CONNIE HEYER'S RESPONSES TO WWS BOARD QUESTIONS

WHITEWATER SPRINGS SUBDIVISION DEVELOPER

QUESTION: Who is the developer/declarant (is there one - is there one owner with "special" declarant/developer powers under the deed restrictions?

This matter is still being researched by Niemann and Heyer.

FM 1174 FENCE/PERMETER FENCING

QUESTION: Who is responsible for the fence?

MS. HEYER RESPONSE:
This is a bit more complex of an issue.

The deed restrictions are relatively straightforward, at least to a lawyer. These fences are not made part of the commons, aka common area. There is no duty or on paper right of the association to maintain them. There is no easement for them in any plat or any deed restriction I have found - no easement rights of the HOA to enter the lot and maintain the fence. Owners of the lots on which the fences are erected must maintain them.

The declaration requires owners to maintain their residence and all buildings on the tract (Article V). It requires owners to keep their tracts free of unsightly "deposits" and prohibits owners from letting buildings fall into disrepair. (Article VIII). "Building" is not defined, but it would be more than a bit incongruous to conclude that only the house structure must be maintained and owners have no duty to maintain their landscaping or fencing or other similar items. That being said I recommend giving owners clear guidance on maintenance duties. This is why associations have rulemaking power; to supplement and clarify the declaration's terms. I would recommend that the association adopt a rule making clear that owners are required to maintain all portions of their lots. The rule can outline maintenance standards (for example, whether any portion of the lot may remain unmowed, etc.). It can clarify that all improvements (fences, retaining walls, outbuildings, etc.) must be kept in a neat and attractive manner.

With regard to whether someone could remove a current fence or add a new fence, the short answer is "no, not without permission of the architectural control committee." Article III of the declaration prohibits any external improvements or changes without plans being submitted and approved by the ACC. This would include removal or additions of fencing, retaining walls, outbuildings, or any other improvements. Again I would suggest that this be reiterated and supplemented in the rules. Someone reading the term "improvements" who is not a nerdy lawyer might not think that this applies to fences, etc. Rules can be a very user-friendly vehicle to provide a better song sheet for all owners. Confusion with architectural regulations, including unintentional "I didn't know I needed prior approval" mistakes, are some of the more common

things I see. Rules can be helpful in clarifying. Rules would need to be adopted by the board at a 72-hour noticed meeting for which rule adoption was on the agenda noticed to the ownership.

One more thing I forgot to mention. Since Montvale owns the two lots at the entrance, Section III lots 301 and 370, an easement should be created (if it does not already exist - I'm checking) an easement for the HOA for the mailboxes and fences and make clear that these areas are Commons. All it would take is an easement. I can't imagine they don't have a survey already of these areas so that much should be taken care of. "Commons" that the HOA has a duty to maintain is defined as property dedicated to common use and includes easement property. I'm happy to reach out to them.

dgr September 6, 2016 email to Ms. Heyer:

. I want to confirm with you the following:

a. TPC 209 or other Texas HOA/POA codes do set a spending limit by the POA Board of Directors with or without a vote of the property owners. Correct?
Correct. But any special assessment adopted by the board or increase in regular assessments adopted by the board must be by board vote at a 72-hour noticed open meeting of the board (the 72-hour notice procedure to the owners I've outlined for you in the past.)

b. With regards to the FM 1174 Fence, the Board previously approved a $50,000 expenditure for this project. The vendor we selected, after informally intervening 3 fence vendors, quoted us a $50,000 bid, that the Board approved. The selected vendor underestimated the linear footage of fencing to be installed and submitted a revised contract in the amount of $62,000. The Board approved the $12,000 increase in price at a duly posted teleconference Board meeting:

aa. Is the Board's action proper in this matter?

Ms. Heyer: Yes, provided that any special assessment or increase in regular assessment was not done outside of an open, noticed board meeting. And provided the vote was taken at an open noticed meeting or outside of a meeting and later documented in the minutes - all per my previous legal summary sent on meeting requirements.

bb. Through the selected vendor, the Association will remove the existing fence and install a new fence that has received ACC approval (i.e., The ACC granted the need variances.). We have not secured a separate or new easement for the fence. We will be replacing and maintaining the fence in the same location as the old fence. Is the Board O.K. in this matter?

Ms. Heyer: As a practical matter I don't see why not. I would notify the property owner of the plans to replace the fencing. If he doesn't object I see no problem. Legally as we've discussed the fence easement should be papered properly

CCR ENFORCEMENT

QUESTION: Can CCR rules and regulations be enforce with fines for noncompliance:

MS. HEYER RESPONSE:
Yes. WWS would have to adopt rules allowing this. Rules could include stop work and cease and desist provisions, fines, construction rules, gate rules, construction deposits and other things.

CONDENSING OF RESTRICTIVE COVENENTS

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QUESTION; Can WWS condense its Restrictive Covenants?

