove any Board member with or without cause.

ACC APPEALS PROCESS

1. Architectural Control is defined in the CCRs in Article IX. It defines what our ACC Committee is to enforce, and how the enforcement process is to work. I do not believe we have followed the letter or spirit of these CCRs or any other Rules due to the application of the theory of the "form of government" that creates the impression that the Board is the supreme decision-making authority in our HOA.

2. Article IX Section 7 governs how any appeals to ACC decisions should be handled. We do not appear to be following the procedure outlined in Section 7.

> a. The ACC is allowed to decide matters by committee vote, and appears to have done so on several occasions. This is appropriate. However, certain decisions have been appealed to the Board, which has then voted on supporting or reversing ACC decisions. We have specifically discussed that without Board support of the ACC, some form of chaos or havoc will ensue, because reversal of one decision could potentially lead Owners to thumb their nose at any or all rules or rules enforcement.
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> However, Section 6 of Article IX addresses this concern with specificity:
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> > "No Waiver of Future Approval. The approval of the Architectural Control Committee of any proposal or plans and specifications for any work to be done on a Lot ***shall not be deemed to constitute a waiver of any right to withhold approval of consent to any similar proposals***, plans, specifications, drawings or other matter subsequently or additionally submitted for approval by the same (sic) the Owner or by another the Owner on the same or any other Lot within the Common Interest Community."
>
> What's been discussed repeatedly at our Board meetings is the concept of a "slippery slope", whereby any one decision suddenly gives rights for Owners to bypass or ignore ACC authority, or even more importantly, gives any Owner legal basis on which to file a lawsuit against the Board for breach of fiduciary duty. It is my opinion that no such slippery slope exists, and that each and every decision, per the language in Section 6, stands

independently and should not be considered precedent-setting.

b. If an Owner appeals the decision to the Board, which several have done, it is usually with a letter or email. That matter is then deliberated at the Board meeting, which is per Colorado Statute, to be done in a public setting with public notice to the Owners. We have not actually complied with this statute in my term of service, to my knowledge. We have not either invited the affected Owner to the meeting, nor given notice to any other Owners who may wish to observe the deliberations or make comments, which appears to be rights granted to them by the CCRs and state statute.

c. Furthermore, there appears to be two additional avenues for resolution granted to Owners who are not satisfied with decisions by the Board per the Policy of Enforcement of Convenants and Rules (Including Notice and Hearing Procedures and Schedule of Fines) Effective Feb. 1, 2006. I am aware of the theory that this may be superseded in some manner, but have not seen a definitive legal opinion from Mr. Dauster or case law authority that proves this section does not apply, but my comments are made under the theory that they still are part of our overall CCRs and Rules.

(i) Section 3.1 of this document defines Mediation:

> "Request for Mediation: In the event of a dispute between the Association and any Owner . . . either the Association or an Owner may request mediation by an independent, third-party mediator."

While this section does not impose a required duty to use mediation, it certainly contemplates the use of mediation to avoid legal expenses to the HOA, and it requires that the Owner (or initiator of the mediation) to pay for the first 2 hours.

(ii) Section 3.2(c) says:

> "The Association and any participating Owner may be represented by an attorney at the mediation. Each party shall pay their respective attorney fees associated with the mediation."

Mediation does NOT exclude the right of the Owner to have legal representation at mediation. Therefore, the simple presence of a lawyer in a dispute does not necessarily make this a "pending legal matter" as though it has the weight of litigation that has been filed in a court. It simply means the Owner has chosen to have a professional review the matter and assist in communications.

It is quite possible that shutting down all direct negotiation is contrary to the spirit of the intent behind allowing mediation to settle disputes prior to litigation through direct communication between the parties, even if legal opinions have been sought.

(ii) If Mediation is rejected or fails, then there are still other available options for resolution, including both a Hearing with the Board, as well as a direct appeal to the vote of the Owners.

(iii) Section 4 of this document defines the "purpose of the hearing" as:

> 1) determine if there was a mistake made in issuing the Notice
> 2) determine if there ware mitigating circumstances
> 3) make arrangements for bringing the violation into compliance over a period of time, if warranted.

If we are to have a hearing, which I believe is the current plan in one instance, then it would appear these define the basis on which the Board could consider reversing the Notice (of noncompliance). Whether or not the Board, or any members of the Board, do or do not think a hearing will result in this outcome, it is my opinion that the Owners are entitled to the hearing anyways. We cannot prejudge, or operate as a "kangaroo court".

d. If the hearing does not decide in favor of the Appellant, however, Section 7 of Article IX specifically gives the

right of the Owner to appeal a Board decision to the Owners:

> "If the decision of the Board is appealed to the Owners, the decision of the Board shall be upheld and affirmed ***unless a majority of all the Owners*** (regardless of the number of the Owners actually present at the special meeting called for the purpose of considering the appeal) ***vote to reverse and overturn the Board's decision.***"

It is my opinion that Section 7 gives ***the Owners supreme authority*** in all ACC matters, ***not the Board***. Therefore, the portrayal of Owners waiving their rights due to a "form of government" in which they elect representatives who make decision on their behalf without recourse is a faulty if not false characterization. In fact, the correct metaphor is that the Owners are the Legislative Branch, and the Board is the Executive Branch. ***The Owners can overrule any ACC decision*** that is appealed to the Board with a simple majority vote which does not require physical presence. Or, if you prefer, it's also an example of "jury nullification", in which the citizens are allowed to judge the rule itself as well as it's applicability in context to any other citizen.

e. The question for which I do not see clear direction, but only a guidance, is whether or not Owners can weigh in on such a decision by mailing in their votes vs. handing another Owner a proxy to be hand-delivered to the scheduled and publicly announced special meeting for consideration of an appeal.

