

---

**Legal Aspects of Condominium Development and Homeowners'  
Associations:  
Smooth Operation and Management of Homeowners' Associations**

**John Sanford McDavid\***  
**Lindsay G. Watts<sup>+</sup>**

**August 30, 2006**

---

---

\* John Sanford McDavid is a Shareholder in YoungWilliams P.A. His areas of practice include real estate, oil, gas and natural resources law, both transactions and dispute resolution. He is a member of the Firm's Business Opportunities Group and has extensive experience in counseling his clients in real estate financing and loan closings, corporate formations, general business planning, and contract negotiations and preparation.

<sup>+</sup> Lindsay G. Watts is an associate with YoungWilliams P.A where she is a member of the firm's Business Opportunities Group. Currently, she is focusing her practice on real estate, oil, gas and natural resources law, and general business and commercial transactions.

## **A. Introduction**

In recent years, the United States has experienced an upsurge in the desire of individuals to maintain control over the quality of various local services and community growth. The movement towards “privatization” is happening all around us, but, most importantly, it’s happening around our homes. The commonality of the homeowner’s association is self-evident; when you buy a home in a new subdivision, chances are that you will automatically become a member of the homeowner’s association. This “members only” club is comprised of all the people who own homes in the same development and it is those same people, and not local governments, who will enforce and uphold the restrictive covenants which limit and control the use of your real property. Frequently the developer will control the homeowner’s association until most of the lots or homes are sold then control passes to the homeowners.

Although it is common for states to govern condominiums, a majority of jurisdictions have not yet passed legislation relating to homeowner’s associations. This paper will discuss common issues faced by homeowner’s associations, as well as relevant Mississippi law relating to the subject.

## **B. Recognizing Different Types of Homeowners’ Associations**

In recognizing different types of associations, it is important to note that the terminology used to define the homeowner’s association varies somewhat from locality to locality. In some parts of the country, they are commonly known as “townhouse” associations, while in others, they are referred to as “planned unit developments (PUDs). This is not to be confused with the special “planned unit development ordinance” which is often referred to in zoning law. Additionally, homeowner’s associations are sometimes referred to as “common interest developments” (CIDs). Types of associations can be

compartmentalized into other categories as well, including: residential, commercial, industrial, mixed use, and time shares.<sup>1</sup>

It is also useful to distinguish the homeowner's association from other forms of common ownership, such as condominiums and cooperative housing corporations. While statutory authority relating to homeowner's associations and cooperative housing corporations are either scarce or non-existent, condominiums are often governed by state laws. While condominiums often consist of ownership of an apartment unit combined with a fractional interest in the common elements, ownership in a homeowner's association consists of ownership and possession of a platted lot and any improvements. Conversely, ownership in a cooperative housing association consists of owning shares of stock in a corporation with an appurtenant occupancy agreement for a particular apartment. Additionally, while common areas are owned by a homeowner's association, with condominiums, the common elements are owned in undivided fractional interests by the unit owners. With cooperative housing associations, the entity owns the entire property, including the common areas, and the shareholders or members have contractual rights to use certain parts of the property.

### **C. Complying with Laws Governing Association Powers and Duties**

As previously discussed, many states have not yet enacted laws governing homeowner's associations. Consequently, we are left to look primarily to case law for guidance in complying with any laws governing association powers and duties. The rules of contractual construction are particularly important, as well as the basic rules involved in real property transactions. Very few cases deal specifically with requirements imposed upon homeowner's associations.

In Mississippi, the case of *Perry vs. Bridgetown* sets forth the basic requirements for proper formation of a homeowner's association. *Perry v. Bridgetown Community Ass'n, Inc.*, 486 So. 2d 1230 (Miss. 1986). *Perry* states that four basic documentary steps are required to form a homeowner's association: (1) preparing and recording the subdivision plat, (2) preparing and recording the declaration, (3) preparing the bylaws

---

<sup>1</sup> Wayne S. Hyatt, *Condominium and Homeowner Association Practice: Community Association Law* 8 (2<sup>nd</sup> ed. 1988).

and incorporating the association, and (4) deeding the lots with the appropriate recitals in accordance with the declaration.