MS. HEYER RESPONSE:
Yes, the CCRs may be condensed. This would include finding any difference between the documents and noting them, unless you wanted to have all six sections vote 67% (each section votes 67%) to adopt a new all-encompassing declaration. But, I think they are all virtually identical, so a consolidation would likely not be that much trouble.

WHITEWATER SPRINGS DAM

QUESTION: What about the Dam? Does the board need authority for new improvements?

MS. HEYER'S RESPONSE:
No in my opinion the board does not need authority to undertake new improvements. The declarations (Article VII section 2) expressly allow annual assessments to be used for "construction" of common elements and construction of drainage systems or community facilities. That being said it is often a good idea as we discussed. But the only restriction I find is that if you needed to levy a special assessment to fund the dam, it must be approved by a majority of members casting votes.

ROAD IMPACT ASSESSMENTS:

The short answer is that the board by board resolution at a board meeting may increase the amount of these assessments. But it would take a declaration amendment (67% vote of all owners in all respective sections) to allow any increase over 15%. The declaration caps increases to 15% above the previous year's fee. So, if you need more money in the coffers to fund road repairs and you want to do it as much as possible out of this fund rather than the general common fund, you likely should be increasing this amount every year. Road maintenance costs tend to go up every year. This board vote would need to be taken at an open, 72-hour noticed board meeting at which this vote was an agenda item noticed to the ownership.

These assessments are allowed by virtue of the second amendment to your declarations. In Article VIII related to "special assessments". These Road Impact Assessments are payable only by owners seeking ACC approval for construction of a new single family home - it is strictly a one-time fee.

SPEED LIMITS

Question: Can you enforce speed limits?

MS. HEYER'S RESPONSE:
I believe we discussed, but yes you could adopt a speed limit rule, have volunteers out with radar guns, and enforce the rule.

MEETING REQUIREMENTS

QUESTION: What are POA board meeting requirements?

MS. HEYER RESPONSE FOLLOWS:

HOA Board Meeting Notice Requirements as of 9-1-15
By: Connie N. Heyer, Niemann & Heyer LLP

Effective September 1, 2015, the laws for notice for HOA board meetings have changed. These laws are not applicable to condominium associations. The new laws apply regardless of what an HOA's governing documents require in terms of notice. HOA board members should familiarize themselves with the meeting notice requirements to ensure that no inadvertent violations occur. An HOA's own legal counsel, and in professionally managed communities, an HOA's professional property manager, will be able to assist associations in helping to make sure these notice requirements are met. The new requirements affect what a board meeting notice must include in the event a board

meeting is held electronically, and adds additional items that require 72-hour notice before being discussed and/or acted on. The new requirements include the following:

- ALL board meetings may now be held electronically or by telephone;
- A board no longer needs to hold a meeting when the board acts on an item *as long as* the item is not one of the "magic 14" (these items are outlined below); and
- Seven new items now require a board meeting in order to have discussion or vote on them (these items are outlined below).
- Any in-person board meeting must still be noticed using the mail or 72-hour notice process. The only exception to the 72-hour notice requirement is situations where the board takes action outside of a meeting as allowed by law.

Summary of Items Requiring 72-hour Owner Notice.

For any board meeting, in-person or otherwise (e.g. held electronically), at which the following items are even DISCUSSED, regardless of whether a vote is taken, 72 hours notice must be given to all owners as outlined below. Items that may not even be discussed at a Board meeting without 72 hour owner notice are [**bolded items are new effective 9-1-15]**:

(1) fines;
(2) damage assessments;
(3) initiation of foreclosure actions or enforcement actions[1];
(4) increases in assessments;
(5) levying special assessments;
(6) appeals from denials of architectural control approval;
(7) suspending rights of an owner before the owner has an opportunity to appear before the board;
(8) lending or borrowing money;
(9) the adoption and/or amendment of one of the association's governing documents;
(10) the approval of an annual budget or an amendment of an annual budget that increases the budget by more than 10%;
(11) the sale or purchase of real property;
(12) filling a vacancy on the board;
(13) construction of new capital improvements (does not include repair, replacement, or enhancement of existing capital improvements); or

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[1] **Initiation of a force mow** or other self-help remedies would be considered "initiation of enforcement action" in all likelihood – so force mows should be approved by the board at an in-person noticed, open, board meeting, or there should be a policy adopted prescribing a pre-set policy and authorization for force mows. Same with **fines**, **common area usage right suspension**, and initiation of any other enforcement action.

(14) the election of an officer. (These are the "magic 14" items that will be referenced further

below.)

However, a board may take action outside of a meeting, including voting by electronic or telephonic means, without 72- hour notice if each board member is given a reasonable opportunity to express their opinion to the other board members and given the opportunity to vote and the "magic 14" items are not voted on or discussed.

Form and content of 72-hour owner notice of board meeting.

*The 72 hour notice of Board meeting must include the "date, hour, place, and general subject" of a regular or special board meeting, and a general description of each item to be brought up in executive session.

