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under the laws of Arizona*

SCOTTSDALE COUNCIL OF HOMEOWNERS ASSOCIATIONS
SCOHA NEWSLETTER

IN OUR 39th YEAR

MAY 2013

Do You Know What Your State Legislators Did This Session That Affects Your Association?

At least two bills affecting homeowners associations will become law 90 days after the current legislative session ends.

SCOHA's President, Curtis Ekmark, has been closely involved in monitoring the legislature's activities throughout this session and he will provide details on these new laws and how they will affect your association.

Get a jump on analyzing any changes necessary for your association by attending SCOHA's meeting on May 28 at 11:45 a.m.

Please make your reservations as soon as possible, and please note that we must have a reservation to guarantee a lunch and a seat at the meeting.

Call Nancy Fagan at 480-945-7098 by 5:00 p.m. on Friday, May 24 for reservations or e-mail your reservation to jeanne@ekmarklaw.com.

SCOHA ANNOUNCEMENTS

SCOHA's WEB SITE:

Don't forget to check our web site!

SCOHA's web site address is www.scottsdalehoa.com.

You can enter the member section by typing hoamember for the password.

OUR NEXT MEETING:

We'll take the summer off and see you on September 24.

Have a fun and safe summer!

**SCOHA
DATA TO
REMEMBER:**

**Tuesday,
May
28th
11:45 a.m.**

**Lakeview Room
McCormick Ranch Golf
Club
7505 McCormick Pkwy**

**\$15.00
Reservations
Required**

**Call Nancy Fagan at
480-945-7098 by
Friday, May 24**

480-922-9292

jeanne@ekmarklaw.com • www.scottsdalehoa.com

Rentals in HOAs: The Good, The Bad and The Ugly

Summary of the April 23, 2013 Meeting

SCOHA's guest speaker was Eric Boyd, attorney with the firm of Ekmark & Ekmark.

To determine if your association can restrict, limit or completely prohibit rentals within the community, you need to first refer to the association's governing documents.

Declaration provisions governing rentals can take many forms, including the following:

- Complete prohibition of rentals.
- Limited number of rentals allowed in the community.
- Minimum term for the rental, such as no short-term rentals.
- Restrictions on the non-residential "multiple" family or business use of a lot.
- Restrictions regarding nuisance in the community.
- Specific requirements for owners of rental properties.

If an association's governing documents don't mention rentals, it still might be able to restrict them IF the association has rule-making authority, and if so, that authority must be broad enough to give it the power to adopt rules that concern the whole community and not just the common areas.

If an association has the required rule-making authority, it can adopt rules concerning rentals. For example, some of these rules may include the following:

- Requiring owners to provide a copy of the lease to the association with provisions which require tenants to comply with the

association's governing documents and require tenants to complete a Crime and Drug Free Lease Addendum.

- Requiring tenants to comply with the association's governing documents.
- Requiring evidence that the tenant has been provided copies of the association's governing documents.
- Requiring submission of a rental information form with term of lease, names of tenants and others residing in dwelling, and contact information for tenants and the owner.

An association with the required rule-making authority may be able to adopt rules restricting rentals of less than a certain term (30 days, three months, etc.). If the Declaration prohibits non-residential, multi-family or business use of lots or units, the association could argue that a short-term lease conflicts with these provisions. Accordingly, the purpose of the rules restricting rentals of less than a certain term could be to maintain the character of the community as devoted exclusively to single-family, residential, and/or non-business use.

Mr. Boyd pointed out, however, that the Arizona Court of Appeals has held that a homeowner's short-term leasing to vacationers did not violate the Declaration that required the community to be devoted solely to single-family residential use. In this case, the association argued that allowing short-term lessees to use the property violated the Declaration's plain language. The Declaration's language permitted leasing in general and did not distinguish between short-term and long-term leasing.

Associations could argue that, where the short-term leasing of one's home is prohibited by applicable zoning ordinance, such behavior is also

a violation of the Declaration when the Declaration provides that a violation of law is also a violation of the Declaration.

If the association's board is given the power to determine what constitutes a nuisance, the association could also prohibit short-term rentals based upon a finding by the board that such behavior creates a nuisance in the community.

