

Orchard Villa Townhomes Homeowners Association Minutes
Board of Directors
February 7, 2011 – Grand County Public Library

Board members present: Marc Thomas, Chris Ensworth, Barbara Crossan and Bill Topper. Connie Baty was absent. No homeowners were in attendance. Jeff Frost of TLC Landscaping was also in attendance.

President Marc Thomas made a motion, seconded by Bill Topper, to approve the Board minutes of the December 6, 2010 as presented. The motion passed unanimously.

Marc Thomas reported that as of February 7, 2011, the Association had \$25,355 in its operations checking account, \$3,670 in savings and \$26,425 in Reserve Certificates of Deposit. The financial report from our accountant showed that one homeowner was late in making assessment payments and would need to be mailed a reminder notice. The Board approved payment of nearly \$3,000 in bills. Chris Ensworth reported that all homeowners are current in providing proof of insurance on their units.

Jeff Frost from TLC Landscaping reported that except for thinning out two cottonwoods by Building 12, he has completed the tree pruning in the common area and plans to turn on the sprinklers in mid-March. He will also add wood chips to the RV screen line and our 400 North entrance. He said that mowing would take place on Tuesdays and Wednesdays this year.

The registration for the Association's domain name on its website has been renewed for two years, Marc Thomas said. He noted a previous board member had originally registered the domain name under the name of that member's business. He said that the two of them will figure out how to transfer ownership of the domain name for the association's website to the homeowners association within the next two years.

Marc Thomas made a motion, seconded by Bill Topper, to hire Audie Harper to screw down the fence staves on the southwest fence line. Labor is not to exceed \$800. The motion passed unanimously. Chris Ensworth will draw up specifications to solicit bids to replace broken fence poles on the southwest fence line. The board plans to schedule staining of the southwest fence line this fall, as well as painting of the doorjambs in our phase two buildings.

The Board tabled any further action on getting Orchard Villa certified by the Federal Housing Authority. Marc Thomas said he could find no record of the project ever having been certified by the FHA. Also he said that he could not find any other homeowners association in Moab that had been certified by the FHA. The board decided to table any further action on the matter after it was noted that not only would we have to re-certify every two years, but also the certification process and requirements would result in increased association expenses.

Marc Thomas moved to approve a March-September common area pest treatment contract with Spanish Valley Pest Control costing \$889.00. The motion was seconded and approved unanimously.

Bill Topper made a motion for Marc Thomas to proceed with negotiations with adjacent property owner Catherine Markle on an easement she is requesting from Orchard Villa for a driveway off of our 400 North entrance, and to address Board concerns. Barbara Crossan seconded the motion and it passed unanimously. If and when a satisfactory agreement is made and approved by the majority of the Board, then the easement could still only be granted provided 67 percent of our homeowners approve it. The Board's attorney advised that state laws take precedence over Association governing documents. He noted Utah state law U.C.A. 57-8a-104(2)(a) - the Utah Community Associations Act states that associations may not require more than "67 percent approval" of voting interests, which translates to 48 of Orchard Villa's 72 units (see included attorney email from February 2, 2011, below).

The meeting was adjourned.

**Orchard Villa Townhomes Homeowners Association Board of Directors
Action on Insurance, February 11, 2011**

President Marc Thomas informed the Board by email that State Farm Insurance had told him it wanted the Association to increase its policy deductible to \$10,000 from \$5,000 before issuing a final policy to us. It stated the higher deductible had become the industry standard and would lower the Association's premium by nearly \$1,000. Walter Johnson, who has advised the Board on its insurance coverage in the past, (he is an insurance broker by profession and an Orchard Villa Homeowner) recommended the Board accept the terms and use the savings to build an insurance deductible fund over the next few years rather than pay higher premiums. The Board agreed and approved the change by email.