*Ideally (though the statute provides no guidance on what "general subject" means), include in the notice any specific agenda item that you know of (for example, "a rule amendment will be voted on.")

*In addition to specific known agenda topics, general notice might look like: "Topics may include general association business, including old business and new business, covenant enforcement and budgeting/assessment."

*If the board meeting is going to be held electronically or telephonically, the notice must include instructions on how the owners can access the electronic communication method. The owners must be able to access the meeting using the same method the board uses to access the meeting. Owners should not, however, be allowed to listen during executive session.

*Executive session matters may include personnel matters, litigation, contract negotiations, enforcement actions, confidential attorney communications, matters involving the invasion of owners' privacy, or matters involving parties who have requested confidentiality and the board has agreed to honor that request.

Timing and method of 72-hour notice.

Notice of a board meeting (in-person, electronic, or telephonic) must be either:

(1) mailed to owners at least 10 but no more
than 60 days beforehand; OR
(2) provided at least 72 hours before the meeting by:

(a) being posted notice in a conspicuous location on the common area or (with permission) and owner's Lot, *OR* on an association-maintained website or on "other internet media" – presumably Facebook, etc.); ***AND***
(b) being emailed to all owners who have provided their email address to the HOA.

Situations in which open board meetings and 72 hour owner notice ARE required:

ANY time the board will be voting on *or even discussing* any item on the "magic 14" list. And, ANY time the board holds a meeting. A board may take action *outside of a meeting* (for example, email vote) on issues other than the "magic 14". But any *meeting* must be noticed by mail or 72-hour notice.

**Situations in which open board meetings and 72 hour owner notice are NOT required (board must only observe whatever notice requirements are contained in the bylaws for director meetings)

Where there is no discussion or vote on any of the "magic 14" items. Action may be taken outside of a meeting (including voting by email or phone) if none of the "magic 14" topics are discussed or voted on. Landscape contracts for example could be approved by email vote.

Actions taken without noticed meeting must be documented.

Actions taken without the 72-hour notice to owners must be summarized orally at, (including any actual or estimated expenditures approved) and documented in the minutes of, the next regular or special board meeting.

Executive session permitted topics.

The board continues to maintain the right to adjourn a board meeting and reconvene in a closed executive session for certain issues, namely, personnel matters, litigation, contract negotiations, enforcement actions, confidential attorney communications, matters involving the invasion of owners' privacy, or matters involving parties who have requested confidentiality and the board has agreed to honor that request. Decisions made in executive session must be summarized orally in general terms, including any expenditures approved, and recorded in the minutes. This author recommends that boards not make any decisions, or keep any minutes, in executive session. Discuss items as appropriate, then come out of executive session into the "regular" meeting and take the vote, and record the vote in the minutes. There is no "requirement" that the board go into executive session to discuss certain topics, it is simply an option for the board to use at its discretion.

Development Period Exceptions

With important exceptions, the meeting requirements discussed above do not apply during the development period. The only instances where the 72-hour open, noticed meeting requirements apply during the development period are if a board meeting is conducted for the purpose of:

(1) adopting or amending the governing documents, including declarations, bylaws, rules, and regulations of the association;
(2) increasing the amount of regular assessments of the association or adopting or

increasing a special assessment;

(3) electing non-developer board members of the association or establishing a process by which those members are elected; or

(4) changing the voting rights of members of the association.

In these four cases, even under the development period, owners must be given the 72-hour (or mailed) noticed of meeting. There is no "magic 14" for the development period – it is a "magic 4."

Minutes.

Boards must keep written minutes as record of each regular and special meeting and give owners access to approved minutes. This is true for conference call meetings just like in-person meetings.

Recommendation.

The "magic 14" items have the potential to make board meetings lengthy and unwieldy, consuming large amounts of volunteer board member time. The potential for this depends obviously on the size of the community and the number of violations that occur. It is recommended that Boards consider speaking with the Association's legal counsel regarding adopting a standard, standing policy that would eliminate the need to discuss routine "magic 14" items on a case-by-case basis.

For example, fines are on the "magic 14" list – the board cannot even *discuss* fines without an open and noticed board meeting. The board could consider adopting a policy of a standard fining schedule, to automatically be followed in the event of a violation, without need for case-by-case discussion of fines unless the board deems it appropriate (in which case the board would reserve discussion on the topic for an open and noticed board meeting.) Force mows are "initiation of enforcement action", so again, need to be approved case-by-case at an open board meeting, or a standard pre-approved procedure needs to be adopted. Consult with association legal counsel to discuss options – they will vary depending on the particular HOA documents.

Conclusion.

These statutory changes represent a significant change in the HOA Board meeting landscape. HOA directors would be well advised to familiarize themselves with these new laws, and consult with our attorneys and your management professional to help ensure compliance. File Server: FORMS:CH POA Forms:MeetingRequirementsN&HFNL6-16.doc