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VIA E-MAIL - bteague1943@msn.com

Mr. Robert Teague

Dear Bob:

I am writing in response to your e-mail requesting we offer an opinion regarding the procedure utilized by the Apache Wells Homeowners Association in its current effort to amend the CC&Rs. It is my understanding that the ballot for the amendment was mailed in June of 2011. It is also my understanding that the procedure has not been completed, and rather that the vote is ongoing. Apparently, it seems that the board of directors is of the opinion that it may have an open-ended vote for an indefinite period of time until they obtain a majority of owners. We disagree, and rather believe the procedure is fundamentally flawed. The signatures of those approving the amendment must all be valid, current homeowners living in the community at the time the amendment is deemed to have been approved. If a homeowner approved of the amendment in July of 2011, and thereafter became deceased, and the final signature tally allegedly approving the amendment was obtained in June of 2012, or a year after the vote was begun, then it would be inappropriate to include in that count the vote of an individual that is now deceased. We believe the same logic would apply if a homeowner moved from the community during the year as well.

We understand the purpose of a vote is to take a "snapshot" of the community and determine whether a particular set of homeowners agree or disagree with the proposed amendment at a particular time. Keeping the vote open for such an extended period of time runs the risk that those who previously approved of the vote may no longer be owners, may be deceased, or may be delinquent in their assessments and no longer be in a position to have their votes appropriately counted. We believe the law requires a vote be conducted, and not for there to simply be an open-ended effort to gain compliance by waiting until enough signatures are obtained, as that is not a means by which to obtain an accurate determination of whether members approve or disapprove of a particular proposition at a given time.

In addition, we have concerns about the way in which the vote is being conducted, as it appears that there has been no meeting scheduled, nor have they set a deadline. As set forth in A.R.S. § 33-1812:

> Notwithstanding any provision in the community documents, after a determination of the period of declarant control, votes allocated to a unit may not be cast pursuant to a proxy. The Association shall provide for votes to be cast in person and by absentee ballot, and may provide for voting by some other form of delivery. Notwithstanding section 10-3708 or the provisions of the community documents, any action taken at an annual, regular, or special meeting of the members shall comply with all the following if absentee ballots are used:
>
> (1) The absentee ballots shall set forth each proposed action;
>
> (2) The absentee ballot shall provide an opportunity to vote for or against each proposed action;
>
> (3) The absentee ballot is valid for only one specific election or meeting of the members and expires automatically after the completion of the election or meeting; and
>
> (4) The absentee ballot specifies the time and date by which the ballot must be delivered to the board of directors in order to be counted, which shall be at least seven days after the date that the board delivers the unvoted absentee ballot to the member.

In addition to A.R.S. § 33-1812, even the Nonprofit Corporations Act at Section 10-3708, which does allow for voting without a meeting, requires that each ballot:

> (1) Indicate the number of responses needed to meet the quorum requirements;
>
> (2) State the percentage of approvals necessary to approve each matter other than election of directors; and
>
> (3) Specify the time by which a ballot must be delivered to the corporation in order to be counted, which time shall not be less than three days after the date that the corporation delivers the ballot.

It is clear that whether under the planned community statutes or the nonprofit statutes governing votes, a ballot cannot simply be open ended and counted indefinitely into the future until approval is obtained, and rather a specific deadline must be specified on the ballot by which all votes must be concluded.

As set forth in the attached Affidavit of former State Senator Chuck Grey, who was the sponsor of A.R.S. § 33-1812, it was always the intent of the legislature "to have all voting for members of a planned community to occur in an open meeting in accordance with A.R.S. § 33-1804." As such, clearly A.R.S. § 33-1812 would apply, and § 33-1812 precludes an open-ended ballot, and rather requires both a meeting and a specified deadline. In addition, we believe the bylaws indicate that a meeting is required when a vote is conducted. Article VIII, Section 5 of the bylaws regarding voting rights specifies that "Membership meetings shall require no standing quorum, provided the meeting was regularly noticed." Article X, Section 2(c)(3) provides that membership must approve an expansion of improvements to the services of the common areas that would result in an increase of 10 percent in the general assessment rate by a majority vote of the residential owners present and voting at a noticed meeting. Article X, Section 2(d)(1) provides that special assessments must be approved by a majority vote of residential owners at a special election called for that purpose. Article XIII, Section 1(1)(d) also provides that approval of amendments shall require a two-thirds vote of the members present and voting at an annual or special meeting.

We think it is evident that it is the intent of both Arizona law and the Association's own governing documents that such issues be addressed at a meeting, and not by some open-ended, non-election procedure that is clearly biased in an effort to obtain approval by keeping it open ended until sufficient signatures are obtained.

In addition, we understand that there may be misrepresentations being made by the board of directors as to the intent of the amendment and that these misrepresentations may be shared with homeowners when seeking to obtain their approval. Such misrepresentations would also be a basis to challenge any vote approving this amendment. The Association is obligated to treat members fairly and reasonably and misrepresenting the intent of a proposed amendment is in violation of that obligation.

For instance, we understand that misrepresentations have been made as to what would be the effect of amending the CC&Rs regarding special assessments. Clearly, Section 7.5 of the proposed amended CC&Rs would provide that rather than requiring an approval of 50 percent of the members to pass a special assessment, that only 50 percent of those that actually participated in the vote would be required. This could result in much fewer members passing a special assessment, as rather than having the required total of 706 members to approve a

special assessment, as is currently required, so long as the quorum obligation is met a special assessment could be passed with as little as 26 percent of the members if that 26 percent constituted a majority of those that actually voted. If the members of the community are misrepresenting the intent of this provision when seeking to cause members to vote in favor of this proposed amendment, that would be a basis to challenge the vote as well.

Thank you for the opportunity to be of assistance. Should you require anything further, please let us know.

Sincerely,

CHEIFETZ IANNITELLI MARCOLINI, P.C.

By:_____
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