Once formed, a homeowner's association holds many powers with regards to the property owners whom it affects. One unique power of the homeowner's association is that membership is almost always made mandatory. Indeed, while members cannot be compelled to be active, they can and are, in fact, required to be members. Once title is taken, each property owner automatically becomes a member of the association and is subject to the covenants.

In *Goode vs. Village of Woodgreen Homeowners Association*, 662 So. 2d 1064 (Miss. 1995), the Court expounds on the powers, as well as the limits of powers, afforded to a homeowner's association, stating that:

One such power is the power to control the use and enjoyment of the property. 'The extent of the power is defined in the declaration [of covenants], but usually encompasses use and size of buildings upon individual lots and regulation of the property commonly enjoyed by all lot owners.' As to the limits of this power, this Court has stated that the association is not beyond review in administration of these powers – review by the court must be guided by the intent stated in the declaration of purpose and judged by a test of reasonableness.

In applying the reasonableness test to a restrictive covenant, the court will balance rights of the individual property owner with the rights of other association members who expect maintenance and enforcement of the covenants. During the drafting phase of the formation of a homeowner's association, keep the reasonableness test in mind as it acts as the main limitation on a homeowners association in enforcing the covenants.

Another issue to consider is the power of the association to enlarge its control over property through amendments. Indeed, it may sometimes seem to property owners that a homeowner's association can make up the rules as it goes along. However, in determining the extent to which property control may be enlarged through amendments of the covenants, courts will look to the intent of the declaration and notice to the lot owner. *Perry*, 486 So. 2d at 1234. Although seemingly basic, it is important to include a

provision in covenants which specifically allows for amendment. Consideration should be given to what percentage of the homeowners must join or consent to the amendment.

Finally, in accordance with the covenants, the association has a lien right with which to enforce the assessment obligation. This is commonly referred to as the power to levy. In general, courts have been unsympathetic to most arguments raised in opposition to the requirement of payment of assessments. Additionally, in *Bond vs. Lake O'The Hills Maintenance Ass'n*, 381 So. 2d 1043, (Miss. 1980), the Mississippi Supreme Court held that requirements in a deed to pay annual assessments to the homeowner's association was a covenant running with the land.

#### **D. Guiding Your Clients through Owner's Rights and Responsibilities**

When practicing association law, your client could be a potential purchaser of a lot, a lender, a developer, or the association itself. In guiding your individual client through his rights and responsibilities, you must first be aware of your client's perspective.

In representing a potential purchaser of a lot, "the attorney must balance the need for a thorough review and explanation of the association's documentation and of the applicable concepts with the need for cost effectiveness."<sup>2</sup> Keep in mind that while the purchaser needs to fully comprehend the effect of the restrictive covenants and the workings of the association on his purchase of property, oftentimes, he is not prepared to pay for extensive legal review.

Representing the lender involved in the purchase and sale of a home in an association requires the attorney to develop an awareness for the lender's needs in the transaction. Associations are beneficial tools for banks involved in mortgage lending as they offer a unique protection of the collateral's value. A lender might want notice if its borrowers' assessments are not timely paid.

The attorney for the developer is an active participant from the beginning. The attorney should initially be involved in the planning of the development by offering

---

<sup>2</sup> Wayne S. Hyatt, *Condominium and Homeowner Association Practice: Community Association Law* 8 (2<sup>nd</sup> ed. 1988).

advice and guidance to the developer. However, the most important role of the developer's attorney is to draft and prepare the documents which will create and govern the association. As will be discussed below, preparation of the restrictive covenants is a task which requires forethought and attention to detail as well as insight to the developer's goals for the community. In this sense, being involved from the start will be of great assistance to the attorney. It is also helpful to keep in mind that the "association will continue long beyond any individual's involvement in the development."<sup>3</sup> The covenants can state how long they will be effective and can provide a method for the property owners to extend the effectiveness for certain stated periods.