Mr. Boyd then reviewed situations in which an association's documents explicitly or impliedly allow rentals but it wants to restrict them. In this situation, an association should perform the same analysis regarding broad and narrow rule-making authority to determine if it has the power to adopt rules restricting rentals.

If a rule restricting rentals would conflict with the provisions in the Declaration, the restriction must take the form of an amendment to the Declaration due to this conflict. If additional rules to restrict the rentals act in furtherance of or effectuate the rental restrictions in the Declaration, the rules could be adopted to help accomplish the restrictions detailed in the Declaration. Mr. Boyd emphasized that an association's rules must be reasonable to survive a challenge by the owners.

If an association's documents don't mention rentals, but the association wants to prohibit them or limit the number allowed, a rule completely prohibiting rentals is probably unenforceable and would probably be seen as unreasonable.

For condominium associations, it may not be possible to prohibit rentals without unanimous approval of the members. Such a restriction could be seen as a change of the "uses to which the unit is restricted" under the Condominium Act at A.R.S. § 33-1227(D).

A complete prohibition on rentals should take the form of an amendment to the association's Declaration. Even if an association has the votes to amend the Declaration, pursuant to a Court of Appeals case, there is now an increased risk of using a Declaration's amendment provision to make "substantial and unforeseeable changes" that impose additional burdens on association members. In this case, the association tried to amend its Declaration to require that all owners become mandatory members of a community club. The court determined the amendment to be invalid since it interfered with the owner's reasonable expectations.

Conversely, another Arizona Court of Appeals case upheld a prohibition on rentals imposed by an amendment to the Declaration approved by the required vote of the owners.

Mr. Boyd pointed out that this demonstrates that there is no way to know how a court would rule with a rental prohibition amendment. A complete prohibition on rentals is probably less likely to pass muster than a mere restriction.

If an association's documents explicitly allow rentals, an association would need to amend its Declaration in order to prohibit rentals where they were previously explicitly allowed. However, such an amendment may not be enforceable in light of the Court of Appeals decision. Even if the new amendment were approved, the association would need to strongly consider grandfathering existing owners who are renting their dwellings.

If an association's documents prohibit rentals, but the master association's documents contain different provisions, the association should first determine if this presents a conflict. It should also determine if the subassociation's documents simply add on further restrictions to the master association's documents and if there is a provision in either

Declaration that addresses what a conflict is and what document governs in the event of a conflict.

If an association wants to amend the Declaration to limit the number of rentals or the percentage of rentals in the community, it should determine if there will be issues with grandfathering existing owners and if it will allow hardship exceptions. If such an amendment is adopted, an association needs to determine its enforcement. Depending on the association's rule-making authority, it should consider adopting rules to effectuate enforcement of the Declaration provisions limiting the number of rentals or the percentage of rentals. Once the

maximum number or percentage of rentals in the community is reached, the association should develop a procedure to ensure that new rentals are allowed, while keeping in mind the ceiling set by the governing documents. Mr. Boyd pointed out that the concerns for the validity of a rental prohibition also could apply to a rental cap.

When enforcing rental provisions in the documents, violation letters, fines, etc. should be directed to the owner and not the tenant. The tenant could get a copy of the violation letters. The owner, not the association, needs to pursue eviction of a tenant.

2013 SCOHA OFFICERS AND DIRECTORS

Director	Phone No.	E-mail Address
Curtis Ekmark – President	480-922-9292	curtis@ekmarklaw.com
Peter Wheeler Reiss – Vice President	480-994-4386	peterreiss4@gmail.com
Nancy Fagan – Treasurer	480-945-3630	nrfagan@cox.net
Helen Corson – Corporate Secretary	480-991-4734	
Jeanne Malys – Assistant Secretary	480-922-9292	jeanne@ekmarklaw.com
Walt Young	480-994-4331	DEAZWYBY@aol.com
Bob Rogers	480-585-0929	rrogers4542@gmail.com
Jaime Uhrich	480-860-1122	jaimeuhrich@mccormickranchpoa.com
