OAH: 07F-H067029-BFS

September 27, 2007

Complaint: the HOA board, upon advice of attorney, interpreted CC&Rs with an uncommon meaning;

Source of Law: CC&Rs; case history.

Discussion: Following the discussion in executive session, the Board, **upon recommendation of its attorneys**, [emphasis added] passed a Resolution interpreting Section 11.02 to mean that, rather than requiring an affirmative vote of at least 80% *of the entire membership of the Association* to amend the Declaration, only an affirmative vote of at least 80% of the members voting, either in person or by absentee ballot*, at a meeting* to amend the Declaration would be required.

Although testimony at the hearing made for a compelling argument that homeowner associations should be wary of making the ability to amend their governing documents too strenuous, it does not obviate the fact that the existing Declaration represents a contract between the Association and its 1,322 members – a contract upon which each of those individual owners had a right to rely. Furthermore, the Board's "interpretation" of Section 11.02 had the effect of allowing as few as 106 members of the association to make significant changes to the contract governing all 1,322 of its members. That was a dramatic change from the Board's belief, prior to the passage of the Resolution, that an affirmative vote of at least 1,058 members of the Association would have been necessary to amend the contract which governed all the Association's members.

Article 11, Section 11.02 of the Declaration was not ambiguous on its face. Its meaning was clear, even to the Board prior to October 16, 2006. It was not a proper subject for interpretation under Article 14, Section 14.01, and the Resolution changing the interpretation of Section 11.02 was an invalid exercise of the Board's authority under the Declaration.

The pertinent portion of Section 11.02 provides:...

the Declaration may be amended by the affirmative vote of owners holding at least eighty percent (80%) of the total voting power in the Association at a meeting duly called pursuant to the Articles and Bylaws for the adoption of the amendment.

Petitioner argued that the meaning of Section 11.02 is clear. Respondent argued that Section 11.02 is ambiguous because inclusion of the phrase "at a meeting" suggests that only 80% of the total voting power represented at that meeting would be required to amend a provision of the Declaration. In support of that position, Respondent argued that "The 'total voting power *at a meeting*' is quite different from 'total voting power.'"

Holding: **IT IS ORDERED** vacating the Board's Resolution of October 16, 2006, by which the Board interpreted the meaning of Article 11, Section 11.02 of the Declaration.

IT IS FURTHER ORDERED vacating any amendments to the Declaration, passed after the Board's Resolution of October 16, 2006, and which were based upon the affirmative votes cast by 80% of the members, either in person or by absentee ballot at a meeting called for the purpose of amending the Declaration.

IT IS FURTHER ORDERED that Respondent shall reimburse the filing fee paid by Petitioner in the amount of $2,000.00.

Comments: This is an important case reflecting 1) HOA attorney "collusion" with the HOA board, and 2) the meaning of contracts and everyday understanding of contractual terms. I say "collusion" because the attorneys fully know the law and how the courts interpret the contractual meanings of the terms therein, yet, regardless of the above, they appear to assist the HOA in its aims and goals.

The initial HOA attorney, Ekmark Law firm, prematurely filed a motion to dismiss forgetting to count the 5-day mailing allowance that is standard for court filing – 5 days are tacked on to specified 5 day response time to allow for delivery of mail. Did these learned, CAI lobbyist attorneys forget the law?

The new law firm for the HOA was Carpenter, Hazelwood. Carpenter is, and has been, the other long-time CAI lobbyist in Arizona.