Finally, attorneys often represent the actual association. As summarized by Wayne Hyatt, a leading authority in association practice, the attorney for the homeowner's association must be proficient in six areas.<sup>4</sup> First, as an *educator*, the attorney must continue to provide guidance and advice to both new officers and members joining the association. Second, because oftentimes the association attorney is working to resolve disputes, he must act as the supreme *negotiator*. Next, as most attorneys are already aware, he is to be a constant *problem-solver*, offering practical advice rather than theoretical observations. Fourth, the attorney's role as a *political advisor* is extremely important; it is this role which keeps the homeowner's association in check, as being "right on the law and wrong on the people"<sup>5</sup> does very little to further community harmony. Next, as with any client, the association attorney should allow the board or the committee to make decisions; however, in some situations where this is impractical, the attorney should be prepared to be the *decision maker*. Finally, keeping in mind that the document preparation does not end with the formation of the association and preparation

---

<sup>3</sup> Wayne S. Hyatt, *Condominium and Homeowner Association Practice: Community Association Law* 9 (2<sup>nd</sup> ed. 1988).

<sup>4</sup> Wayne S. Hyatt, *Condominium and Homeowner Association Practice: Community Association Law* 442-447 (2<sup>nd</sup> ed. 1988).

<sup>5</sup> Wayne S. Hyatt, *Condominium and Homeowner Association Practice: Community Association Law* 445 (2<sup>nd</sup> ed. 1988).

of the covenants, the association attorney must continue to be a *drafter* of documents while amendments and improvements are in progress.

#### **E. Development of Conditions, Rules, Restrictions, and Regulations That Prevent Trouble Later**

Before beginning to draft restrictive covenants, it is of vital importance to give adequate forethought to what exactly you would like to restrict and why. A detailed discussion with your client is a good place to start; additionally, discussions with colleagues practicing in the field regarding problems frequently encountered could be of great assistance. Researching trends leading to the rise and fall of property values and posing questions to established realtors in the area can also help you become more efficient in drafting covenants which will be useful to residents down the road. Oftentimes, the paramount concerns in drafting restrictive covenants are to support the stabilization and/or rise in property values and to provide a mechanism to aid residents in maintaining a pleasant neighborhood atmosphere.

The 1971 Mississippi Supreme Court case of *Kemp vs. Lake Serene Property Owners Association, Inc.* illustrates the importance of drafting effective restrictive covenants. *Kemp vs. Lake Serene Property Owners Association, Inc.*, 256 So. 2d 924. In *Kemp*, the homeowners association filed a complaint against a property owner who placed a trailer on his property, claiming that he was in violation of a restrictive covenant that required submission and approval of building plans by the building committee. In his answer, the property owner stated that the plans had been submitted to the building committee and were approved. However, from looking at the plans, it was impossible to ascertain that the property owner intended to enclose a mobile home inside the building. Because there was nothing in the covenants specifically prohibiting the use of a pre-packaged dwelling, the Court, applying a rule of strict construction, reversed the decree of the lower court and found for the property owner, stating:

Covenants of this kind should be fairly and reasonably construed and the language used will be read in the ordinary sense. The entire instrument should be considered in ascertaining its meaning, but the restriction should not be extended by strained construction.... If the original owner of the subdivision had desired to prohibit the use of house trailers as residences,

this could easily have been accomplished by designating house trailers as prohibited use, or by restricting architectural design, or by placing a minimum on the floor space for a residence, or by prohibiting temporary residences. None of these things were done.

As this case demonstrates, courts generally do not look with favor upon restrictive covenants. Ambiguities in the covenants will be applied in a light most favorable to the property owner; therefore, when in doubt, err on the side of being overly specific about prohibitions.

Although not an exhaustive list, it is common for homeowners associations to regulate: exterior paint, mailboxes, fences, noise, pets, home businesses, pools, seasonal decorations, hedges, weeds, lawn care, garbage cans, views, window coverings, garages, outdoor lights, clotheslines, shingles, TV and cable antennas, and basketball hoops. Some associations limit the types of vehicles allowed to be parked in front of homes. For example, a work trucks with ladders, cables and trailers attached may be prevented from parking in front of the house. Giving some initial thought to these categories and drawing from your own experiences and logical conclusions can help you to draft covenants which are complete, unambiguous and pertinent to future homeowners. Exercising forethought and thinking about how particular rules may apply in the future may help your clients to avoid unnecessary disputes and expensive litigation.