Response From Our Attorney Regarding the Driveway Easement Issue, February 7, 2011

Marc:

The following is my response to your inquiry regarding the request, by a neighboring property owner, that the Orchard Villa HOA convey an access easement to allow that neighboring property to access Hale Avenue, which is a private street within the HOA property. My understanding is that the neighboring property will be developed with two duplex properties. You asked that I opine on whether the Board or the Members have authority to enter into such a transaction; and second what procedures should be followed in the event that the HOA elects to proceed.

First, the covenant Declaration for the development, dated January 14, 1994, constitutes the contract defining the reciprocal rights and obligations of each lot owner to one another. The Declaration provides that common areas, which are defined as everything within the development other than individual lots, shall be "owned in common" by the lot owners. The declaration is specific that each lot owner has a reciprocal easement with respect to the common areas, and further provides that common areas are not be partitioned or split up. Article II, Section 1, 5. The covenants are silent on the authority of the HOA to convey some or all of the common areas in the circumstance presented here, and the Declaration provides that it can only be amended in the present situation upon approval of 100% of the "Lot Owners." Article X, Section 3

Second, the Articles of Incorporation of the HOA, dated March 7, 1994, further delineate the powers of the corporation relative to the subdivision. The power to manage the corporation is vested in the Board of Trustees, and the "Corporate property may be conveyed or encumbered by authority of the Board of Trustees." However, the Articles mention some limitations on conveyance of common areas, providing that at such time as 100% of the Lots are sold, "unless 75% of the memberships have given written approval, the corporation shall not be empowered to...sell or transfer the common elements." Article IV, Section 2. Thus, once the development passed out of developer control by sale of all the lots, the corporation has no authority to sell or convey common areas except upon approval of 75% of the "memberships." The term "membership" is not defined in the Articles, and it is not used consistently with the language of the Declaration, which refers to the "owners" or "lot owners."

As you can see, these provisions are in tension with one another, and they do not clearly define the circumstances under which the common elements can be transferred. On the one hand the Articles authorize conveyance of common areas upon approval of 75% of the members, whereas the Declaration contains no such provision. Because the Articles were enacted later in time, it is my opinion that any action taken under the Articles which could be interpreted as being contrary to the Declaration would be at risk of being struck down if challenged by a lot owner.

This problem is simplified somewhat by the enactment of the Utah Community Associations Act. That statute provides, *inter alia* [among other things], that association "governing documents," including articles

of incorporation, bylaws, and covenants, “may not require” that an amendment be subject to approval by “more than 67% of the voting interests.” U.C.A. 57-8a-104(2)(a). Thus, the statute authorizes amendments to covenants, bylaws, and articles of incorporation (among other documents) on approval of 67% of the voting interests. In harmonizing the statute with the Orchard Villa documents, it is my opinion that a conveyance of the common areas would require a covenant amendment, and that in turn would require approval of 67% of the lot owners. Upon obtaining that approval, the Board would be entitled to execute any conveyance. If you decide to go forward with this transaction you will want to pay special attention to your voting notice, quorum, and approval requirements in your governing documents.

Having said that, the Board will still need to make recommendations to the Lot Owners as to whether any deal makes sense. My suggestion is that the Board make the best deal it can (assuming there is support for the idea) and then take the deal to the members for approval. You should consider the following: 1) costs for construction; 2) non-cash or cash consideration for the conveyance; and 3) future maintenance. Your Lot Owners will probably want to see that costs for future maintenance of the road are shared by the owners of the neighboring property in proportion to their use. You may want to consider a special assessment where the neighboring property pays a fraction of road costs proportionate to the total number of lots using the road. You should be clear with the neighbor that a deal will require Lot Owner approval. I can help the Board draw up documents that will implement whatever deal you strike.

I hope this answers your questions. Please give me a call with any other concerns.

Christopher G. McAnany
Dufford, Waldeck, Milburn & Krohn, LLP
744 Horizon Court, Suite 300
Grand Junction, CO 81506