I think it should be carefully considered whether US Postal Service delivery and/or email would be acceptable forms of receiving votes on any ACC-appeals matters, and that consideration of documenting such a policy be done appropriately.

f. In summary, we must ensure that the meeting minutes address the issue Heather Phillips raised, the response by Irve and Walker, and whether I am solely making this rebuttal as an amendment, or whether there is additional support by other Board members, an acknowledgement of the actual ACC appeals process which grants ultimate authority on ACC decisions to the Owners, not the Board. We have sowed discord and confusion by adjourning the meeting without full discussion and resolution of this matter at the meeting. Those not present may get their information from participants who have their own take on what happened, and this is a fundamental issue that could affect many other ACC decisions, and may, in fact, affect some past or current ACC decisions.

EFFECT ON CURRENT MATTERS

1. It is my opinion that in order to follow the CCRs and Rules, we must have a hearing with the Bruckners. If the hearing does not result in a change or reversal, we must allow the Owners to vote on the issue. I think this may also apply to other decisions besides the Bruckner's roof and we should be prepared to have challenges to other past decisions.

2. It is my opinion that their use of legal counsel does not prohibit communication, even if it is a best practice. I believe that the crux of their complaint is about avoiding communication and transparency. Since we did not comply with statute regarding an open board meeting in which they or other Owners could participate prior to their hiring of an attorney, I think we have a weak overall case to suddenly slam the door shut, simply because they've hired an attorney.

3. It is my opinion that they have the right to request Mediation and a Hearing. I question whether or not the Hearing should or could be public, but feel that after the meeting last night, any attempt to do this behind closed doors works against the perception of legitimacy of the board, and the self-governing experiment that enters year 3.

4. It is my opinion that a general moratorium on email is unnecessary, and, in fact, contradicting the spirit of the statutes on transparency. Our deliberations, verbal or written, are not privileged outside of the narrow topics defined by statute. In addition, it is simply an unnecessary burden to require Board members to conduct business verbally. If Board members feel they cannot perform their duties in the open, then it's possible they should reconsider whether they can participate as Board members. Transparency is a requirement, not an option.

5. In the matter of the Bruckner's, Mr. Dauster met with only two Board members, who have conveyed his opinions back to us verbally. Unfortunately, the analysis above, and in particular the Article IX Section 6 & 7 provisions appear

to contradict with the characterization that we are forced to impose replacement under threat of potential legal liability from other Owners.

a. I suggest that no such liability exists.
b. I would like to see the written opinion of Mr. Dauster where he contemplates Article IX Section 6 and 7
c. I believe that given the ability for Owners to overrule the Board (and an apparent movement lead by a newly elected Board Member, Heather Phillips to act upon the right), it makes no logical sense that doing anything but forcing roof replacement would create such liability. If it does, then Mr. Dauster needs to explicitly explain where the liability goes when the Owners overrule the Board.

6. Since we have an issue with transparency of the review by Mr. Dauster, I believe that prior to any hearing, the entire board needs to hear directly from Mr. Dauster, which can be in the form of a letter or email, regarding this new consideration. No such consideration was made either at the meeting when we chose a bifurcated fine/replacement resolution, nor at the special meeting in which we were threatened with the potential of legal liability (and I was singled out, in particular for providing basis by sending an email). If the Owners are creating legal liability for themselves as individuals or for the HOA as a whole by choosing to reverse the ACC decision by majority vote, they should be fully informed by our legal counsel (or at the very least aware of our legal counsel's position on this matter) without filtering from those who spoke to him.

7. I do not wish my comments under this heading to be part of my addendum to the Annual Meeting Minutes. These are "for your eyes only", but a matter of the open records that any owner may access to understand whether or not any Board member did, in fact, stand up for the rights entitled to Owners delineated in our CCRs and Rules. It's clear that our secrecy has tormented the perception that the Board is either not considering such matters, or is ignoring them in pursuit of enforcement on the grounds of absolute or final authority on ACC matters which does not actually exist. This will serve to document that such consideration has, at the very least, been voiced.

8. I think the Board should become familiar with the concept of "jury nullification", which is, in effect, what our CCRs allow. While we have rules, the Owners literally have supreme authority to say "but we don't care what the rules say, we don't want that rule enforced".

At the meeting, the portrayal that someone would have to "go hire an attorney" and it would be "so difficult" to change the rules by Walker in response to additional questions by Heather was uncalled for. Clearly, the CCRs define rules, allow for the ACC or Board to enforcement, BUT, they also allow the Owners to say "but we don't care what the rules say", giving them ultimate authority by simple majority rule.

To convey that all Owners should fear bullying by pay to play exorbitant costs in our court system, and that we are all trapped into CCRs and Rules due to the same legal expense is a false characterization. The real power is in Section 7 of Article IX. The Owners have ultimate authority to determine what rules we do and don't enforce. Transparency requires us to have these deliberations in the open, and, frankly, to document them for future homeowners who may consider them differently in the future.

I am sorry if my principled stand on this is controversial. And, I want to make abundantly clear that this does not, in any way, mean I am incapable of performing my duties, as was questioned at the last meeting. I believe the ability to adapt to new information and change your mind is an asset, not a liability. I believe that a representative who is incapable of changing their mind and instead pursues a rigid point of view is not only failing to actually represent, but is, in fact, ignoring the duty to allow the majority to have the final say.

We have to address our approach, manner, and our public perception as much as we have concerned ourselves with legal liability. Otherwise, our experiment in self-governance is in peril.

Sincerely,

Andrew Mowery