#### **F. Resolving Conflicts between Governmental Rules and Association Rules**

The United States Constitution and the Bill of Rights set forth certain rights in our country which are available to all citizens. However, the constitutional benefits and limitations only apply to government action. In deciding whether the actions of homeowners associations must comply with these rules, one must first determine whether state action is present. Two important theories relating to constitutional law are important here – the judicial enforcement theory and the public function theory.

Under the judicial enforcement theory, first announced by the Court in *Shelley vs. Kraemer*<sup>6</sup>, state action is present when a court enforces racial restrictions. In *Shelley*, a

---

<sup>6</sup> *Shelley vs. Kraemer*, 334 U. S. 1 (1984).

black couple wished to purchase a lot and the owners of the property had agreed to sell to them. However, a restriction in the sellers' deed prohibited the sale of land to blacks. When the neighbors asked the court to enforce the deed restrictions and prevent the sale, the court refused, stating that judicial enforcement would equate to state action, thereby violating the Fourteenth Amendment's restriction against discrimination based on race. The outcome of the Shelley case safely implies that, were a court faced today with a race restriction in a restrictive covenant, the judicial enforcement theory would prohibit it being upheld. Indeed, *Shelley's* application may even extend to court's denying to uphold land use restrictions.

The public function theory, articulated by the United States Supreme Court in *Marsh vs. Alabama*<sup>7</sup>, explains that if an area has all of the characteristics and functions of any other town, the guarantees of the Constitution are also applicable there. In *Marsh*, a Jehovah's Witness was prohibited from dispersing religious pamphlets in a town owned by a shipbuilding corporation. Even though the area was clearly owned as private property of the corporation, the court found, based on the public function theory that the First Amendment did apply in the area. Although there are several similarities between homeowner's associations and towns, there are also many differences. To date, most courts have not equated the actions of associations with state action based on this theory. However, with the movement towards community developments which are more and more characteristic of townships, this theory may become important. For example, previously, associations have been limited to control over an area defined solely by homeowners; now, however, with the onslaught of developments like *Lost Rabbit*, which advertise a town square complete with private businesses, the similarities between communities governed by homeowners associations and towns where the Constitution must apply is growing more prevalent.

#### **G. Setting Up Budgets, Reserves and Special Assessments**

The budget of the homeowner's association directly affects its smooth operation. Generally, the board is responsible for "general oversight of the association's financial

---

<sup>7</sup> *Marsh vs. Alabama*, 326 U. S. 501 (1946).

activities includ[ing] at least four areas: assessment collection, the day-to-day financial condition, the establishing and maintaining of reserve funds, and the long-term projection of financial needs.”<sup>8</sup> Before adopting a budget, it is important to look to the governing documents to determine who controls the budget’s adoption, how assessments are made and used and other matters affecting the organization of the budget.

After organizing and adopting a budget, the next step is dealing with collections and disbursements. First, impress upon the officers the importance of maintaining accurate transactional records. Second, in collecting assessments, develop a system early on which provides consistency and organization. Common procedures utilized include written statements to members, coupon books, and reminder notices, as well as delinquency procedures when assessments are overdue. Setting specific dates on which dues are both due and delinquent helps to keep members informed and aids in the process or organization.

Unexpected expenses not contemplated by the budget will undoubtedly occur. Many associations set up reserve funds for these expenses. Before embarking on the task, special thought should be given to the adequacy of the reserve, as well as how the reserves should be computed, disbursed, and used. Similarly, special assessments may also be levied in an “emergency.” However, the initial concern focuses on what authority is given the association by the governing documents to levy this assessment. Other problems arise in the very definition of an “emergency.” Finally, like reserves, the association should give consideration to how, procedurally, to impose special assessments as well as what they may be used for.

If your client’s neighborhood is gated, the association will own and be responsible for maintaining the roads. Since roads must be resurfaced periodically a reserve fund should be set up for this purpose. It is usually preferred to accumulate the reserve over several years then make a special assessment for the whole amount.

---

<sup>8</sup> Wayne S. Hyatt, *Condominium and Homeowner Association Practice: Community Association Law* 245 (2<sup>nd</sup> ed. 1988).

## **H. Deciding How Repairs and Improvements Will Be Handled**

A central duty of the homeowner's association is the duty to repair and maintain the common areas. Due to concerns regarding potential liability as well as the desire to maintain property values, it is important for the association to be diligent in addressing maintenance needs. Proper handling of the budget can aid in the accomplishment of swift repairs. Additionally, a good understanding of the workings of special assessments and reserves can make the process easier if the project is sudden and/or costly. Occasionally, when performing major repairs to an area, it may be necessary for the association to borrow money to complete the work. Should a situation like this arise, associations should be prepared, like all other borrowers, to show the lender that there is a viable stream of income to support the loan.

You may also want to discuss with your client whether they want to develop a policy concerning who will make the repairs. The association may want to avoid contracting with members of the association or they may not. The association may want to make it a practice to only hire licensed, bonded and insured repairmen.

## **I. Confidently Dealing With Contracts and Contract Disputes**

After securing the finances to make the necessary repairs, the next step is contracting with companies to provide repair services. The board should be prepared to negotiate mature business contracts which will work to the association's advantage. Knowledge of basic contract principles such as preparation of a written document which is signed and dated by the parties is helpful. Additionally, the contract should recite minimum levels of performance guaranteed by the provider as well as any other state specific protections afforded to contracting individuals. Final payment for the project should also be withheld until work is satisfactorily completed.

You should encourage your client to let you review any important contracts prior to execution. Obviously, if they wait until after the contract is executed, you cannot assist them in getting the best terms possible.

When contract disputes arise you can certainly be of assistance to the association. You may want to consider inserting arbitration clauses in your association contracts. Arbitration can be quicker, cheaper and more private than litigation.

**J. Being Aware and Prepared for Liability Issues and Fulfilling Insurance Obligations**

In today's legal climate, it is important to advise clients to be aware of potential liability as well as posturing them to withstand the legal battle.

In personal injury cases, "courts have not distinguished between an association's duty of care to those residents who are members of the association and its obligation to those residents who are not members. Thus the association's obligations are the same toward lessees as they are toward owner-occupants..."<sup>9</sup> As for persons who are unrelated to the property, it is likely, under common tort law, that the homeowner's association is liable for injuries to these guests which occur as a result of the negligence of its agents. Obviously, this means that special attention to maintenance of the common areas is important in avoiding personal injury liability. Additionally, association officials may be personally liable to members and non-members for their own active role in the commission of a tort involving the property.

One important practice in preparing every homeowner's association for liability is that of incorporation. Incorporation, among other benefits, protects the members of the corporation with limited liability. For an individual member to become liable for a debt of the corporation would require the uphill battle of "piercing the corporate veil." However, should an association fail to incorporate, it will expose itself and, more importantly, its members to potential individual liability for debts. Although payment of the debt might first be satisfied through the assets of the association, if there is not enough to pay off the debt, the creditor may then look to the individual members for payoff. Although there is little authority either way, it is likely that members would be required to pay a pro rata share of the debt rather than becoming jointly and severally liable.

---

<sup>9</sup> Robert G. Natelson, Law of Property Owners Associations 322 (1989).

Insurance is one of the most important tools an association can possess with regards to preparation for liability issues. Three basic kinds of insurance that every association should have include: casualty insurance, public liability insurance, and directors' and officers' liability insurance.<sup>10</sup> Casualty insurance provides protection from destruction for the real property managed by the association (i.e. common areas); public liability insurance will provide protection against personal injury and property damage, and directors' and officers' liability insurance provides protection for the persons making decisions regarding the association and pays for the costs of defending suits against them. With respect to casualty insurance, recommend that the association get an "all risks" policy so that the coverage will be as broad as possible. Also, recommend that the association review the limits and terms of its insurance every few years. Fluctuations in values may require changes in the policies.

---

<sup>10</sup> Wayne S. Hyatt, *Condominium and Homeowner Association Practice: Community Association Law* 274 (2<sup>nd</sup> ed. 1988).